

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 4 September 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 about the handling of a complaint concerning the contents of a radio programme broadcast in 2006. 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 11 April 2013 and asked for information of the following description:
 1. *"Page 3 of the 'new procedures' I want an explanation of the position of 'Head of Accountability' and 'Director of Governance'. I need information about these positions and what part each played (or should have played) in my complaint.*
 2. *Page 5 of the 'new procedures' I need details of the production team and of any comments made by any member of that team.*
 3. *I need information about any other matters which should have been communicated to me and which the Governors considered.*

4. *Page 5 of the 'new procedures' I need to know who the Complaints Adviser was and importantly who was the independent Editorial Adviser. I need information about anything which should have been communicated to me and which was considered by the Governors' Committee.*
5. *I need to know about anything here which should have been communicated to me by virtue of the 'new procedures'.*
4. The BBC responded on 7 May 2013. It stated that the information is excluded from FOIA because it is held for the purposes of 'journalism, art 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 request for information.

Scope of the case

6. The complainant contacted the Commissioner on 28 May 2013 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 Commissioner has therefore had to consider whether the BBC was correct to claim that the requested information is derogated.

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 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 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 concerns how an editorial complaint has been handled. The request included who dealt with the complaint, what position they are and what part they played in the complaint. It also included a request for any

information that was considered by the Governors and the Governors' Committee which should have been communicated to him and any information that should have been communicated by virtue of the 'new procedures'. When considering the purposes for which the information was held, the BBC has explained that editorial complaints constitute a review of the standards and quality of particular programme making, in order to further enhance standards. It further stated that the outcome of the complaint and any information relating to the complaint plays a significant role in improving editorial decisions in the future which could involve a complaint or programme about a similar or identical matter. In this way, the information plays a significant role in improving the quality of journalistic output. The BBC's investigation into complaints and the use of the whole editorial complaints process is therefore integral to the BBC's journalistic purpose.

19. The Commissioner will adopt a similar position to the one taken in case reference FS50464626¹. This case considered a request relevant to the current case as it concerned information regarding the same editorial complaint. The Commissioner's decision was that the information requested was derogated as it had a clear direct link with the BBC's output. This decision was subsequently appealed to the Tribunal² but was struck out on the grounds that there was no reasonable chance of it succeeding. The Tribunal explained that "there is no prospect of a Tribunal finding that the BBC held the information requested for purposes other than journalism". Allowing for the similarity between the cases, the Commissioner has found it appropriate to reproduce below the same reasoning provided in respect of his decision on the derogation considered in FS50464626.
20. The Commissioner has supported the BBC's view that information relating to editorial complaints is held for the purposes of 'journalism, art or literature' (such as in case reference FS50404473 and FS50465338). Editorial complaints to the BBC are considered in the process of creating and improving programmes and integral to this process is the ability to maintain an independent and impartial position with respect to criticism.

¹ http://www.ico.org.uk/~/media/documents/decisionnotices/2012/fs_50464626.pdf

² http://www.informationtribunal.gov.uk/DBFiles/Decision/i978/EA-2012-0258_Decision_2013-02-01.pdf

21. In another case (reference FS50316361) the complainant made a request to the BBC for details of its procedures for handling editorial complaints and correspondence and documentation generated in the course of handling this complaint. The refusal of the BBC to provide the information in this case was upheld by the Commissioner as he was satisfied that it was held for journalistic purposes and therefore fell under the derogation. The Commissioner is satisfied that the same rationale connects the information in this case to the derogated purpose.
22. A recent Tribunal decision (EA/2010/0042, 0121-0125 & 0187) considered requests made in connection with a broadcast, complaints arising from this, and the way in which the complaints were handled. The Tribunal noted, at paragraph 37, that the "*key question is...whether the information in question is held 'directly', 'to any significant degree' or in 'sufficient proximity' to the journalistic functions of the BBC. These functions are to be understood as including monitoring, reviewing and correcting programme output, as well as the act of broadcasting.*" The Tribunal confirmed that information about complaints is used to review future output, and as such directly relates to output and is therefore derogated.
23. Overall, the Commissioner considers that the BBC has provided 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 second and third points of the definition namely editorial purposes and for maintenance and enhancement of the standards and quality of journalism. He therefore considers that the information falls within the derogation.
24. For all of the reasons above, the Commissioner is 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

25. 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

26. 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.
27. 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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