

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 6 March 2014

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 the number of complaints about homophobic material on the BBC Messageboards. 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 16 October 2013 and asked for:

"1. What is the definition of "homophobic material" that moderators enforcing the Messageboards' House Rules are using?

2. What guidance or training in identifying homophobic material is given to the moderators enforcing the Messageboards' House Rules? If there is written guidance, what is it?

3. What is the guidance given to moderators enforcing the Messageboards' House Rules about the circumstances in which

homophobic material which breaks the House Rules may be allowed to remain?

4. How many complaints about homophobic material posted on the BBC Messageboards have been received in the year to date and in each of the previous two calendar years?

5. How many of those complaints resulted in material being removed in the year to date and in each of the previous two calendar years?"

3. The BBC responded on 13 November 2013. It stated 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. However, it did provide some information outside of the FOIA.

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.

Reasons for decision

6. 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."

7. 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'.

8. 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.
9. 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)
10. 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.
11. 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.
12. 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.
13. 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'.

14. 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.
15. The information that has been requested in this case is about complaints and definitions about 'homophobic material' on the BBC Messageboards.
16. On 16 January 2014 the Commissioner invited the complainant to withdraw his case but the complainant responded that the derogation did not apply as the information requested is for '*complaints about content created by members of the public*'. The Commissioner then asked the BBC for their detailed arguments.
17. 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.
18. The Commissioner recognises that the High Court cases did not specifically consider information related to BBC Messageboards. Nevertheless, any discussions, for example, in relation to editorial decisions to moderate, limit, extend, or restrict message boards would clearly fall within the remit of journalistic output.

19. The BBC Messageboards are a form of user interaction that is akin to programme content. The BBC is hosting a public discussion online, in the same way that it hosts discussion and debate in television and radio programmes. The BBC Messageboards are not developed in isolation and are closely monitored in line with the BBC's Editorial Guidelines and the Messageboards House Rules.
20. The decision notice for the case reference [FS50154312](#) is relevant as that case considered a request for information concerning Messageboards in which the BBC monitored and removed inappropriate content as part of the editorial and creative process *'Even though the messages themselves are user-generated content, the range and variety of message boards, how they will be monitored and removal of inappropriate content are all part of the editorial and creative process'*
21. The refusal of the BBC to provide the information was upheld by the Commissioner as he was satisfied that it was held for journalistic purposes and therefore fell under the derogation.
22. In further decision notices the Commissioner has considered the content generated by members of the public and the moderation of this user-generated content on the BBC Radio 2 Facebook page and Twitter account. In both FS50488408 and FS50498129 the Commissioner found that the moderation of the user-generated content was covered by the derogation.
23. In considering the number of complaints about homophobic material posted on the BBC Messageboards, the Commissioner and the BBC have already referred the complainant to previous decision notices (FS50295017, FS50363611 and FS50465338) where the Commissioner determined that information about complaints was held for the purposes of journalism, art or literature. Complaints information, including the number of complaints, is used to inform editorial choices, editorial direction and helps to inform future output.
24. The decision notice [FS50465338](#) includes reference to a recent appeal to the First-Tier Tribunal (Information Rights) (EA/2010/0042, 0121, 0123, 0124, 0125, 0187, http://www.informationtribunal.gov.uk/DBFiles/Decision/i884/20121120_Judgment_EA20100042+5.pdf 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. 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)

25. The BBC provided witnesses to the tribunal and has also provided evidence to the Commissioner on this and previous cases to show that complaints, numbers of complaints, investigations into complaints and the use of the whole editorial complaints process is integral to the BBC's journalistic purpose.
26. 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

27. 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

28. 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.
29. 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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