

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 19 February 2018

Public Authority: British Broadcasting Corporation (BBC)

Address: Room BC2 A4
Broadcasting Centre
Wood Lane
London W12 7TP

Decision (including any steps ordered)

1. The complainant has requested information about the BBC and 'positive discrimination'. The BBC said that the requested information was covered by the derogation and excluded from the FOIA.
2. The Commissioner's decision is that this information is held by the BBC for the purposes of 'journalism, art or literature' and does not fall within the scope of FOIA. She therefore upholds the BBC's position and requires no remedial steps to be taken in this case.

Request and response

3. On 24 December 2017, the complainant wrote to the BBC and requested information in the following terms:

"Over many years it has become clear that there is an inherent prejudice in the BBC's determination of front-line (in front of camera or microphone) appointments. There is a far greater proportion of foreign/people of colour/black 'presenters' (FCB) than one would expect if selection had been made without prejudice. This inequity has, it appears, now permeated the inter-programme, Christmas continuity 'slots' (apologies - I don't know the correct name for these short 'fillers') where we now see an adult and child, clearly of Middle-Eastern origin and most

likely not Christian (given the preponderance of non-Christian religions in this region) 'celebrating' Christmas (Christmas lights, Christmas washing up etc). A number of questions come to mind ... 1. How does the BBC go about selecting such a high proportion of FCB staff? Is there a policy of positive discrimination? How does the BBC justify, what amounts to, negative discrimination against non-FCB applicants? When was this policy initiated? How is the policy sustained and enforced and by whom? 2. Who (which committee?) required that our Christian celebration should be (in the continuity slots) blazoned by characters who were clearly not indigenous English/British? And for what reason? In my humble opinion, the BBC is engaged in a form of inverted racism (one of the OED's definitions is: "The belief that all members of each race possess characteristics, abilities, or qualities specific to that race, especially so as to distinguish it as inferior or superior to another race or races") by preferentially selecting people of certain 'racial groups' (or ethnicities ...) over others."

4. The BBC responded on 17 January. The BBC explained that it did not believe that the requested information was caught by the FOIA because it was held for the purposes of 'art, journalism or literature'.

Scope of the case

5. The complainant contacted the Commissioner on 18 January 2018 to complain about the way his request for information had been handled.
6. The Commissioner communicated to the complainant her preliminary assessment of the complaint, which was that the requested information is derogated. The complainant accepted that information regarding the BBC's Christmas 'idents' would be derogated but not the information concerning its staff. He confirmed that, as indicated by the request, his references to 'staff' concern the BBC's on air presenters.
7. The Commissioner's investigation has focussed on whether the BBC holds the information the complainant has requested for the purposes of 'journalism, art or literature' and therefore excluded from the FOIA.

Reasons for decision

8. 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 says:

"The British Broadcasting Corporation, in respect of information held for purposes other than those of journalism, art or literature."

9. 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 'the derogation'.

10. 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)

11. 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.

12. 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.

13. 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.

14. 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'.
15. 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.
16. The information requested in this case concerns the decisions the BBC makes about its presenters and those employed to be in front of the camera.
17. The Commissioner is satisfied that the information is well within the expected remit of the BBC for the purposes of creating content and producing output – its journalistic and artistic/creative activities in this case. This in turn closely relates to the editorial decision making process and resource allocation. Therefore, the information is held for the purposes of the derogation. It is inextricably linked to the BBC's output i.e. the material the BBC publishes or broadcasts.
18. The Commissioner finds 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. As a result the Commissioner is satisfied that, in this case, she has no jurisdiction in this matter and therefore no statutory power to order disclosure.

Right of appeal

19. 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

20. 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.
21. 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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