

Freedom of Information Act 2000 (FOIA)

Decision Notice

Date: 24 April 2013

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 information concerning the victims of Porton Down, both deceased and surviving; servicemen who have attended Porton Down and who cannot be accounted for; payments made to the legal firm involved with obtaining compensation for victims; and alleged conspiracy and fraud matters. 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 for the purposes of 'journalism, art or literature' and does 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 11 December 2012 and asked for:

"My questions are as follows the first being a two part question.

(1) Has the BBC at any time received and or reported on any of the information I have made mention to above, including the figures "645 veterans" and "39 family members of deceased veterans"? (YES or NO)

(2) Has the BBC ever received, at any time, any information that relates to servicemen who had attended Porton Down who cannot be accounted for? (YES or NO)

(3) Has the BBC ever been made aware of a 3.72 million pound payment awarded to [Name redacted] from persons unknown with the MoD? (YES or NO)

(4) Has the BBC ever been made aware of any visit - or visits - made to the offices of [Name redacted] by the City of London Police in relation to not only a 3.72 million pounds fraud, but also on conspiracy charges? (i.e. missing Porton Down veterans that [Name redacted] was aware of at the time he was "negotiating" his own claim with persons unknown with the MoD.)

(5) If the BBC are to decide that the matters I have alluded to here are not true, would the BBC - Stuart Webb and Co including Lord Patton - be willing to make inquiries to various BBC stations - including BBC Newcastle and BBC Bristol - in order to verify what I say is true?"

4. The BBC responded to the complainant on 9 January 2013 and provided him with a letter advising about the BBC's derogation under the FOIA in respect of all matters connected with "journalism, art or literature." It explained that Part VI of Schedule 1 to 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 stated 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.
5. The complainant submitted a complaint to the Commissioner on 10 January 2012.

Scope of the case

6. The complainant contacted 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.
7. The scope of this case has been to consider whether the BBC was entitled to rely on the derogation under the FOIA.

Reasons for decision

8. 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."

9. 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'.
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 the FOIA.
15. The Supreme Court said that the 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."*
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 the 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. The information that has been requested in this case concerns the Porton Down victims, both deceased and surviving; servicemen who have attended Porton Down and who cannot be accounted for; payments made to the legal firm involved with obtaining compensation for victims; and alleged conspiracy and fraud matters.
20. In light of submissions made by the BBC in previous cases, the Commissioner understands that the collation and retention of information from many sources is an important tool used by the BBC to monitor, maintain and enhance its journalistic, artistic and literary output, and to ensure the impartiality of that output.

21. The Commissioner has considered all of the information before him, but for conciseness he has focussed on explaining why he has decided that the information requested falls within the derogation.
22. 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; and
 - 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.
23. When considering the purposes for which the information was held at the time of the request, the BBC has explained that the information was obtained and held for the purposes of creating content and producing journalistic output. The Commissioner finds that it would be reasonable to expect that information concerning the victims of Porton Down and their legal representation would inform the future creation of news and other related output. The retention of this information would also enable the re-use of existing material and facilitate research for future programming.
24. In addition, the requested information could also be held for editorial purposes: for the analysis and review of individual pieces of output and for the provision of context and background to the output. It would also enable a review of the standards and quality of particular programme making, in order to further enhance standards.
25. The issue of whether to conduct further enquiries to validate the truth or otherwise of information obtained is also a journalistic activity and any information obtained from this activity would also be considered "journalistic" in nature.
26. When considering the connection between the information itself and the journalistic activities relating to such output, the BBC has explained that the information obtained relates directly to output and would be used to inform programme making.
27. Overall, the Commissioner considers that the BBC has provided sufficient evidence that it holds the information for the purposes of journalism. He is content that the information is held for the purposes outlined in the definition namely the collecting or gathering, writing and verifying of materials for publication, editorial purposes and for

maintenance and enhancement of the standards and quality of journalism.

28. 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.

Right of appeal

29. 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

30. 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.
31. 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

Rachael Cragg
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