

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 18 May 2018

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

Address: BC2 A4 Broadcast Centre
White City
201 Wood Lane
London
W12 7TP

Decision (including any steps ordered)

1. The complainant has requested the number of complaints made against Frankie Boyle. 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 did not fall inside FOIA. She therefore upholds the BBC's position and requires no remedial steps to be taken in this case.

Request and response

3. The complainant wrote to the BBC on 6 March 2018 and asked for:
'Under the Freedom of information Act (and at no cost to myself) can you please let me know how many public complaints have been made to the BBC against the comedian Frankie Boyle, covering all his appearances on the BBC, both radio and television.'
4. The BBC responded on 8 March 2018. The BBC 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. 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 requests for information.

Scope of the case

6. The complainant contacted the Commissioner on 11 March 2018 to complain about the way the request for information had been handled. In particular, he challenged the operation of the derogation in this case. He argued:

'I recently complained about a Frankie Boyle programme on BBC TV. I received a reply stating that there had only been six complaints from an audience of 1.6 million. I was made, in my opinion to feel that I was out of touch and that the BBC had used statistics to prove a point using their own data.

I then asked under the Freedom of Information Act to know how many complaints about Frankie Boyle had been received by them covering all his appearances on BBC TV and Radio?...

I feel very confused that statistics can be used selectively by them to prove their point, but yet they feel they can withhold the bigger picture, something I think should be in the public domain and interest, as we are paying for the BBC with our TV licence fees.'

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

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 states:

"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 situation 'the derogation'.
10. 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.

11. 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)

12. 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.
13. 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.
14. 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.
15. 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'."

16. 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.
17. In this case, the information that has been requested is the number of complaints against the comedian Frankie Boyle, covering all his appearances on the BBC.
18. The BBC has confirmed that the information is held by the BBC's Audience Services and if any complaints have been escalated then BBC's Executive Complaints Unit (the ECU) is also likely to hold information on complaints about Frankie Boyle. *'Audience Services and the ECU have advised that ... they do not track or report on the number of complaints received about a particular individual across all of BBC radio and television as an overarching figure, as requested by the complainant.'*
19. The BBC explained who uses the information to create output:

'Audience Services reports on complaints and comments on an 'Audience Log Report' overnight on a daily basis and areas that are directly involved in the creation of programme content can access these reports through an online portal. This enables relevant programme areas to monitor the overnight reaction to their broadcasts.

In addition, the number of complaints received ... is provided across the BBC including to areas that are directly responsible for the relevant programme content. Audience Services has advised that this information and any additional reports it circulates (e.g. appreciations, other comments) about editorial points raised in audience reaction would be used by the BBC's comedy department. These individuals will hold editorial roles within the BBC.

Further, in the event of a complaint concerning Frankie Boyle being upheld by the ECU, the finding would be reported to the Editorial Standards and Complaints Committee, which consists of Divisional Directors or their representatives and is chaired by the Director of Editorial Policy and Standards.'

20. The BBC argued that the complaints received about its broadcast items, and the issues raised, is a source of feedback about the content and quality of the BBC's programming. This information, whether used alone or together with other information, is important in the ongoing review and improvement of programme content.

'In this case the complaints received about a particular comedian appearing across various BBC programmes is one indicator, along with others, of the public perception of those programmes and the relevance of that particular style of comedy This information is used by the programme areas to inform editorial decision-making about future content. In particular, this information is directly relevant to decisions regarding the continued publication of the particular item of output; any necessary changes to content; and how the programme should be broadcast. At a broader level, this information is also used by the BBC comedy department and the BBC as a whole to inform the BBC's editorial direction.'

21. The BBC considered that the requested information falls within the second (editorial) and third (maintenance and enhancement of the standards and quality of journalism) limbs of the Information Tribunal's analysis:

'the requested information is directly relevant to editorial decisions regarding whether and how a programme should be broadcast... ultimately, the BBC's creative output.'

'The requested information also allows programme areas, the comedy department and the BBC as a whole to identify and monitor any issues regarding non-compliance with the BBC's Editorial Guidelines. This is particularly important in the context of comedy broadcasts as the number of complaints may give rise to issues of generally accepted standards.'

22. The Commissioner considers that the information requested in this case are editorial complaints which form part of the on-going review of the standards and quality of programme making and is held to help inform future editorial discussions and decisions to improve the quality of journalistic output.
23. The BBC has provided evidence in this and previous cases to show that complaints, investigations into complaints and the use of the whole editorial complaints process is integral to the BBC's journalistic purpose.

This has been supported by the appeal to the First-Tier Tribunal (Information Rights) - EA/2010/0042, 0121, 0123, 0124, 0125, 0187.

24. The Commissioner accepts the BBC's position in relation to the information requested. She considers that there is a direct link between the information being sought and the BBC's output. The BBC has provided sufficient evidence that it holds the information for the purposes of journalism. Specifically, she is satisfied that the information is held for editorial purposes and for maintaining and enhancing the standards and quality of journalism. Consequently, she 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.

Other matters

25. In answer to the complainant's point that the BBC provided a response to a complaint about one programme but withheld the information requested under FOIA, the BBC submitted that the BBC's handling of an editorial complaint is necessarily distinct from the BBC's statutory obligations under FOIA.
26. The BBC explained that handling complaints is guided by the BBC's internal complaints framework and its responsibilities to Ofcom (https://ssl.bbc.co.uk/complaints/forms/assets/complaintsnew/resources/BBC_Complaints_Framework.pdf.) and that outside of FOIA it proactively publishes a great deal of information about complaints. (<http://www.bbc.co.uk/complaints/>)
27. The Commissioner (and the tribunal at paragraph 23 above) notes that such voluntary publication "does not intrude upon the defined scope of FOIA" and it is not within the remit of the Commissioner to comment on information provided outside of FOIA.

Right of appeal

28. 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>

29. 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.
30. 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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