

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 21 May 2014

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

Address: 2252 White City
201 Wood Lane
London W12 7TS

Decision (including any steps ordered)

1. The complainant has requested information about a BBC Editorial Standards Committee ruling. The BBC explained that the 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 is not caught by the FOIA. He therefore upholds the BBC's position and does not require the BBC to take any further steps.

Request and response

3. On 17 October 2013, the complainant wrote to the BBC and requested information in the following terms:

1. Please provide all information relating to the formulation of the response cited above [a BBC Editorial Standards Committee ruling on a consolidated appeal about the Corporation's description of Jerusalem as an Israeli city during its coverage of the 2012 Olympics]. I would expect this to include, but not to be limited to:

- i. Meeting minutes*
- ii. Meeting readouts*
- iii. Briefing notes*
- iv. Other meeting memoranda*

I would also expect to include correspondence between relevant parties, such as:

- i. Letters*
- ii. Emails*
- iii. Email attachments*
- iv. Notes taken during or after phone calls*
- v. Text messages*

If the ESC relied on pre-existing documents during the formulation of its ruling I should be grateful if you could provide a register of all such documents and state each documents:

- a) Title*
- b) Date*
- c) Purpose*

while also providing copies of the documents themselves.

To be clear, I am not requesting information related to the resolution of every complaint submitted about the BBC's description of Jerusalem as an Israeli city. I am requesting information related to the formulation of the ruling quoted on page one that was used in the resolution of multiple complaints.

4. The BBC responded on 24 October 2013. It provided some information within the scope of the request – a link to information published on its website concerning a consolidated appeal about BBC Online Olympic country profiles. The BBC said that the requested information was excluded from the FOIA because it was held for the purposes of 'journalism, art or literature'.

Scope of the case

5. The complainant contacted the Commissioner on 28 March 2014 to complain about the way their request for information had been handled. Specifically, they challenged the operation of the derogation to their request and this was the focus of the Commissioner's investigation.

Reasons for decision

6. Schedule One, Part VI of the 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.

7. 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'.

8. 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.

9. 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 said 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)

10. 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.
11. 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 applied.
12. 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'.

13. 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. 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.
14. 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.
15. The information that has been requested in this case concerns a BBC Editorial Standards Committee ruling.
16. The complainant submitted an extensive case to the Commissioner outlining why the information they had requested is not derogated. This discussed the nature and limits of 'journalism', the BBC's obligations to be truthful and accurate, and a brief history of Israel and East Jerusalem and international community positions on Jerusalem.

17. In its response to the complainant, the BBC put forward the following arguments for why the information they had requested - which relates to editorial complaints - was caught by the derogation:
- (i) Editorial complaints form part of the on-going review of the standards and quality of particular areas of programme making, with a view to further enhancing these standards; the complaints themselves and the information associated with them plays a significant role in helping to inform editorial discussion and decisions going forward. In this way the BBC uses information relating to editorial complaints to inform future content and improve the quality of journalistic output. This is an important part of the BBC's process of creating and improving programmes.
 - (ii) There have been a number of appeals in respect of similar information where the BBC's position has been put forward in some detail and accepted by the Information Commissioner (eg FS50363611, FS50295017 and FS50327965). In those cases, the Commissioner agreed that complaints information is used to inform the BBC's editorial choices and future output and is created as part of the management and enhancement of the standards and quality of journalism.
 - (iii) *Stephen Gee QC v British Broadcasting Corporation EA/2010/0042, 0121, 0123, 0124, 0125, 0187*) was relevant to the complainant's case. This appeal to the Information Tribunal concerned requests for information about an edition of *Panorama* and the handling of the complainant's subsequent editorial complaint about the programme, including the actions and processes of the Editorial Standards Committee. As in the case that is the subject of this notice, the requests sought information generated by and related to the BBC's process for handling editorial complaints. The Tribunal in *Gee* found that information held for the purposes of the editorial complaints process corresponds to the third element of journalistic activity originally formulated by the Tribunal in the *Sugar* case - the maintenance and enhancement of standards and the quality of journalistic activity with regard to accuracy, balance and completeness, and the review of the standards and quality of particular areas of programme making.

18. The Commissioner accepts the BBC's position in relation to the information requested. He 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, he is satisfied that the information is held for the purposes outlined in the second and third point of the definition at paragraph 12, namely for editorial purposes and for maintaining and enhancing the standards and quality of journalism. Consequently, he 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

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: 0116 249 4253

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
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF