

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 21 January 2019

Public Authority: British Broadcasting Corporation (BBC)

Address: Room BC2 A4
Broadcasting Centre
Wood Lane
London W12 7TP

Decision (including any steps ordered)

1. The complainant has requested information from the BBC about a computer system associated with BBC podcasts, and an episode of a particular podcast.
2. The Commissioner's decision is that this information is held by the BBC for the purposes of 'journalism, art or literature' and does not fall within the scope of FOIA. She therefore upholds the BBC's position and requires no remedial steps to be taken in this case.

Request and response

3. On 2 August 2018, the complainant wrote to the BBC and requested information in the following terms:

"Will you please be kind enough to tell me whether the computer system, by which above-mentioned podcasts have been listed at

<http://www.bbc.co.uk/programmes/p02pc9ny/episodes/downloads>, is capable of being used automatically to update, at predetermined times, the Web content provided by the server, in such a way that specific

podcasts become (without further human intervention) listed and available for download.

If the computer system is so capable, then please tell me why it would seem that it is not used in the way that I suggest above.

Will you please also be kind enough to tell me why a podcast of a '5 live science' programme, that I understand to have been broadcast between 5 a. m. and 6 a. m. on Sunday 01 July 2018, would seem NOT to be mentioned on the Web page at

<https://www.bbc.co.uk/programmes/p02pc9ny/episodes/downloads>"

4. The BBC responded on 12 September 2018. It explained that it did not believe that the requested information was caught by the FOIA because it was held for the purposes of 'art, journalism or literature'.
5. On 24 September 2018 the complainant submitted a complaint to the Commissioner about this response. He argued that there is a distinction between journalistic investigation/journalistic material and the dissemination of journalistic material and that his request related to dissemination and engineering, and not to 'journalism'.

Scope of the case

6. The complainant contacted the Commissioner on 26 September 2018 to complain about the way his request for information had been handled.
7. The Commissioner communicated to the complainant her preliminary assessment of the complaint, which was that the requested information is derogated, and she invited him to withdraw his complaint. The complainant did not accept this assessment and presented a series of counter arguments which are given below. The matter will now be concluded through this decision notice.
8. The Commissioner's investigation has focussed on whether the BBC holds the information the complainant has requested for the purposes of 'journalism, art or literature' and therefore excluded from the FOIA.

Reasons for decision

9. 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 says:

"The British Broadcasting Corporation, in respect of information held for purposes other than those of journalism, art or literature."

10. 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 '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' referred to below. 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.
17. The information requested in this case concerns the computer system that the BBC uses to deliver its podcasts, and an episode of a particular podcast.
18. In correspondence to the Commissioner the complainant has provided a number of arguments to support his position that the information is not derogated. He has explained that he is interested in promoting the introduction of some automation into how podcasts are listed on the BBC's website; he considers that the BBC lists podcasts inconsistently at present. By way of an example, he says the '5 live Science' episode referred to in his request was not made available as a podcast.
19. The complainant has also referred to the Supreme Court judgement in the Sugar/BBC case and the judgement's definition of '*journalism, art or literature*', given at paragraph 16 of this notice. He considers that this suggests that everything the BBC does is excluded from the FOIA and

that held '*for the purposes of journalism*' should therefore be considered in a relatively narrow way, rather than a relatively wide way.

20. The Commissioner will address this point first. As the BBC had done in its response to his request, she advises the complainant to visit the BBC's website, specifically its published FOI Disclosure Logs¹, where the breadth of BBC information captured by the FOIA is evident.
21. In his submission to the Commissioner, the complainant has then referred to other aspects of the Sugar ruling, with which he disagrees. He argues that it is highly unlikely that releasing the information he is seeking would encumber or compromise the production of content by the BBC. This is, he says, because making podcasts available for download takes place AFTER the journalistic production of the material in those podcasts. The complainant's other main argument is that the Supreme Court's definition of journalism as including the act of broadcasting or publishing material is wrong. He considers that the word '*journalism*' would include the *preparation* of journalistic material, but not the broadcasting or disseminating of the material.
22. The Commissioner does not consider these to be a strong arguments. Publishing content and making it available is quite clearly part of the journalistic process. If it is not published or disseminated, material is simply the private thoughts and ideas of an individual or organisation. The complainant may, as he states, find the Sugar judgement unclear as to whether it intended to refer to the broadcasting or other dissemination of journalistic material; however, the Commissioner considers the judgement to be quite clear on that point and does not consider it necessary to discuss it further.
23. The Supreme Court's reasoning and decision in the Sugar case is clear and robust. The Commissioner is satisfied that the information the complainant has requested – about both the computer system and the specific programme to which he refers – is well within the expected remit of the BBC for the purposes of creating content and producing output – its journalistic and artistic/creative activities in this case. This in turn closely relates to the editorial decision making process and resource allocation. Therefore, the information is held for the purposes of the derogation. It is inextricably linked to the BBC's output ie the material the BBC publishes, broadcasts or otherwise disseminates.

¹ <https://www.bbc.co.uk/foi/publication-scheme/classes/disclosure-logs>

24. The Commissioner finds that this information is held for the purposes of journalism and that the BBC was not obliged to comply with Parts I to V of FOIA. As a result the Commissioner is satisfied that, in this case, she has no jurisdiction in this matter and therefore no statutory power to order disclosure.

Right of appeal

25. 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

26. 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.
27. 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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