

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 15 March 2019

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

Address: BC2 A4 Broadcast Centre
White City
201 Wood Lane
London
W12 7TP

Decision (including any steps ordered)

1. The complainant has requested the listening figures for the Radio 2 Drivetime show. 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 did not fall inside FOIA. She 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 26 October 2018 and asked for:
'Listening figures for the Radio 2 Drivetime show (previously Simon Mayo, more recently Jo Wiley and Simon May) for the last 12 months, broken down into the smallest time intervals you have data for (weekly/monthly or quarterly, for example).'
4. The BBC responded on 1 November 2018. The BBC 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 FOIA if it is held for 'purposes other than those of journalism, art or literature'. It concluded that the BBC was not required

to supply information held for the purposes of creating the BBC's output or information that supports and is closely associated with these creative activities. It therefore would not provide any information in response to the requests for information.

Scope of the case

6. The complainant contacted the Commissioner on 16 November 2018 to complain about the way the request for information had been handled. In particular, he challenged the operation of the derogation in this case.
7. The Commissioner invited the complainant to withdraw his case on 26 November 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 27 November 2018 to contend that *'the BBC does not hold this information significantly for journalism.'*
9. The Commissioner considers the scope of the case is to determine if the requested information is excluded from FOIA because it would be held for the purposes of 'journalism, art or literature'.

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 – i.e. 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 information requested is for the listening figures of the Radio 2 Drivetime show.
21. The BBC stated that this information is held. BBC Audience Services prepare performance reports based on the data that is provided by Radio Joint Audience Research Limited (RAJAR). These reports are shared with programme executives and commissioners, enabling individuals that are directly involved in the commissioning and creation of programme content to use this information in their editorial decision-making processes:

‘radio listening figures are used by radio programme executives and content commissioners to learn about audiences’ patterns of consumption and for the analysis and review of programmes. In this way, the requested information about listening figures informs decisions about current and future programme making, including decisions about the commissioning, scheduling and production of BBC broadcasts.’

22. In this case, the requested information about listening figures for the Radio 2 Drivetime show is used by the programme executives of Radio 2 Drivetime in the following ways:

‘a. to inform editorial decisions about the format of the Drivetime show and the nature of content that should form part of the show’s broadcast output;

b. to inform editorial decisions as to the time at which particular segments of the programme are presented; and

c. to assist in maintaining and enhancing the standards of Radio 2's journalistic output by providing information against which the BBC can measure.'

23. The BBC also explained that a key part of its work is obtaining feedback on its services, reflecting on that feedback, and making informed decisions about the quality of the services provided and how to improve those services. Audience figure information is one way that the BBC measures an audience's reaction to a programme.
24. In light of the submissions made by the BBC in this and previous cases (<https://ico.org.uk/media/action-weve-taken/decision-notice/2017/2013511/fs50663858.pdf>) the Commissioner considers that decisions concerning the listening figures for a particular radio show fall under the second and third elements explained above in paragraph 17 - editorial judgements and the maintenance of standards. The information requested therefore falls squarely within the definition of journalism and the Commissioner is satisfied that the information requested is derogated.
25. Having applied the approach to the derogation set out by the Supreme Court and the Court of Appeal, which is binding, the Commissioner is 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.
26. 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 IV of the FOIA in respect of the complainant's request.

Right of appeal

27. 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: <http://www.justice.gov.uk/tribunals/general-regulatory-chamber>

28. 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.
29. 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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