

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 20 February 2018

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

Address: Broadcast Centre
White City
Wood Lane
London
W12 7TP

Decision (including any steps ordered)

1. The complainant has requested information relating to BBC's Tigrinya service. The BBC refused to provide the requested information at question one citing the exemption under section 40(2) of the FOIA (third party personal data) as its basis for doing so. The BBC applied the derogation to question four of the request.
2. The Commissioner's decision is that the BBC has correctly applied section 40(2) of FOIA to the withheld information at question one and correctly applied the derogation to question four.
3. The Commissioner does not require the public authority to take any steps as a result of this decision notice.

Request and response

4. On 17 November 2017, the complainant requested the following:

'I write to you to make a freedom of information request with regards to the BBC's Tigrinya service.

I would like to know the following about the service;

- 1) *How many staff does the service have? Of these, how many are Eritreans and how many are Ethiopians?*

- 2) *During the recruitment process how did the BBC check the Tigrinya language proficiency (both oral and written) of the candidates and who had the last word in the selection?*
 - 3) *During the setting up of the service, was the BBC aware of the differences in culture and language between the Tigrinya speakers in Eritrea and Ethiopia? If so, what steps were taken and are being taken to ensure a fair representation of both Eritrean and Ethiopian issues?*
 - 4) *How does the BBC regulate the quality of the Tigrinya service? When a complaint is made, who translates articles written in Tigrinya into English? Who checks the accuracy of the translation?*
5. The BBC responded on 18 December 2017 that the information was held for derogated purposes and fell outside of FOIA. It also provided some information about the Tigrinya service outside of the FOIA. The BBC does not provide an internal review when the information is not covered by the FOIA.

Scope of the case

6. The complainant contacted the Commissioner on 2 January 2018 to complain about the way his request for information had been handled. He argued that *'the information I have requested is not actually related to the BBC's journalistic output but is related to the BBC's administration.'*
7. During the Commissioner's investigation, the BBC amended its response to the complainant. It disclosed answers to the second and third part of the request. These answers to Q2 and Q3 have not been disputed by the complainant and therefore are not part of the scope of this case.
8. The BBC cited section 40(2) (Third party personal data) to Q1 and continued to apply the derogation to Q4.
9. Therefore, the Commissioner considers the scope of this case to be to determine if the BBC has correctly applied the exemptions it has cited. The Commissioner will look at the application of section 40(2) to Q1 and the application of the derogation to Q4 of the request.

Reasons for decision

Question One - Section 40(2) – Third party personal data

10. This exemption provides that any third party personal data is exempt if its disclosure would contravene any of the Data Protection Principles set out in Schedule 1 of the Data Protection Act (DPA).

Is the withheld information personal data

11. Personal data is defined by the DPA as any information relating to a living and identifiable individual.
12. The two main elements of personal data are that the information must 'relate' to a living person and that the person must be identifiable. Information will relate to a person if it is about them, linked to them, has some biographical significance for them, is used to inform decisions affecting them, has them as its main focus or impacts on them in any way.
13. The information in this case doesn't directly identify individuals. However, because the name of an individual is not known, it does not mean that an individual cannot be identified. The Commissioner's guidance on what is personal data¹ states that if information 'relates to' an 'identifiable individual' it is 'personal data' regulated by the DPA:

"A question faced by many organisations, particularly those responding to Freedom of Information requests, is whether, in disclosing information that does not directly identify individuals, they are nevertheless disclosing personal data if there is a reasonable chance that those who may receive the data will be able to identify particular individuals."

It also states:

"The starting point might be to look at what means are available to identify an individual and the extent to which such means are readily available. For example, if searching a public register or reverse directory would enable the individual to be identified from an address

¹<https://ico.org.uk/media/for-organisations/documents/1554/determining-what-is-personal-data.pdf> & https://ico.org.uk/media/for-organisations/documents/1549/determining_what_is_personal_data_quick_reference_guide.pdf

or telephone number, and this resource is likely to be used for this purpose, the address or telephone number data should be considered to be capable of identifying an individual.

When considering identifiability it should be assumed that you are not looking just at the means reasonably likely to be used by the ordinary man in the street, but also the means that are likely to be used by a determined person with a particular reason to want to identify individuals. Examples would include investigative journalists, estranged partners, stalkers, or industrial spies."

14. In this case, the BBC explained that the BBC's Tigrinya service is a small team of under ten staff in the BBC's Global News division. Given the size of this group and the public nature of their work as journalists working in the field, disclosing the requested information would identify living individuals.
15. The complainant has provided evidence to the Commissioner that there is information about some members of the Tigrinya team on social media. For example one named radio presenter with photograph was identified as Eritrean. Another named senior broadcast journalist with photograph was identified as a former editor at the Ethiopian Reporter.
16. The BBC have stated that '*the Facebook pages of the two BBC staff members identified do not disclose which part of BBC World Service they work in*'.
17. Given the above explanation, particularly the small volume of staff working in this team, the public nature of their work and the availability of their information on social media, the Commissioner considers that it is reasonably likely that individuals could be identified.
18. Therefore, the Commissioner is satisfied that the requested information in this case constitutes personal data.

Sensitive personal data

19. Any consideration of fairness must first determine whether the requested information is defined as sensitive under the DPA. Section 2 of the DPA defines sensitive personal data as information which relates to:
 - (a) racial or ethnic origin
 - (b) political opinions
 - (c) religious beliefs
 - (d) trade union membership
 - (e) physical or mental health

- (f) sexual life
 - (g) criminal offences, sentences, proceedings or allegations.
20. The requested information falls into the first category of sensitive personal data.
21. The BBC explained that the BBC's Tigrinya service is a small team of under ten staff and disclosing the exact figures for how many staff are employed in the service and how many of these staff members identify as Eritrean or Ethiopian would disclose sensitive personal information about those individuals:
- 'Disclosure would raise real security risks for BBC employees identified. These risks arise from the political contexts in which these individuals report for the BBC, from countries in Africa where BBC journalists are working in environments complicated by authoritarian political regimes, corruption, censorship and restrictions on the movements and other freedoms of the media.'*
22. The complainant disputes this security risk as irrelevant as there is already so much information available in the public domain. The request only deals with nationality and not about ethnic origin: *'an Eritrean can be a member of any of the nine ethnic groups...'*
23. Having considered the request for the numbers of 'Eritreans' and 'Ethiopians' the Commissioner considers that this is clearly sensitive personal data under section 2(a) racial or ethnic origin. Although the Commissioner recognises that there is information publicly available on social and other media, the Commissioner can only consider what can be disclosed by the BBC under FOIA.
24. As sensitive personal data, by its very nature, this has been deemed to be information that individuals regard as the most private information about themselves. Further, as disclosure of this type of information is likely 'to have a detrimental or distressing effect' on the data subject, the Commissioner considers that it would be unfair to disclose the requested information.
25. Having considered the BBC's submission and the views of the complainant the Commissioner is satisfied that the withheld information under Q1 is sensitive personal data and that disclosure would breach the first data protection principle as it would be unfair to the individuals concerned. The Commissioner upholds the BBC's application of the exemption provided at section 40(2) of the FOIA.

Question 4 - derogation

26. 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.”

27. 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’.

28. 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.

29. 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)

30. 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.

31. 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.

32. 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.
33. 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'.
34. 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.
35. The Commissioner adopts a similar definition for the other elements of the derogation, in that the information must be used in the production, editorial management and maintenance of standards of those art forms.
36. In this case, the information requested at Q4 concerns – *'How does the BBC regulate the quality of the Tigrinya service? When a complaint is*

made, who translates articles written in Tigrinya into English? Who checks the accuracy of the translation?

37. The BBC explained that the requested information is *'used by the relevant division – and BBC content makers more generally – to moderate and refine output. Disclosing the editorial processes that the team employ to 'regulate the quality of their services', as well as identifying those involved in this process from within the team, including translators, are editorial matters that impact on the nature and direction of BBC journalistic output.'*
38. The Commissioner considers that the information requested in this case, relating to quality of the service, complaints and accuracy of translation falls under the second and third elements explained above, editorial judgement and the review of standards. The information requested therefore falls squarely within the definition of journalism.
39. The Commissioner has therefore found that this information is 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

40. 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: www.justice.gov.uk/tribunals/general-regulatory-chamber

41. 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.
42. 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