

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 9 February 2015

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 requested how many BBC staff had been sent to France to cover the shootings. 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. On 11 January 2015 the complainant sent the following information request to the BBC:

‘I wish to object to the license fee funding being used to send ridiculous numbers of journalists to France to cover the recent shootings. Whilst it may be a big story it does not need multi-10s of journalists and supporting staff (sound & vision) to provide adequate coverage. Just about every news programme, be it radio or television, has sent multiple different journalists; some of these being sent to France from distant locations. This is a reckless waste of the license fee. As a supplementary question to this complaint please provide details of the number of BBC staff (direct and contracted) allocated in France to cover the shootings. If necessary please treat this as a Freedom of Information Act request.’

4. The BBC responded on 14 January 2015. 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.'
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. On 18 January 2015 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.
7. He argued that 'it is my opinion that the BBC is abusing the Freedom of Information Act by using it to dismiss legitimate concerns by the License Fee paying public; the exact opposite of what was intended by the act.'
8. In response to the Commissioner's letter of 22 January 2015, the complainant argued that '*the number of journalists used for the event cited is not a product (output) of the BBC*'.
9. In addition the complainant wrote to the BBC on 26 January 2015 with a further complaint on the issue of derogation:

'It has become clear to me that the BBC is using the FOIA Derogation to reject complaints of whether the complaint is directly concerning art, journalism or literature output. As a subscriber to the licence fee I object to this disingenuous behaviour. Please explain how many complaints have been rejected in this manner over the last 12 months and what percentage this equates to out of the total number of complaints.'
10. On 30 January 2015 the BBC responded, again explaining that it believes that the information requested is excluded from the Act because it is held for the purposes of 'journalism, art or literature.

11. The Commissioner will consider both complaints under the scope of the case.

Reasons for decision

12. 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."

13. 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'.
14. 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.
15. 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)
16. 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.
17. 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.

18. 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.
19. 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'.

20. 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.

21. The complainant's request for how many BBC staff had been sent to France to cover the shootings is well within the expected remit for the purposes of creating content and producing output.
22. The complainant has already been referred to the decision notices for case references [FS50404473](#), [FS50497318](#), [FS50319492](#), [FS50363611](#) as relevant to his request as they also considered requests for information concerning costs.
23. Job titles, qualifications and experience of the BBC's staff are directly linked to the BBC's output. The creation of news programmes involves the consideration of many factors - one of which is the number of staff needed to produce and present those programmes and the costs involved in deploying those staff. The decision as to how much resource to dedicate to a particular piece of BBC output is a fundamental programme making decision.
24. Televising large public events all involve the same sort of editorial decisions on logistical scenarios, resource allocation, creative output and the costs involved. Furthermore, the expenditure involved in the coverage of such events will be used to inform editorial and budgetary decisions for future events.
25. The Commissioner recognises that the decision to send a particular number of journalists to an event relates to editorial decisions about the content that the BBC wants to offer its customers and this in turn relates to the overall editorial decision making process and resource allocation. It is therefore intimately linked to the corporation's output and it is clear that the Commissioner has no jurisdiction in this matter.
26. The Commissioner has accepted on a number of occasions (such as in case reference [FS50314106](#)) that the BBC has a fixed resource in the Licence Fee and resource allocation goes right to the heart of creative decision making. The Commissioner is satisfied that the same rationale applies in this case.
27. In addition the Information Commissioner has issued a number of decisions supporting the BBC view that information relating to complaints, quality reviews and standards is held for the purposes of 'journalism, art or literature': FS50295017 (complaints on political bias), FS50363611 (complaints about the World Cup) and FS50404473 (the number and nature of complaints about the royal wedding).
28. 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

29. 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)
30. In all these cases 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.
31. For all of the reasons above, the Commissioner is satisfied that the information requested is derogated and therefore outside the remit of the FOIA. The Commissioner has found that the requests are 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

32. 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: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

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

33. 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.
34. 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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