

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 21 October 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 copies of all communications from the Conservative Party about the Election in May 2015. 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 was excluded from FOIA. He therefore upholds the BBC's position and requires no remedial steps to be taken in this case.

Request and response

3. On 13 May 2015, the complainant wrote to the BBC and requested information in the following terms:

'Under the Freedom of Information Act could you please provide all the written and spoken communications which came from Conservative politicians and Conservative Central Office about the BBC's conduct and reporting of the May 2015 Election over the last two months of the Campaign.'

4. On 21 May 2015 the BBC responded and explained that it did not believe that the information was caught by FOIA because it was held for the purposes of 'art, journalism or literature'.

5. On 29 May and 22 July 2015 the complainant complained to the ICO about this response. He argued that *'this is an inaccurate response to the request. My request was not for any journalistic content but for the Conservative responses to the BBC's coverage of the Election.'*
6. The Commissioner invited the complainant to withdraw his case on 21 August 2015 (citing the decision notice [FS50463644](#)) as it was his opinion that the requested information was held for the purposes of journalism, art and literature and that the BBC was correct in its refusal to disclose this information.
7. However, the complainant declined to withdraw his case and wrote to the Commissioner on 2 September 2015 to dispute the derogation. He argued that his request:

' is a charter matter and not a journalism one. The Charter states that: The BBC shall be independent in all matters concerning the content of its output" If the BBC is subject to pressure from one, or more, of the political parties, especially ones likely to form a Government, then this principle may well not hold. Considering evidence in relation to this constitutional issue of the BBC seems therefore to be a matter where Freedom of Information should apply. The election is merely the occasion when this independence is most likely to be challenged, for obvious reasons.'
8. On 3 September 2015 the Commissioner invited the BBC to provide its more detailed arguments about why it believed that the information requested falls within the derogation.

Background

9. The BBC provided a background to the requested information.
10. The BBC is required by its 2006 Charter and Agreement to ensure that matters of political controversy are covered with due accuracy and impartiality.
11. The BBC publishes 'Election Guidelines' for its editorial staff to refer to specifically when covering elections. These guidelines are in addition to the BBC's Editorial Guidelines which set out the values and standards all BBC content must meet. (<http://www.bbc.co.uk/editorialguidelines/>)
12. The Election Guidelines help to define how the BBC will comply with its duty of due impartiality during the period leading up to and including the general election. They *'provide a framework for journalists to deliver to audiences impartial and independent reporting of the campaign, giving*

them fair coverage and rigorous scrutiny of the policies and campaigns of all parties. The Election Guidelines give specific advice on achieving due impartiality in coverage of parties and issues.'

Scope of the case

13. The Commissioner considers the scope of the case is to determine if the requested information for correspondence from Conservative politicians during the election campaign is excluded from FOIA because it would be held for the purposes of 'journalism, art or literature'.

Reasons for decision

14. 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."

15. 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'.

16. 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)*

17. 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.

18. 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.
19. 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.
20. 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'.

21. The Supreme Court added 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.

22. The information that has been requested in this case is for the communications that came from Conservative politicians and Conservative Central Office regarding the BBC's conduct and reporting of the 2015 election period between March and May 2015.

23. The BBC have argued that

- The requested information concerns editorial complaints or feedback. It is inevitable that, in the course of elections, party officials and their offices comment or make a complaint to the BBC when they perceive the BBC may be failing the required standards of the BBC Editorial Guidelines.
- The primary users of the requested information are those directly concerned with output and editorial policy and management.
- Information concerning editorial complaints or feedback is intrinsically linked to the BBC's output. Complaints and feedback are about, and are intended to influence, the BBC's content. Complaints received about the content of programmes provide the BBC with a source of feedback about the content of its programming.
- Information relating to complaints is used to review and assess compliance with the BBC's editorial obligations and to inform future creative decisions, including decisions about continued publication of the particular item of output under scrutiny, any necessary corrective output, scheduling, applicable content standards and the BBC's overall editorial direction. Such purposes relate to the creation of output and the "maintenance and enhancement of the standards and quality of journalism (particularly with respect to accuracy, balance and completeness)".
- Allowing the BBC to consider and review its past performance and freely to discuss and analyse its future content is central to the freedoms which the derogation is designed to protect.
- It is the BBC's position that the requested information, which is held and used by programme makers and editors, is used to influence and create output. It is also held for editorial purposes for the analysis and review of individual pieces of output, and for the provision of context and background to the output.
- There is no area of broadcasting where the BBC's commitment to due impartiality is more closely scrutinised than in reporting election campaigns. Accordingly, the need for a space to make major editorial decisions independently and free from unwarranted

interference is particularly important when the requested information concerns the BBC's internal deliberations about how to make editorial decisions about the communication from politicians and their respective offices.

24. In response to the complainant's concern that the BBC's independence is subject to possible pressure from one, or more, of the political parties, the BBC has argued that there is no legal support for this. The Supreme Court identified that:

It is that public service broadcasters, no less than the commercial media, should be free to gather, edit and publish news and comment on current affairs without the inhibition of an obligation to make public disclosure of or about their work in progress (para78).....Information held for any such purposes of journalism, art or literature was absolutely exempt from disclosure.(para 111)

25. The Commissioner has already referred the complainant to the decision notice [FS50463644](#) which considered the request for correspondence between the BBC 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.
26. In 2015, there was a similar request (case reference [FS50570746](#)) concerning copies of any minutes and emails when it was discussed/decided which parties should participate in the proposed Election TV debates. The Commissioner considered the derogation applied by the BBC and his decision concluded that the request was for information held for the purposes of journalism and that the BBC was not obliged to comply with Parts I to V of FOIA.
27. Having applied the approach to the derogation set out by the Supreme Court and the Court of Appeal, which is binding, the Commissioner is satisfied that the requested information falls under the definition of journalism and is therefore derogated. The Commissioner sees no basis for deviating from the approach as the complainant argues; the information clearly falls within the derogation. The derogation is engaged as soon as the information is held by the BBC to any extent for journalistic purposes. The conclusion reached by the Commissioner is also consistent with the previous decision notices FS50463644, FS50299957 (2010 Election) and FS50570746.
28. In conclusion, and for all of the reasons above, 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

29. 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>

30. 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.
31. 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