

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 27 November 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 on the number of complaints on misleading news coverage on devolved matters. The BBC explained the information was covered by the derogation and excluded from FOIA. 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

2. The complainant wrote to the BBC on 23 July 2013 and asked:

'I would like to know how many complaints the BBC has received each year in each of the last five years over misleading coverage in their news broadcast of matters which are :

(i) Devolved to the Scottish Parliament but where coverage has not indicated that Scotland has its own policy and practises on these matters and the matter has been reported as if it covered the entire United Kingdom.

(ii) Reserved to Westminster but where coverage has referred to England or England & Wales in news broadcasts and has not indicated that the issue also affects viewers and listeners in Scotland.

For each category of complaint above I would like to know how many complaints have been upheld each year in each of the five years.'

3. The BBC responded on 20 August 2013. It explained that it believes that the information requested is excluded from the Act because it is held for the purposes of 'journalism, art or literature.'
4. 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

5. The complainant contacted the Commissioner on 26 August 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 and argued that '*as I did not ask for details of the BBC's journalistic data, I asked for details of the public's complaints about the BBC's reporting, which is a separate matter. As the BBC already publishes some information about the complaints it receives from the public it does not seem to me that they are interpreting the Act either correctly or consistently.'*
6. In response to the Commissioner's letter of 8 October 2013, he stated that '*he does not accept that complaints made by members of the public can be classified in any way as journalism; ...[his] request was, in part, to determine how many complaints had been received by the BBC from the public concerning its coverage of reserved and devolved matters this part must be outwith the BBC's schedule of derogation.'*

Reasons for decision

7. 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."

8. 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'.
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 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)*
11. 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.
12. 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.

13. 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.
14. 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'.

15. 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.
16. 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.
17. The information that has been requested in this case is the number of complaints on misleading news coverage on devolved matters. The BBC argues that these are editorial complaints which form part of the on-

going review of the standards and quality of programme making and is held to help inform future editorial discussions and decisions to improve the quality of journalistic output.

18. The Commissioner has issued a number of decisions supporting the BBC view that information relating to editorial complaints is held for the purposes of 'journalism, art or literature'. The BBC has already referred the complainant to a number of decision notices (including case references [FS50295017](#) on complaints on political bias, [FS50363611](#) on complaints about the World Cup and [FS50465338](#) on the number of complaints about Panorama programmes) where the Commissioner upheld the BBC arguments.
19. The BBC also referred to the recent appeal to First-tier Tribunal (Information Rights) (EA/2010/0042, 0121, 0123, 0124, 0125, 0187 http://www.informationtribunal.gov.uk/Judgment_EA20100042+5.pdf) which also concerned requests for information about an edition of Panorama and information generated by and related to the BBC's process for handling editorial complaints.
20. The tribunal accepted that "the maintenance and enhancement of output standards (arising, by virtue of quality reviews in terms of accuracy, balance and completeness)" (paragraph 41) is held for the purposes of journalism, art or literature.
21. The tribunal identified the key issue as being to what extent information about editorial complaints formed "post-transmission editorial scrutiny and review and was held...for the purposes of journalism" (paragraph 12)
22. The BBC provided witnesses to the tribunal and has also provided evidence to the Commissioner on this and previous cases to show that complaints, investigations into complaints and the use of the whole editorial complaints process is integral to the BBC's journalistic purpose.
23. The tribunal unanimously dismissed each of the Appellant's appeals and accepted that information held for the purposes of the editorial complaints process provides a "valuable tool and resource for research for other programmes" (paragraph 110). The tribunal further accepted that it would be expected that BBC programme makers producing similar programmes would "refer to the underlying journalistic materials held and retained in respect of the original broadcast as well as the material generated by virtue of the complaints process".(paragraph 75)

In answer to the complainant's point that 'as the BBC already publishes some information about the complaints it receives from the public it does not seem to me that they are interpreting the Act either correctly

or consistently.’ the BBC explained that it does publish a great deal of information about complaints upheld or resolved by the Editorial Complaints Unit at stage 2 of the complaints process. However, the Commissioner (and the recent tribunal) upholds the BBC’s position that such voluntary publication “does not intrude upon the defined scope of FOIA”. (paragraph 57)

24. Overall, the Commissioner considers that the BBC has provided evidence that it holds the complaints information for the purposes of journalism and that this has been supported by the recent appeal to the First-tier Tribunal (Information Rights).
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 FOIA.

Right of appeal

26. 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

27. 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.
28. 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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