

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 15 February 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 amount paid for the broadcasting rights to the 2014 Commonwealth Games. The BBC explained the information was covered by the derogation and excluded from the FOIA.
2. The Commissioner's decision is that this information was held by the BBC genuinely for the purposes of 'journalism, art or literature' and did not fall inside the FOIA. He therefore upholds the BBC's position and requires no remedial steps to be taken in this case.

Request and response

3. The complainant's MP wrote to the BBC on his behalf on 9 September 2011 and asked for the following under FOIA:

'The amount paid by the BBC for the broadcasting rights to the 2014 Commonwealth Games.'
4. The BBC responded on 28 September 2011. It stated that it believed 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 to 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's MP contacted the Commissioner to complain about the way his request for information had been handled. He also provided an email showing that the complainant was dissatisfied. It was apparent that he challenged the operation of the derogation in this case.
6. Having reviewed the nature of the request and previous investigations, the Commissioner decided that it was not necessary to contact the BBC for further information or arguments in support of its decision that the requested information falls outside the scope of FOIA.

Reasons for decision

7. 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:

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

8. This means that the BBC has no obligation to comply with part i to v of the FOIA where information is held for 'purposes of journalism, art or literature'. The Commissioner calls this situation 'the derogation'.
9. 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.
10. 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)*

11. The Commissioner considers that it follows from this that if the information is genuinely held for any of the three derogated purposes – i.e. 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.

12. 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 actually 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.
13. 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,*
 - * 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."*
14. The information that has been requested in this case is the amount paid for the broadcast rights for the 2014 Commonwealth Games.
15. In light of submissions made by the BBC in previous cases the Commissioner considers that the second element of journalism within the definition above, the editorial process, is relevant in this instance.
16. He recognises that the decision to embark upon the creation of programmes or a series of programmes covering events such as the 2014 Commonwealth Games, involves the consideration of many factors. One of which is the amount that needs to be bid to obtain the rights to the coverage. He considers that the decision about what events to focus sports coverage on and what to bid for coverage are editorial decisions about the content that the BBC wants to offer its customers.

17. The Commissioner considers that the information falls within limb two because it is information that is used by the BBC when undertaking the *'exercise of judgement on issues such as: the selection and timing of matters for broadcast or publication.'* when the BBC is deciding the scope of sports coverage that it will offer. This is particularly so in the current economic climate where the BBC must carefully consider the value for money given that it must cut the amount of money spent on sports coverage – indeed at the time of the decision, after the settlement with the government, it needed to find 20% reductions.
18. The Commissioner has accepted on a number of occasions (such as in case reference **FS50314106**) that the BBC has a fixed resource in the licence fee and resource allocation goes right to the heart of creative decision making. The Commissioner is satisfied that the same rationale connects the information to the derogated purposes. The more money that is spent on the broadcast rights, the less money is available to consider the creative and artistic feel of the coverage.
19. At the time of the request the rights to the Commonwealth Games 2014 had been won and the information would also be used to benchmark future expenditure when considering what to bid for other major sporting events of a similar nature.
20. The Commissioner considers that his decision in this regard is supported by a previous High Court judgment¹ which concluded that the information covered by the following request was derogated:

'how much the BBC paid for the rights and to cover the recent Winter Olympics in Turin Italy.'
21. While the Commissioner recognises that this request related to the rights of coverage of a previous Winter Olympic Games (rather than the subsequent one), he is satisfied that the similarities mean that it is analogous to this case. Both cases concern the cost of the broadcasting rights for the BBC in covering a set event and Irwin J found that this information was derogated. The Court of Appeal judgment did not overturn his reasoning in this regard.
22. To support his analysis the Commissioner has considered the fourth factor and been mindful of the purpose of the derogation, which was articulated by Lord Neuberger of Abbotsbury MR at paragraph 45 of his judgment in *Sugar*:

¹ BBC v The Information Commissioner [2009] EWHC 2348 (Admin)

"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.' This is apparent, to my mind, as a matter of common sense, looking at FOIA on its own, but it was also stated in terms to be the policy in a letter from the Department of Constitutional Affairs in 2003, which was admitted in evidence by the Tribunal – hence the quotation marks."

23. The Commissioner finds in this case that the disclosure of the withheld information would also be likely to impinge the BBC's editorial independence. This is for three reasons. Firstly, the information about what the BBC bid would be useful to its competitors for future events. This is because the bids are otherwise confidential and competitors in knowing the offer from the BBC would be able to amend their strategy accordingly. Secondly, the information would be used by those critical of the BBC to cause discomfort, while its competitors would have no similar obligation to disclose the information. Finally, it must be noted that we are entering a period of time where money is sparse and the BBC may need to negotiate with partner organisations to share coverage rights. Its bargaining position would be reduced if the partner organisations know exactly what it paid. The disclosure of this information would place the BBC at an unfair disadvantage to its commercial rivals and this supports the Commissioner's conclusions that the information is held for derogated purposes.
24. Finally, the Commissioner explained his preliminary verdict to the complainant and invited the complainant to put forward any arguments he may wish to raise to challenge his view. He received no arguments from the complainant in this case.
25. For all of 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 the FOIA.
26. As the Commissioner has found that the request is for information held for the purpose of journalism the BBC was not obliged to comply with Parts I to V of FOIA.

Right of appeal

27. 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

28. 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.
29. 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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