

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 13 December 2018

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 requested information about internal complaints made by BBC staff against the Victoria Derbyshire programme. 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 so did not fall within the remit of the FOIA. She therefore upholds the BBC's position and requires no remedial steps to be taken in this case.

Request and response

3. On 1 October 2018, the complainant wrote to the BBC and requested information in the following terms:

"I am sending this request under the Freedom of Information Act.

1) Please state the number of internal complaints made by BBC staff against the Victoria Derbyshire programme in each of the following calendar years:

a) 2015

b) 2016

- c) 2017
 - d) 2018
 - 2) *Please provide a breakdown of the categories of complaint made in each year*
 - 3) *Please provide a breakdown of the outcomes of the complaints made in each year.*
 - 4) *Please provide a copy of the anonymised free text of all complaints, setting out the reasons for each complaint."*
4. On 16 October 2018 the BBC responded and 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 the Act if it is held for "purposes other than those of journalism, art or literature". It stated that the BBC was not required to supply information held for the purposes of creating its output or information that supports and is closely associated with these creative activities. The BBC therefore would not provide any information in response to the above request for information.

Scope of the case

6. On 18 October 2018 the complainant contacted the Commissioner 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 that *"this information is expressly not held for the purposes of journalism. It is information about internal HR management within the BBC, and nothing to do with its editorial process. Moreover, it is information that is unlikely to be even held by the programme itself, instead being held by the BBC HR and associated complaints departments, which are expressly not part of the BBC's editorial process. As such, it seems clear this is information that falls within the scope of the FOIA, and should receive a full response"*.
7. The Commissioner invited the complainant to withdraw his case on 31 October 2018 as it was her opinion that the requested information was held for the purposes of journalism, art and literature and that the BBC was correct in its refusal to disclose this information.
8. However, the complainant declined to withdraw his case and wrote to the Commissioner on 31 October 2018 to dispute the derogation. He asked for a full decision notice to allow him the option to appeal to the first tier tribunal.

9. On 5 November 2018 the Commissioner invited the BBC to provide its more detailed arguments about why it believed that the information requested falls within the derogation.
10. The Commissioner considers the scope of the case is to determine if the requested information is excluded from the FOIA because it would be held for the purposes of "journalism, art or literature".

Reasons for decision

11. 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."

12. This means that the BBC has no obligation to comply with parts I to V of the Act where information is held for "purposes of journalism, art or literature". The Commissioner calls this situation "the derogation".
13. 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 requested information is caught by the derogation. The following analysis focusses on the derogation.
14. 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)

15. 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.

16. 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 has applied in this case.
17. If a sufficiently direct link is established between the purposes for which the BBC holds the information and any of the three derogated purposes – journalism, art or literature – it is not subject to FOIA.
18. 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."

19. However, the Supreme Court also 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".
20. 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.

21. 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.
22. In this case, the information requested concerns internal complaints made by BBC staff against the Victoria Derbyshire programme.
23. The Commissioner has considered the arguments from the complainant and from the BBC, but for conciseness she has focussed on explaining why she considers that the information requested falls within the derogation.
24. The complainant argued that the information requested is not related to editorial process of the BBC and it is held by HR management for internal purpose.
25. The BBC has explained that *"information about the internal number of complaints, a breakdown of the category and outcomes of the complaints regarding the Victoria Derbyshire programme is held by the BBC Audiences, who handle complaints from its audiences, and editorial staff within the Victoria Derbyshire team"*.
26. The Commissioner accepts the BBC submissions that information about editorial complaints, including internal complaints, is intrinsically linked to the BBC's output, and this information can be used in decision making about future programming. All complaint information allows the BBC to make any necessary review and analyse for future output. Disclosure of the information would therefore hamper BBC editorial decisions on future content.
27. In light of submissions made by the BBC in this and a previous case (FS50731459¹) the Commissioner considers that the decisions concerning complaints including internal staff complaints about the Victoria Derbyshire programme fall under the third element explained above, the maintenance and enhancement of the standards and quality of journalism. The information requested therefore falls squarely within the definition of journalism and the Commissioner is satisfied that the information requested is derogated.
28. Having applied the approach to the derogation set out by the Supreme Court and the Court of Appeal, which is binding, the Commissioner is

¹ <https://ico.org.uk/media/action-weve-taken/decision-notice/2018/2259048/fs50731459.pdf>

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.

29. 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 V of the FOIA in respect of the complainant's request.

Right of appeal

30. 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

31. 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.
32. 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

Ben Tomes
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