

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 10 January 2017

Public Authority: The British Broadcasting Corporation ('the BBC')

Address: 2252 White City
Wood Lane
London
W12 7TP

Decision (including any steps ordered)

1. The complainant requested a copy of a policy discussion report. 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 4 August 2016, the complainant wrote to the BBC and requested information in the following terms:

'Please could you also pass on to the FOI BBC office my request for a copy of this suppressed report leaked in part to the Daily Mail, link below

<http://www.dailymail.co.uk/news/article-3657284/We-touch-ordinary-ghastly-Britons-says-ex-BBC-chief-Leaked-email-says-ignores-despises-millions-not-embrace-liberal-views.html>

4. On 2 September 2016 the BBC responded to the request. The BBC explained that the information was not caught by FOIA because it was held for the purposes of 'art, journalism or literature'.

5. On 16 September 2016 the complainant complained to the Commissioner about this response. He referred to the BBC Charter to be *'bound by law to be inclusive of all opinion, and yet here a very wide body of opinion is demonized as "ghastly" in a discussion paper, which relates to BBC orientation as a whole. If a former BBC boss is asserting that the BBC is failing in its duty to respect widely held opinion, that is extremely serious and of the deepest public interest.'*
6. The Commissioner invited the complainant to withdraw his case on 5 October 2016 as it was her 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 7 November and commented: *'I am not prepared to withdraw the complaint. And for the BBC to be completely free from the Act is a real scandal...'*
8. On 14 November 2016 the Commissioner invited the BBC to provide its more detailed arguments about why it believed that the information requested falls within the derogation.

Scope of the case

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

Reasons for decision

10. 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."
11. 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'.

12. 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)

13. 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.
14. 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.
15. 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.
16. 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'.

17. 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.
18. The information that has been requested in this case is for a copy of a policy discussion report.
19. The BBC considers that the first element of journalism (collecting or gathering, writing and verifying of materials for publication) and the second element (the editorial process), is relevant in this case.
20. The BBC has argued that
 - The disputed information is a memorandum drafted by the former Head of the Political Research Unit. Information held by the Political Research Unit is created and intended to be used by BBC editors, journalists and programme makers to support the BBC News output on matters relating to Parliament, legislation, government, political parties and constitutional affairs.
 - The memorandum at issue concerns the United Kingdom European Union membership referendum (Brexit) and included the Head of Political Research's analysis on the referendum polls. It is the role of the Head of the Political Research Unit to prepare such briefings – providing factual information, analysis and comment - on key news stories for BBC editorial staff about political matters, which is intended to assist those in editorial roles.
 - The requested information is intended to provide factual information and analysis, which will directly influence editorial decisions, and the final publication and broadcast of BBC's news stories.

21. In response to the complainant's concern that the BBC is '*completely free from the Act*' and this '*is a real scandal*' the BBC has replied that the complainant has misinterpreted how the FOI Act applies to the BBC as the BBC only remains subject to the Act for certain types of information.
22. In addition the BBC stated that 'the briefing paper does not assert "*that the BBC is failing in its duty to respect widely held opinion*", nor does it relate to the "*BBC's orientation as a whole*". As detailed above, the paper is held within the BBC's News division by the Political Research Unit and was drafted to support BBC News senior editors in their output on issues related to the referendum.'
23. The BBC explained to the Commissioner that it has Editorial Guidelines that apply to all content and set out the standards expected. If a member of the public wished to make an allegation that the BBC's output was not impartial, independent or it was not serving the public interest, a complaint can be made to the BBC Executive.
24. 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 she was satisfied that it was held for journalistic purposes and therefore fell under the derogation.
25. The Commissioner is satisfied that the same rationale applies in this case. She considers that the BBC has provided sufficient evidence that it holds the information for the purposes of journalism and is satisfied that the information is held for editorial purposes. There is a clear direct link between the purposes for why the information is held and the BBC's output. Therefore, the information requested clearly falls within the definition of "journalism".
26. Consequently, the Commissioner has found that the information falls within the derogation, which means that the BBC is not obliged to comply with Parts I to V of the 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: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

Website: <http://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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