

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 1 February 2016

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 from the BBC any correspondence between Alan Yentob and BBC staff members about the charity 'Keeping Kids Company'.
2. After investigation, the Information Commissioner has found that the information sought by the complainant is not held by the BBC for the purposes of FOIA. The Commissioner's decision is that the BBC is entitled to rely on section 3(2)(a) of FOIA and that other information was held by the BBC for the purposes of 'journalism, art or literature' and did not fall inside FOIA. He 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 27 August 2015 and made the following information request:

'Please provide digital copies of all correspondence between Alan Yentob and any BBC staff member about or mentioning Kids Company.'

4. On 7 October 2015, the BBC declined to disclose any of the requested information citing section 3 and the derogation:

'if, and to the extent that, any communications with Mr Yentob in his account for the purposes of his role at Keeping Kids Company might be stored on BBC systems, those communications are held for and on behalf of Keeping Kids Company and are not held by the BBC on its own behalf; the information would not be held for the purposes of the Act and the BBC was not obliged to confirm whether or not the requested information was held.'

And

'In relation to correspondence held by other BBC staff, the information you have requested is excluded from the Act because it is held for the purposes of 'journalism, art or literature.' The BBC is therefore not obliged to provide this information to you and will not be doing so on this occasion.'

5. The complainant requested an internal review on 26 October 2015. The BBC sent him the outcome of its internal review on 24 November 2015 and upheld its position.

'The requester concedes in his request for an internal review that he considers and accepts that Alan Yentob's role as a trustee with the charity Keeping Kids Company is in his "private capacity". Indeed, Mr Yentob's role as a trustee of the charity is not associated with his role as Creative Director of the BBC, the roles and responsibilities associated with which are publicly available. Mr Yentob's role with the charity is registered as an "outside activity" on his published declaration of personal interests. The Information Commissioner's guidance makes clear, at paragraph 18, that "private emails sent or received by staff in the workplace via the public authority's email system would not be held by the authority for the purposes of FOIA".'

6. On 1 December 2015 the complainant wrote to the Commissioner and argued that:

'I fail to see how email correspondence between Alan Yentob and other BBC staff about or mentioning Kids Company is wholly or even partly comprised of information held on behalf of Kids Company. It may be the case that S3(2) applies if a member of Kids Company is involved in the email exchange (for example, by being copied into the exchange) but even then the legitimate question arises: Why is Alan Yentob, a Director of the BBC, corresponding with another BBC employee about a personal (albeit charitable) interest?

Likewise, if the requested information is held on behalf of Kids Company and/or for the purpose 'of journalism, art or literature' why was it being conveyed to another BBC employee?

It does not make any sense.'

Scope of the case

7. The Commissioner considers that the scope of the case is to
 - determine if the requested information is excluded from FOIA because the information requested was not held for the BBC's own purposes and therefore falls outside the definition of information held for the purposes of FOIA under section 3(2)
 - determine if it would be excluded from FOIA because the information requested is held for the purposes of 'journalism, art or literature'.

Reasons for decision

Section 3(2) – information held by a public authority

8. Section 1 of FOIA states that any person making a request for information is entitled to be told whether the public authority holds the information requested and, if held, to be provided with it.
9. Section 3(2) sets out the criteria for establishing if information is held for the purposes of FOIA:

"For the purposes of this Act, information is held by a public authority if

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 - (a) *it is held by the authority, otherwise than on behalf of another person, or*
 - (b) *it is held by another person on behalf of the authority"*
10. The Commissioner's guidance on "Information held by a public authority for the purposes of the FOIA"¹ states that when a public authority holds information solely on behalf of another person it is not held for the

1

http://ico.org.uk/for_organisations/guidance_index/~/_media/documents/library/Freedom_of_Information/Detailed_specialist_guides/information_held_by_a_public_authority_for_purposes_of_foia.ashx

purposes of the FOIA and that each case needs to be considered according to the specific circumstances.

11. The Commissioner asked the BBC to provide a detailed explanation why it has concluded that, although it may physically hold the information requested, it does not hold this information for the purposes of FOIA.
12. In this case, the BBC has shown that Alan Yentob is a trustee of the charity in a private capacity and this is 'wholly unconnected' to his role as Creative Director at the BBC.
13. The BBC explained that the requested information, in so far as physically held by Mr Yentob, was not held by the BBC for its own purposes or indeed need it for its own purposes and therefore it is not data subject to FOIA.
14. The BBC had made enquiries with the office of Mr Yentob and understood that any information stored at the BBC or on BBC systems relating to the charity Keeping Kids Company was concerned with his role as Chairman of the charity and not with his role as Creative Director of the BBC.
15. The Commissioner has considered the factors in his guidance that would indicate that the information is held solely on behalf of another person (Mr Yentob) and concludes that:
 - The BBC has no access to, use for, or interest in the information;
 - Access to the information is controlled by Alan Yentob
 - The BBC does not provide any direct assistance at its own discretion in creating, recording, filing or removing the information; or
 - The BBC is merely providing storage facilities, whether physical or electronic.
16. The Commissioner has taken all of the above into account and accepts that any information held by Mr Yentob about the charity is in his private capacity. The Commissioner concludes that the information, if held, is not held under section 1(1)(a) of FOIA as under section 3(2)(a) the information is only held on behalf of another person, that being Mr Yentob for the charity 'Keeping Kids Company'.

Derogation

21. The BBC applied the derogation to possible correspondence held by other BBC staff at the time of the request. The BBC conducted

reasonable searches to ascertain whether information might physically be held by other BBC staff members who had communications with Mr Yentob which mentioned Keeping Kids Company and which might therefore be held by the BBC for the purposes of the Act.

22. 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."

23. 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'.
24. 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)

25. 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.
26. 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.
27. 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.

28. 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'.

29. 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.

30. In light of previous cases, the Commissioner considers that the requested information (possible correspondence by other BBC staff to Mr Yentob which mentioned Keeping Kids Company) falls under the definition of journalism and is therefore derogated.

31. The decision notice for the case reference [FS50463644](#) is relevant as it considered a request for information concerning a copy of all emails and meeting/telephone conversation notes between the Health Correspondent Fergus Walsh (or on his behalf) and the Department of Health. The BBC explained the information was covered by the derogation and excluded from the FOIA. The refusal of the BBC to

provide the information was upheld by the Commissioner as he was satisfied that it was held for journalistic purposes and therefore fell under the derogation.

32. For all of the reasons above, the Commissioner is therefore satisfied that the information requested, if held, is derogated. Therefore, the Commissioner has found that the request is for information 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

33. 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

34. 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.
35. 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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