

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 24 January 2012

Public Authority: The British Broadcasting Corporation
(‘the BBC’)

Address: 2252 White City
201 Wood Lane
London
W12 7TS

Decision (including any steps ordered)

1. The complainant has requested the salary of three named newsreaders. The BBC explained the information was covered by the derogation and excluded from the FOIA.
2. The Commissioner’s decision is that this information is held by the BBC genuinely for the purposes of ‘journalism, art or literature’ and does not fall under the FOIA. He therefore upholds the BBC’s position and requires no steps to be taken.

Request and response

3. On 21 July 2011 the complainant made the following request to the BBC:

‘This is a Freedom of Information Act request. Under current law as a public body you have to comply within 20 calendar days from receiving this letter and respond to me in writing. I need the exact salary, before taxation, of newsreaders [three names redacted]’.

4. The BBC responded on 11 August 2011. It stated that the information requested is excluded from the FOIA because it is held for the purposes of 'journalism, art or literature.' It explained that Part VI of Schedule 1 of the FOIA provides that information held by the BBC and the other public service broadcasters is only covered by the FOIA if it is held for 'purposes other than those of journalism, art or literature'. It concluded that the BBC was not required to supply information held for the purposes of creating the BBC's output or information that supports and is closely associated with these creative activities. It therefore would not provide any information in response to the request for information.

Scope of the case

5. The complainant contacted the Information Commissioner (the Commissioner) to complain about the way his request for information had been handled. In particular, he challenged the operation of the derogation in this case.

Reasons for decision

6. Schedule One, Part VI of the FOIA provides that the BBC is a public authority for the purposes of the FOIA but only has to deal with requests for information in some circumstances. The entry relating to the BBC states that the BBC is a public authority:

"...in respect of information held for purposes other than those of journalism, art or literature."

7. This means that the BBC has no obligation to comply with Parts I to V of the FOIA where information is held for 'purposes of journalism, art or literature'. The Commissioner refers to this as 'the derogation'.
8. 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.
9. The scope of the derogation has been considered by the Court of Appeal in the case *Sugar v British Broadcasting Corporation and another* [2010] EWCA Civ 715. The leading judgment 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).

10. The Commissioner considers that it follows from this that if the information is genuinely held for any of the three derogated purposes – ie. journalism, art or literature - it is not subject to the FOIA. His role is to consider whether the information was genuinely held for the derogated purposes or not.
11. With regard to establishing the purpose for which the information was held, Lord Neuberger of Abbotsbury MR (at paragraph 55) drew a distinction between information which had an effect on the purposes of journalism, art or literature and information that was in fact being held for one of those purposes. Based on this judgment the Commissioner considers that for information to be held for a derogated purpose it is not sufficient for the information to simply have an impact on the BBC's journalistic, artistic or literary output. The BBC must be using the information in order to create that output, in performing one of the activities covered by journalism, art or literature.
12. The Court of Appeal adopted the Information Tribunal's definition of journalism which set out that journalism comprises three elements.
 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; and*
 - *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 journalists by more experienced colleagues, professional supervision and guidance, and reviews of the standards and quality of particular areas of programme making."*
13. The information that has been requested in this case is the salaries of three named newsreaders.
14. In light of submissions made by the BBC in previous cases and mentioned in the refusal notice the Commissioner considers the second

element of journalism within the definition above (the editorial process) to be relevant to this case. The request concerns information that relates to editorial and budgeting decisions and therefore affects the creative output of the BBC.

15. In considering whether the information is held genuinely for the purposes of journalism, the Commissioner has considered the following four factors:
 - the purpose for which the information was created;
 - the relationship between the information and the programmes' content which covers all types of output that the BBC produces;
 - the users of the information; and
 - the need to ensure a level playing field between the BBC and its commercial rivals.
16. When considering the purposes for which the information was created, and the users of the information, the BBC has explained that decisions around which presenter or contributor to engage and how much resource to allocate to secure their services are essentially editorial decisions. The information therefore supports a wider editorial decision to engage and reimburse journalists for their professional services with regard to the BBC's journalistic remit.
17. When considering the connection between the information itself and the programmes' content, the BBC has explained that information about payments to newsreaders is held for purposes closely associated with its creative activities. In withholding what are called 'talent costs' the BBC is seeking to protect its editorial integrity by allowing programme makers to produce programmes free from interference and scrutiny and any undue pressure.
18. In light of submissions made by the BBC in previous cases the Commissioner understands that the BBC regards the decision as to how much resource to dedicate to a particular piece of BBC output to be a fundamental programme making decision. The BBC has a fixed resource (the licence fee) and resource allocation goes right to the heart of creative decision making. It is the Commissioner's view that information about the costs of BBC journalists is operational information, which has a relationship to its creative output. The Commissioner is satisfied that such decisions form part of the editorial process.
19. The BBC has also argued that the FOIA was intended to provide a 'level playing field' in the broadcasting market and that disclosure of the

requested information would place it at an unfair disadvantage compared to its commercial rivals.

20. The Commissioner is mindful of the purpose of the derogation, which was articulated by Lord Neuberger of Abbotsbury MR at paragraph 45 of his judgment in *Sugar*:

"The purpose of limiting the extent to which the BBC and other public sector broadcasters were subject to FOIA was 'both to protect freedom of expression and the rights of the media under article 10 of the European Convention on Human Rights, and to ensure that [FOIA] does not place public sector broadcasters at an unfair disadvantage to their commercial rivals'."

21. The Commissioner is therefore satisfied that the disclosure of the requested information may impinge the BBC's editorial independence. This is because it would place the BBC at an unfair disadvantage to its commercial rivals.
22. For all the reasons given above, the Commissioner is satisfied that the requested information is held for the purposes of journalism and is derogated. The BBC was therefore not obliged to comply with Parts I to V of the 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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

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

Pamela Clements
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