

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 21 July 2022

Public Authority: British Broadcasting Corporation (BBC)
Address: 2252 White City
201 Wood Lane
London
W12 7T

Decision (including any steps ordered)

1. The complainant made a request for information relating to the decision not to broadcast the situation comedy "Then Churchill said to me".
2. The BBC explained the information was covered by the derogation and excluded from FOIA.
3. The Commissioner's decision is that this information would be held by the BBC for the purposes of 'journalism, art or literature' and would not therefore fall inside FOIA. He therefore upholds the BBC's position and requires no remedial steps to be taken in this case.

Request and response

4. On 18 June 2022 the complainant made a request for the following information:

"I would like to put in a freedom of information request to ask for any documentation relating to the decision not to broadcast the situation comedy "Then Churchill said to me" in 1982.

I would also like any information relating to the budgets for the program which, as I understand it, was filmed in full and not broadcast for 10 years.

I would also like to ask for any information which may (or may not exist) about whether or not there was an official moratorium preventing

the broadcast of the program in subsequent years or any official plan to suppress the existence of the master tapes.”

5. The BBC responded on 29 June 2022 and refused to provide the requested information. It stated that it was exempt from disclosure under the ‘derogation’.

Scope of the case

6. The complainant contacted the Commissioner on 30 June 2022 to complain about the way his request for information had been handled.
7. The Commissioner considers the scope of the case is to determine if the requested information is excluded from FOIA because it would be held for the purposes of ‘journalism, art or literature’

Reasons for decision

8. Schedule One, Part VI of FOIA provides that the BBC is a public authority for the purposes of FOIA but only has to deal with requests for information in some circumstances. The entry relating to the BBC states: “The British Broadcasting Corporation, in respect of information held for purposes other than those of journalism, art or literature.”
9. This means that the BBC has no obligation to comply with part I to V of the Act where information is held for ‘purposes of journalism, art or literature’. The Commissioner calls this situation ‘the derogation’.
10. The House of Lords in *Sugar v BBC* [2009] UKHL 9 confirmed that the Commissioner has the jurisdiction to issue a decision notice to confirm whether or not the information is caught by the derogation. The Commissioner’s analysis will now focus on the derogation.
11. The scope of the derogation was considered by the Court of Appeal in the case *Sugar v British Broadcasting Corporation* and another [2010] EWCA Civ 715, and later, on appeal, by the Supreme Court (*Sugar (Deceased) v British Broadcasting Corporation* [2012] UKSC 4). The leading judgment in the Court of Appeal case was made by Lord Neuberger of Abbotsbury MR who stated that: “ once it is established that the information sought is held by the BBC for the purposes of journalism, it is effectively exempt from production under FOIA, even if the information is also held by the BBC for other purposes.” (paragraph 44), and that “....provided there is a genuine journalistic purpose for

which the information is held, it should not be subject to FOIA.”
(paragraph 46).

12. The Supreme Court endorsed this approach in *Sugar (Deceased) v British Broadcasting Corporation and another* [2012] UKSC 4¹ and concluded that if the information is held for the purpose of journalism, art or literature, it is caught by the derogation even if that is not the predominant purpose for holding the information in question.
13. In order to establish whether the information is held for a derogated purpose, the Supreme Court indicated that there should be a sufficiently direct link between at least one of the purposes for which the BBC holds the information (ignoring any negligible purposes) and the fulfilment of one of the derogated purposes. This is the test that the Commissioner will apply.
14. If a sufficiently direct link is established between the purposes for which the BBC holds the information and any of the three derogated purposes – i.e. journalism, art or literature – it is not subject to FOIA.
15. The Supreme Court said that the Information Tribunal’s definition of journalism (in *Sugar v Information Commissioner* (EA/2005/0032, 29 August 2006)) as comprising three elements, continues to be authoritative:
 1. The first is the collecting or gathering, writing and verifying of materials for publication.
 2. The second is editorial. This involves the exercise of judgement on issues such as:
 - the selection, prioritisation and timing of matters for broadcast or publication,
 - the analysis of, and review of individual programmes,
 - the provision of context and background to such programmes.
 3. The third element is the maintenance and enhancement of the standards and quality of journalism (particularly with respect to accuracy, balance and completeness). This may involve the training and development of individual journalists, the mentoring of less experienced

¹ <https://www.supremecourt.uk/cases/docs/uksc-2010-0145-judgment.pdf>

journalists by more experienced colleagues, professional supervision and guidance, and reviews of the standards and quality of particular areas of programme making.

16. However, the Supreme Court said this definition should be extended to include the act of broadcasting or publishing the relevant material. This extended definition should be adopted when applying the 'direct link test'.
17. The Supreme Court also explained that "journalism" primarily means the BBC's "output on news and current affairs", including sport, and that "journalism, art or literature" covers the whole of the BBC's output to the public (Lord Walker at paragraph 70). Therefore, in order for the information to be derogated and so fall outside FOIA, there should be a sufficiently direct link between the purpose(s) for which the information is held and the production of the BBC's output and/or the BBC's journalistic or creative activities involved in producing such output.
18. The Commissioner adopts a similar definition for the other elements of the derogation, in that the information must be used in the production, editorial management and maintenance of standards of those art forms.
19. In determining whether the information is held for the purposes of journalism, the Commissioner has considered the following factors:
 - The purpose(s) for which the information was held at the time of the request;
 - The relationship between the purposes for which the information was held and the BBC's output on news and current affairs, including sport, and/or its journalistic activities relating to such output.
20. The complainant has argued that, "this is not a question with any journalistic implications - it is about the non-broadcast of a comedy show." The complainant further explained that, "the program was not broadcast for 10 years."
21. The Commissioner considers that the information that has been requested in this case relates to the selection, prioritisation and timing of matters for broadcast or publication. The request is therefore directly related to the output of the BBC in terms of selection of matters and timing for broadcast/publication.
22. For the reasons above, the Commissioner is therefore satisfied that the information requested is derogated. Therefore, the Commissioner has found that the request is for information held for the purposes of

journalism and that the BBC was not obliged to comply with Parts I to V of FOIA.

Right of appeal

23. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from: First-tier Tribunal (Information Rights)

GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0870 739 5836

Email: grc@Justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

24. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
25. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed.....

Gemma Garvey
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF