

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 29 April 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 has requested all information on any contingency plans. 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 6 January 2015 and asked for:

'All information on any BBC contingencies, measures or planned actions relating to an extreme national emergency - specifically the end of the world, but also major national crises such as nuclear attack - as they may relate to broadcast and online publishing output, whether pre-recorded, pre-prepared or pre-scripted in line with plans for live broadcast.

- Emails sent and/or received within on BBC systems and/or using BBC email accounts, relating to any such contingencies, measures or planned actions, as outlined above.

- All information on contingency plans for BBC output - broadcast outlets and online publication - in the event of a major catastrophe, including the priority list of which BBC services should be kept running in the event of major catastrophe: for example, whether BBC Radio 4 would be

regarded as a more important service to be maintained than BBC Three (TV channel)'

3. The BBC responded on 2 February 2015. 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. 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.

'1. The Royal Charter requires the BBC Trust to ensure that the BBC "observes high standards of openness and transparency" (point 23, section f).

By refusing to provide me with the information requested, the BBC is being neither open nor transparent, and is therefore failing in its obligations under the Royal Charter.

2. Previous case history would indicate that the "journalism" exemption should not be applied in a sweeping manner, and should instead be applied narrowly. This was the decision of a tribunal and subsequently the Court of Appeal in the case of the Balen Report in 2006.

The Court of Appeal said: "the question whether information is held for the purposes of journalism should thus be considered in a relatively narrow, rather than a relatively wide, way". (See: http://www.theregister.co.uk/2012/11/07/bbc_is_private_go_away/)

3. If the journalism exception is therefore being applied in a "narrow way", it would seem there are only certain circumstances where the exemption could be applied and be allowed to remain. One such reason could be the need to protect a journalist's confidential sources. But in the case of the information I have requested, the facts surrounding the event in question - the end of the world - will surely have been

established beyond reasonable doubt and would be in the public domain. Therefore, there would be no journalistic sources to protect in this instance.

4. *The BBC has previously argued that the "journalism" exception should be applied broadly to include BBC policy-making - as in the Newbery case, which was heard in 2012, relating to the views it formed on climate change. (See: http://www.theregister.co.uk/2012/11/07/bbc_is_private_go_away/)*

This reason should not apply to my request, because the end of the world would not be a matter of policy or policy-making - it would have become established fact at the time the BBC's relevant broadcasts were made.

5. *Previous cases would indicate that the BBC sometimes regards itself as a "non-public" body for the purposes of some Freedom of Information Act requests. (See again: http://www.theregister.co.uk/2012/11/07/bbc_is_private_go_away/)*

In the case of broadcasts relating to the end of the world, and the decisions and planning leading up to them, the BBC would unquestionably be performing public service tasks.

The BBC would be the first and last media outlet many people turned to at a time of such ultimate crisis, fulfilling its purpose to serve and represent the public. Such activities could therefore not be defined as "non-public" for the purposes of my information request.'

6. The Commissioner considers the scope of the case is to determine if the information is excluded from FOIA because it would be held for the purposes of 'journalism, art or literature'.

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 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 information on any contingency plans, measures or actions in the event of an extreme national emergency. For the purposes of their submission to the Commissioner, the BBC considered that Q1 and Q3 of the complainant’s request is for substantially the same information and Q2 is for the BBC emails that relate to any such plans.
16. The BBC provided evidence from the Supreme Court judgement (see also paragraphs 9- 14 above) that the phrase ‘journalism, art and literature’ is to be interpreted widely in FOIA and not narrowly as asserted by the complainant.
17. The BBC also provided evidence on business continuity at local and national level, some of which is publically available. For example, in the event of a localised flooding emergency, relevant authorities will work together to broadcast a live message which may change the scheduled programming: <http://www.bbc.co.uk/news/uk-15250977> ‘Connecting in a Crisis’. At national level, there is an agreement between the Secretary of State for Culture Media and Sport and the BBC http://downloads.bbc.co.uk/bbctrust/assets/files/pdf/about/how_we_govern/agreement.pdf
18. The BBC argue that such contingency planning is a clear example of *‘direct editorial judgement being exercised for the purposes of selection, prioritisation and timing of matters for broadcast or publication (be that online or offline). Such contingency plans are direct editorial decisions (to be taken contingent on the occurrence of a future event) which centre on the BBC’s production of broadcast content and output.’*

19. In addition the BBC argue that email correspondence relating to the BBC's emergency contingency plans for broadcast and online output *'is inextricably linked to, and underpins the creation and production of the BBC's contingency plans, which in turn, informs the BBC's broadcast and online output'*.
20. The Commissioner acknowledges that the Supreme Court did not consider these particular matters but in light of previous cases and considering all of the information before him, the Commissioner considers that the requested information falls under the definition of journalism and is therefore derogated.
21. The decision notice for the case reference [FS50463644](#) is relevant as it considered a request for information concerning a copy of all emails and meeting/telephone conversation notes between the Health Correspondent and the Department of Health. 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 conclusion, the Commissioner considers that the BBC has provided evidence that it holds the information for the purposes of journalism and that the information falls within the derogation. 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

23. 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>

24. 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.
25. 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
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF