

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 20 January 2014

Public Authority: The British Broadcasting Corporation
Address: 2252 White City
201 Wood Lane
London
W12 7TS

Decision (including any steps ordered)

1. The complainant has requested information broadly concerning emails which refer to missing Doctor Who episodes. 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 25 October 2013 and made the following request:

"Please provide me with electronic copies of all the content contained in all electronic mails (emails) sent and/or received by employees of the BBC and/or its subsidiaries since 1st October 2013 which refer to any or all of the missing episodes of the science fiction drama 'Doctor Who'. For the purposes of this request 'missing' means missing from the published list of episodes held in the BBC archives, (ie 106 episodes listed as missing as at 1st October, 97 episodes listed as missing as at 10th October), regardless of whether copies of any or all episodes have been located, recovered, returned or restored but not yet publicly announced as held in the BBC archives".

4. The BBC responded on 12 November 2013. It explained that it believes the information requested is excluded from the Act because it is held for

the purposes of 'journalism, art or literature.' 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 to complain about the way his request for information had been handled. In particular, he challenged the operation of the derogation in this case.
6. The Commissioner has therefore had to consider whether the BBC was correct to claim that the requested information is derogated.

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 concerns copies of emails sent and/or received by employees of the BBC and/or its subsidiaries which refer to any or all of the missing episodes of Doctor Who.
18. The complainant's main argument is that it is inconceivable that every applicable email held by the BBC would fall outside the scope of FOIA. Although the complainant does accept that it may well apply to some of the emails, he argues that for the BBC to claim that every single email can be excluded is unreasonable. The complainant also argues that the BBC has applied a sweeping generalisation when applying the derogation.
19. The Commissioner referred the complainant to the decision notice FS50505200¹. This decision notice considered a request for information concerning the number of missing Doctor Who episodes. The Commissioner upheld the BBC's application of the derogation. The complainant argues that although that decision notice was asking for similar material, the current request under consideration is worded differently and therefore derogation does not apply.
20. The Commissioner notes that the complainant has asked him to be mindful of the public interest and he states there is significant public interest in this topic. The Commissioner appreciates the complainant's view that the information requested is of public interest. However he has to remind himself that this factor in itself does not have a bearing on the central question of whether information is derogated. In this case the

¹ http://www.ico.org.uk/~/media/documents/decisionnotices/2013/fs_50505200.ashx

Commissioner has found that the information requested has a direct link to the BBC's output and therefore is derogated. The reasons for this are explained in the subsequent paragraphs.

21. The BBC has argued that the key reason for the retrieval of any missing material is to restore material to the BBC's programming archive where it is retained for the purpose of further broadcast or distribution. The BBC therefore explains that information held by the BBC that refers to the missing Doctor Who episodes would be held for the purposes of journalism, art or literature. Similarly, the Commissioner would agree with this.
22. The Commissioner disagrees with the complainant's argument that not all of the emails will be held for the purposes of journalism, art or literature. The Commissioner refers to the case of *Stephen Gee QC v Information Commissioner & The BBC* [EA/2010/0042, 0121, 0123, 0124, 0125, 0187] which found that information which is held for the purposes of journalism, will necessarily apply to information held in connection with a wide range of activities undertaken by the BBC. The Tribunal further concluded that this applies to information which might shape directly or indirectly or otherwise influence BBC editorial output with regard to existing or future programming projects.
23. The BBC's recent press release on how many returned missing episodes of Doctor Who it has received since its public appeal provides support of the Commissioner's view that the information requested is derogated. Information that the BBC hold in relation to missing Doctor Who episodes would have been integral to the BBC's journalistic output in this circumstance and any future output regarding missing Doctor Who episodes.
24. 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 the maintenance and enhancement of the standards and quality of journalism. He considers that the information falls within the derogation.
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: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

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

Rachael Cragg
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