

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 10 January 2020

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 details of complaints received by the Question Time production team. The BBC explained the information was covered by the derogation and excluded from FOIA. 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

2. The complainant wrote to the BBC on 17 October 2019:

'Please provide details of complaints received by the Question Time production team since June 2016.'

If it helps limit my request, I am only interested in complaints relating to discussions about the UK exiting the EU. Equally if it is more convenient to provide all complaints this would also be acceptable.'

Please provide the information in a suitable format to facilitate further analysis. If the information is stored in a database then ideally that would be a CSV extract or similar.'

3. The BBC responded on 4 November 2019. 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'.
4. 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

5. The complainant contacted the Commissioner on 8 November 2019 to complain about the way the request for information had been handled.
6. In response to the Commissioner's letter of 21 November 2019, he referred to the Supreme Court Ruling in *Sugar v British Broadcasting Corporation* [2012] and argued:

'The purpose of the derogation is to provide a 'safe space' in which editorial judgements can be made. Malcolm Balen had to balance the views of two very vocal and disparate pressure groups, and the Supreme Court determined that his views and analysis needed protection in order to ensure that journalists and editors working for the BBC would not be deterred in the future from giving their frank opinion on matters for fear these would be disclosed to the public.

Complaints from anonymous members of the public have no need for such protection. Disclosure of public opinion will not deter other members of the public from continuing to provide their views on our official state broadcaster...'

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.'

16. 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 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.
18. 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.
19. In this case, the information requested concerns complaints about the Question Time programme, including complaints relating to discussions about the UK exiting the EU.
20. The BBC explained that the Question Time programme is a topical news and current affairs debate programme involving a panel of experts and public figures from politics and the media who answer questions posed by the members of the public.
21. The BBC confirmed that the BBC's Audience Services division holds information relevant to the request. Complaints are used in the following ways by programme and editorial standards teams:

'a. to inform editorial decisions about the format of the programme and the nature of the content that should form part of the show's broadcast output;

b. to assist in maintaining and enhancing the standards of Question Time's journalistic output by providing information against which the BBC can measure. This includes responding to complaints.'

22. The BBC argued that the *'consideration of editorial complaints and internal correspondence about how to respond to complaints evidently relate to the way that the BBC maintains and enhances its editorial standards. The BBC Complaints process is one way in which editorial teams can understand audience reactions to programming and review any editorial concerns raised. The BBC must have a safe space to consider such concerns and decide whether any editorial changes should be made to the way it produces programmes, and if so, the nature of any such changes. Public disclosure would unfairly pressure decision-making, undermining the independence of the broadcaster.'*
23. The BBC argued that these editorial complaints form part of the on-going review of the standards and quality of programme making and help inform future editorial discussions and decisions to improve the quality of journalistic output.
24. The Commissioner is satisfied that the information requested in this case, relating to the complaints about the Question Time programme, is held for the purposes outlined in the third element of the definition at paragraph 15 above, namely for maintaining and enhancing the standards and quality of journalism.
25. The Commissioner has issued a number of decisions supporting the BBC view that information relating to complaints, quality reviews and standards is held for the purposes of 'journalism, art or literature'. The decision notice [FS50465338](#) includes reference to an appeal to the First-Tier Tribunal which also supported the BBC view.
26. 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.
27. In conclusion, and for all of the reasons above, the Commissioner finds that the information falls within the derogation and that the BBC is not obliged to comply with Parts I to IV of the FOIA in respect of the complainant's request.

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@justice.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

Pamela Clements
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