

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 28 September 2016

Public Authority: British Broadcasting Corporation (BBC)
Address: Broadcast Centre
White City
Wood Lane
London
W12 7TP

Decision (including any steps ordered)

1. The complainant has requested information about findings of the BBC Trust Editorial Standards Committee about a television programme: 'Taking the Credit'. The BBC says that it holds the information for journalistic purposes and, as such, it is not covered by the FOIA.
2. The Commissioner's decision is that the BBC holds the information for the purposes of journalism and it is therefore not caught by the FOIA. The Commissioner does not require the BBC to take any steps.

Request and response

3. On 11 April 2016, the complainant wrote to the BBC and requested information in the following terms:

"Please clarify a number of statements made in your letter to us of Nov 5th 2015 (attached). I will set out in italics below the statements needing clarification and will list my questions to you:

1. "In summary, ACLT ran projects to plant and protect trees in order to generate "carbon credits" that Environtrade could then sell. The programme featured one of those projects"

Questions:

- (a) please identify the project to which the statement refers;*
- (b) is it being alleged that the project in question was run by ACLT?*

(c) if it was not run by ACLT, by which organisation was the project in question run?

2. "The Committee was of the view that there was an inextricable link between the funder organisation and project featured in the programme"

Questions:

(a) which organisation is alleged to have been the "funder organisation"?

(b) what was the nature and extent of the "inextricable link"?

3. "The Committee concluded that it appeared for a contribution the company, which was closely linked to Environtrade, had been able to promote its activities."

Questions:

(a) please identify "the company";

(b) please explain what is meant by, "for a contribution";

(c) please explain in what way the "company" was enabled to promote its activities.

4. "The ESC noted the conclusion of the Global News report that "the allegation that the documentary had been financed in full or in part by Environtrade via ACTL was true, since there was a link between the documentary funder (ACTL) and the organisation featured in the programme (Environtrade)"."

Questions:

(a) Did the ESC agree with Global News' conclusion that the documentary had been funded in whole or part by Environtrade?

(b) What was the basis for that conclusion [i.e. Global News' conclusion]?"

4. The BBC responded on 18 April 2016. It explained that it did not consider that the information was caught by the FOIA because it was held for the purposes of 'journalism, art or literature'. On 4 May 2016 the BBC explained to the complainant that it does not offer an internal review in cases where it does not consider the request is caught by the FOIA.

Scope of the case

5. The complainant contacted the Commissioner on 7 June 2016 to complain about the way his request for information had been handled. He considers that the FOIA should be a means by which the BBC can be held to account for allegations concerning a particular television programme, which the complainant says are incorrect. The complainant considers that the information is not held for the purposes of journalism but concerns a BBC governance matter.
6. The Commissioner's investigation has focussed on whether the requested information is derogated; that is, held by the BBC for the purposes of journalism and therefore not covered by the FOIA.

Background

7. The BBC provided a background to the requested information.
8. The letter referred to in the request was a letter the Senior Editorial Adviser (Strategy and Standards) at the BBC Trust sent to the complainant. The letter was in connection with concerns the complainant raised about a finding of the BBC Trust's Editorial Standards Committee (ESC). The finding concerned compliance with the Editorial Guidelines of a programme produced by Rockhopper Productions Ltd and broadcast on BBC World News, titled 'Taking the Credit'. The BBC explained that BBC World News is a channel owned and operated by the BBC's subsidiary, BBC Global News Ltd.
9. The BBC says that the complainant is particularly concerned to understand the basis of the ESC's conclusion that 'Taking the Credit' was wholly or partly funded by Environtrade. The BBC confirmed that the ESC's decision and the reason for it are set out in its published finding and have been explained to the complainant in more than one letter in the course of what has been a continuing dispute.

Reasons for decision

10. 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."

11. 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'.

12. 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.

13. 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).

14. 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.

15. 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.

16. If a sufficiently direct link is established between the purposes for which the BBC holds the information and any of the three derogated purposes – ie journalism, art or literature - it is not subject to FOIA.

17. 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.

18. 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.
19. 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.
20. In this case, the requested information concerns an ESC decision about the 'Taking the Credit' television programme. The BBC has confirmed to the Commissioner that it maintains its position that at the time of the request, it held this information for the purposes of 'journalism, art or literature'.
21. The BBC says that in so far as the request is understood as being a request for recorded information, the disputed information and/or the information from which the disputed information would be extracted, comprises information relating to the programme in question, which subsequently became the subject of editorial investigation to determine compliance with the BBC's Editorial Guidelines, and other information held in connection with the editorial investigation itself.

22. The 'Taking the Credit' programme had been broadcast by the BBC on 23 October 2009, the findings of the ESC were published in November 2011, and Ofcom's conclusions were published in *Broadcast Bulletin 285*, issued on 17 August 2015.
23. The BBC has told the Commissioner that the complainant had been in correspondence with the BBC Trust regarding its investigation, including subsequent to Ofcom's decision. He took issue with the evidence relied upon and the ultimate findings of the ESC. In a letter to the complainant dated 5 November 2015, the BBC says it indicated that if the complainant were to provide "full new evidence" in support of his complaint about the ESC finding, it would consider whether it would be appropriate and proportionate to investigate his complaint and revisit the finding. The BBC says that it was, and remains, open to the complainant to take this course.
24. The disputed information, or the information from which the disputed information could be extracted, was held at the time of the request by the BBC Trust Unit, which supports the ESC. The ESC is responsible for assisting the Trust in:
 - setting and securing editorial standards
 - monitoring and holding the Executive board to account for the BBC's compliance with Editorial Guidelines and other relevant codes and guidelines
 - determining appeals on these standards and related complaints handling; as well as
 - functions in relation to election and referendum coverage, party political broadcasts, party election broadcasts and referendum campaign broadcasts.

In addition, some of this information was held at the time of the request by the BBC Executive, including by BBC Global News.

25. The BBC has acknowledged that in order to determine whether it held the disputed information for the purposes of journalism, art or literature, the appropriate test to be applied is whether, at the time of the request, there was a sufficiently direct link between the BBC's holding of the information and the achievement of its journalistic purposes.
26. The BBC says that in addition to the aforementioned Sugar case which concerned a post-broadcast review, *Gee v Information Commissioner (EA/2010/0042)* is very similar to the present case. It has noted that the First-Tier Tribunal (Information Rights) dismissed a series of appeals against decision notices issued by the Commissioner, which had found that the BBC held such information for the purposes of journalism, art or literature. The Upper Tribunal subsequently declined to grant the

complainant in that case the permission to appeal against the decision of the First-Tier Tribunal.

27. Regarding the 'direct link', the BBC has told the Commissioner that the purposes for which it held the information (including, but not exclusively, in light of the ongoing challenges to the ESC findings that had been made) were to assess compliance with the BBC's Editorial Guidelines and other relevant requirements such as compliance with Ofcom's Broadcasting Code, and to ensure that the breaches were identified, properly remedied and prevented from recurring. (As a consequence of the ESC's decision, the programme in question could not be re-broadcast).
28. As such, the BBC says it considers that the disputed information falls within the third limb of the definition of journalism (at paragraph 17) articulated by the Information Tribunal and approved in *Sugar*, ie *"the maintenance and enhancement of the standards and quality of journalism"*. Furthermore, the BBC says that it retains editorial complaints information for a number of purposes, even when the appeal has been concluded and does not continue to be the subject of challenge, as in this case. For example to refer to in connection with similar editorial issues to ensure consistent interpretation and application of editorial standards. The BBC argues that this too falls within the third limb of the definition.
29. The BBC says that the fact that the disputed information largely does not itself constitute journalism, in the sense of output, does not prevent it from being held for the purposes of journalism. Nor does the fact that the complainant disputes the accuracy of the findings of the report by Global News; the BBC says that, indeed, this merely serves to maintain the ongoing relevance of the disputed information.
30. The BBC is of the view that, to the extent that the complainant appears to consider that he ought to be entitled to further disclosure in connection with the editorial complaints process, with which he was involved at the time, this is not a factor for the purposes of determining whether disclosure was required under the FOIA. This is assessed by determining the purpose for which the information was held at the time of the request. The BBC has referred to a Tribunal finding in *Gee*:

"even if it were the case that the BBC complaints procedures were either unfair or insufficiently transparent, the Tribunal fully accepts the BBC's contention that FOIA should not, and cannot be used as some form of mechanism to manufacture an alternative statutory right when to do so would frustrate Parliament's clear and express decision to exclude information held for journalistic purposes as so clearly endorsed by the Supreme Court. In those circumstances, it simply cannot be said, in the

Tribunal's view, that it is the purpose of the FOIA to cure every unfairness considered to exist within the BBC's complaints procedure."

31. The Commissioner notes that this finding addresses and negates the complainant's argument at paragraph 5, that the FOIA should be a means by which the BBC should be held to account for certain allegations which the complainant says are incorrect.
32. The BBC also argues that the fact that certain information has already been published or disclosed to the complainant does not prevent the information being held for the purposes of journalism, art or literature and therefore outside the scope of the FOIA.
33. As the BBC has referenced, the Supreme Court has defined the third limb of 'journalism' as *'the maintenance and enhancement of the standards and quality of journalism'* and may involve *'...reviews of the standards and quality of particular areas of programme making'*. The Commissioner has noted that the BBC says it holds the requested information for two journalistic purposes. First, with regard to the complainant's appeal specifically, to assess its compliance against its Editorial Guidelines and other requirements, such as Ofcom's Broadcasting Code. Second, to refer to the information in connection with similar editorial issues to ensure it is interpreting and applying editorial standards consistently.
34. The Commissioner has considered the complainant's arguments, the BBC's submission, her decision in previous cases involving the BBC, and various related appeal decisions. The Commissioner is satisfied that there is a clear and direct link between the information being sought and the BBC's journalistic activities.
35. In conclusion, and for all 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

36. 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

37. 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.
38. 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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