

Freedom of Information Act 2000 (FOIA)

Decision Notice

Date: 20 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 concerning how many complaints were received by the BBC in relation to a specific programme which was broadcast in July 2013. 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 22 July 2013 and made the following request:

"how many complaints were received by the BBC in relation to the Jeremy Vine show broadcast on 10/7/13 especially in relation to the item entitled UKs most stingiest father."

4. The BBC responded to the complainant on 13 August 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 16 August 2013.

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 as he believed that it was unreasonable for the BBC to withhold the information and was not in keeping with the spirit of the FOIA.
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 - Derogation

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 relates to the number of complaints received in respect of the broadcasting of a specific Jeremy Vine programme on 10 July 2013.
20. 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.
21. In determining whether the information is held for the purposes of journalism, art or literature, 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 and its journalistic activities relating to such output.
22. When considering the purposes for which the information was held at the time of the request, the BBC has explained that the information requested relates to editorial complaints. It advised that these form part of an on-going review of the standards and quality of particular areas of programme making with a view to further enhancing these standards. It advised that the complaints themselves and the information associated with them plays a significant role in helping to inform editorial discussion and decisions going forward. Further that this information informs future content and improves the quality of journalistic output.
23. The Commissioner finds that it would be reasonable to expect that information concerning the number of complaints received in respect of

an individual programme would inform as to the content of future screening of programmes and also the creation of new programmes. The retention of this type of information, which notes and analyses the public perception as to what is acceptable to be broadcast, relates directly to the creative process of creating programme content and the editorial decision making process that is involved as to whether, when and how a programme should be broadcast. Decision making as to the views and likely reaction of an intended audience inform future programming.

24. Whenever a programme is broadcast an editorial decision will be made as to the intended audience, current social and legal considerations and the impact of the programme itself. Complaints that are received subsequent to the broadcasting of any programme contribute and inform as to future programme planning. The receipt and consideration of complaints is part of the review and analysis inherent in programme production.
25. When considering the connection between the information itself and the journalistic activities relating to such output, the Commissioner is satisfied that the information obtained as a result of complaints made about a programme relate directly to output and would be used to inform programme making both present and in the future. This is in line with previous decisions of the Commissioner¹ and decisions of the First Tier (Information Rights) Tribunal². The Commissioner is therefore satisfied that there is a direct relationship between the purposes for which the information was held and the BBC's output.
26. Having considered the response of the BBC to the request the Commissioner is satisfied that the BBC has provided sufficient evidence that it holds the information for the purposes of journalism, art or literature. 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.
27. 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, art or literature and that the BBC was not obliged to comply with Parts I to V of the FOIA.

¹ FS50503443, FS50465338

² EA/2010/0042(+5)

Right of appeal

28. 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

29. 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.
30. 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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