

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 12 November 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 requested the number of deaf and/or disabled sports panellists who have appeared on the BBC programme 'Question of Sport' and the number of deaf and/or mobility impaired contestants who have appeared on the BBC programme 'COPYCATS'. The BBC explained the information was covered by the derogation and excluded from FOIA.
2. The Commissioner's decision is that this information was held by the BBC for the purposes of 'journalism, art or literature' and did not fall inside 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 wrote to the BBC on 18 July 2012 and made 2 requests for information:

"BBC TV : A QUESTION OF SPORT. Can you please tell me the number of Deaf and or disabled sports panellists who have appeared on the BBC programme ' Question of Sport, in the past five years? If this is not possible in the past two years, please?"

And

"BBC TV: COPYCATS. 1. a) Can you please tell me the number of Deaf contestants who have appeared on the BBC programme ' COPYCATS'

since its inception? b) If this is not possible can you please forward me the statistics since the beginning of series 3?

2.a) Can you please tell me the number of mobility impaired contestants who have appeared on the BBC programme ' COPYCATS' since its inception and 2. b) If this is not possible can you please forward me the statistics since the beginning of series 3?"

4. On 27 July 2012 and 10 August 2012 the BBC issued a response to each of these requests. The BBC explained that it did not believe that the information was caught by FOIA because it was held for the purposes of 'art, journalism or literature'.
5. 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 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 requests for information.

Scope of the case

6. The complainant contacted the Commissioner to complain about the way his requests for information had been handled. In particular, he challenged the operation of the derogation in his cases.
7. He argued that his request

'was based on the grounds of Equality as defined by the Equality Act 2010 and related to the 'equality of access', that the BBC affords disabled and Deaf people which has nothing to do with journalistic output.....In the Judgment of the Supreme court [2010] EWCA Civ 715, I can find no reference to the request for information based upon the Equality Act 2010. Instead it attempts to define the boundaries of the word "journalism" and makes no reference to the inclusion of a request for information relating to the Equality Act.... it is about time that the BBC were challenged on this issue.'

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

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'.

16. 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.
17. 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.
18. The information that has been requested in this case is the number of deaf and/or disabled sports panellists who have appeared on the BBC programme 'Question of Sport' and the number of deaf and/or mobility impaired contestants who have appeared on the BBC programme 'COPYCATS'.
19. The Commissioner wrote to the BBC on 18 September 2012 for their detailed arguments and the BBC responded on 1 November 2012.

Copycats

20. The BBC explained that the applicants to the *Copycats* programme provided some biographical data and then auditions determined who will take part, based on personality. The BBC made it clear that while the biographical data is not a factor in determining those who take part in the programme, it is information collected or gathered as part of the process of programme production, and that it is information that would be part of the editorial process in providing context and background to the production.
21. The children chosen to audition are able to choose who they might want in their teams and details about disability are not specifically requested at this stage. Once production of the series has ended, biographical material relating to individual applicants is securely destroyed and therefore, at the time of the request (18 July 2012), any detailed biographical information submitted during the application process had been routinely destroyed, as the production had ended.
22. Additional diversity information is created by the BBC during the production itself. The Diversity Report records on-screen and off-screen statistical information on all those involved in the series production, including contestants. The diversity data (ethnicity, gender, age, disability) is collected daily but the nature of a particular disability would only be captured by the production team, if a contestant/participant, had chosen to disclose it.
23. The Diversity Report is used to assist the production team in reviewing its performance in reflecting the diversity of the programme audiences and this assessment then feeds into the team's editorial process of reviewing and planning for future series. The BBC explained that Children's programme makers are aware that their output and content must be diverse and reflect the totality of the UK child audience and the requirement to achieve diverse representation on-screen must be considered at an early stage in production planning. This requirement is written into the Editorial Specification for all productions and therefore the use of the data falls firmly within the second and third parts of the Tribunal's "definition of journalism" referred to in paragraph 15 above.
24. In light of this submission from the BBC, the Commissioner understands that the data collected is not detailed disability information on the number of deaf and/or mobility impaired contestants in the Copycat programme, that the initial biographical information was destroyed by the date of the request and that the Diversity report was used for the editorial element of the definition of journalism.

A Question of Sport

25. The BBC explained that the portrayal of diversity in each series is monitored on a form covering the categories of cultural diversity, disability, age and gender. The information captured is based solely on the Series Producer or Executive Producer's knowledge of individual guests or visible criteria; individuals are not asked to provide these details. The form seeks to collect the producers' perceptions of diversity as this is likely to be representative of the audiences' perceptions of the make-up of the programmes.
26. Once collated, the information provides a record for the programme producers of the range and diversity of contributors across a given series. It is then used as a producer's tool to review the programmes performance in representing diversity and to identify whether there are any specific groups that are currently under-represented. The forms are also collated centrally where they are available for further review at a divisional level. The raw data serves as one means of informing current monitoring and future planning; this in turn has a direct relationship to the output subsequently produced across the BBC.
27. In light of this submission from the BBC, the Commissioner understands that the data collected is not detailed disability information on the number of deaf and/or disabled sports panellists in the Question of Sport programme, and that the completed forms were used for the editorial element of the definition of journalism.

Equality Act

28. In their submission to the ICO the BBC responded in detail about the comments made by the complainant that his requests were related to 'the 'equality of access' that the BBC affords disabled and Deaf people which has nothing to do with journalistic output... it is about time that the BBC were challenged on this issue.'
29. The BBC explained that the Public Sector Equality Duty (section 149 of The Equality Act 2010) supports good decision-making by ensuring public bodies consider how different people will be affected by their activities. The specific duties require public bodies to publish relevant, proportionate information demonstrating their compliance with the Equality Duty; and to set themselves specific, measurable equality objectives. The BBC explained that this applies only to their non-content related activities.
30. However, the obligations of the BBC under the Equality Act 2010 and the Public Sector Equality Duty are entirely separate to the question of derogation. It is not relevant to the key issue of whether the

information was held by the BBC for the purposes of journalism, art and literature.

31. A similar situation was addressed in the decision notice reference [FS50421691](#) where the complainant requested information concerning the modelling prize featured in the competition show *Hot Like Us* and argued on appeal [EA/2012/0054](#) that it was a matter of contract law. In response to that argument the Commissioner asserted that the Appellants concerns "fall outside the Commissioner's remit as he can only consider the purpose for which the requested information is held and whether or not this renders the information subject to the (FOIA) Act." The appeal was struck out by the tribunal on 4 May 2012 which stated that

'The Tribunal has been given the clearest and most authoritative guidance as to how it should treat information requests to the BBC, which may extend to information relating to programme development and transmission. In the case of *Sugar v BBC* [2012] 1 WLR 439 the Supreme Court decided:

- a. if the requested information is held for the purpose of journalism, art or literature at the time of the request, then the information falls outside the scope of the Act; and
- b. this is so even if that is not the predominant purpose for which the information is held or if the information is held for more than one purpose.' [Paragraph 3 of the appeal]...

... The derogation has not been made subject to any qualification, such that it may only be relied upon in certain circumstances. It arises, as a fact, from the nature of the information and the identity of the organisation holding it. [Paragraph 10 of the appeal]

32. Therefore the Commissioner has concluded that the complainant's concerns for equality of access lie outside the Commissioner's remit.
33. 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 FOIA.

Right of appeal

34. 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

35. 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.
36. 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

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