

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 2 April 2014

Public Authority: The British Broadcasting Corporation
(the 'BBC')
Address: 2252 White City
201 Wood Lane
London
W12 7TS

Decision (including any steps ordered)

1. The complainant has requested copies of information relating to the way in which the BBC's management in Scotland responded to an academic report which raised concerns about its television coverage of Scotland's independence referendum. The BBC explained the information was covered by the derogation and excluded from the FOIA.
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 under the FOIA. He therefore upholds the BBC's position and requires no steps to be taken in this case.

Request and response

3. On 24 January 2014 the complainant made the following request to the BBC:

"copies of all internal correspondence and other documents the BBC holds relating to the UWS Fairness in the First Year? report including any instructions or guidance you received in relation to your letter to [name redacted]."

4. The BBC responded on 18 February 2014. It stated that the information requested is excluded from the FOIA because it is held for the purposes of 'journalism, art or literature.'
5. It explained that Part VI of Schedule 1 of the FOIA provides that information held by the BBC and the other public service broadcasters is only covered by the 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 request for information.

Scope of the case

6. On 25 February 2014 the complainant contacted the Information Commissioner (the Commissioner) to complain about the way his request for information had been handled. In particular, he challenged the operation of the derogation in this case.

Reasons for decision

7. Schedule One, Part VI of the FOIA provides that the BBC is a public authority for the purposes of the FOIA but only has to deal with requests for information in some circumstances. The entry relating to the BBC states that the BBC is a public authority:

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

8. This means that the BBC has no obligation to comply with Part I to V of the FOIA where information is held for 'purposes of journalism, art or literature'. The Commissioner refers to this as 'the derogation'.
9. 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.

10. 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).

11. 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.
12. 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.
13. Therefore 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 the FOIA.
14. 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; and*
 - *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."*
15. 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'.
16. 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).
17. Therefore, in order for the information to be derogated and so fall outside the 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.
18. The information that has been requested in this case relates to the way in which the BBC's management in Scotland responded to an academic report which raised concerns about its television coverage of Scotland's independence referendum.
19. The complainant is interested in why (and at whose instigation) the BBC's Head of Public Policy and Corporate Affairs Scotland wrote in "aggressive and intimidatory terms" to the author of the report (a professor of the University of the West of Scotland), calling his research method into question and suggesting that the report might impact adversely on the reputation of the University.
20. In light of submissions made by the BBC in previous cases the Commissioner considers the third element of journalism within the definition above (the maintenance and enhancement of the standards and quality of journalism) to be relevant to this case.

21. Although the information requested is concerned with the BBC's questioning of the academic research, the response of the BBC to the report does directly concern issues of editorial balance, standards of impartiality and quality of output in Scotland. The BBC's response may be concerned with the quality of the research however the focus of that research was the BBC's television coverage of Scotland's independence referendum.
22. The Commissioner is satisfied that the requested correspondence regarding the report (including internal instructions and guidance as to how to respond to it) is held because it has a relationship to BBC output and criticism of that output. The information is concerned with editorial standards regarding BBC programming coverage. It is therefore held with reference to the BBC's editorial and journalism standards and so is held in part for journalism purposes.
23. For all the reasons above, the Commissioner is satisfied that the requested information is derogated. Therefore, the BBC is not obliged to comply with Parts I to V of the FOIA with respect to this request.

Right of appeal

24. 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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

25. 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.
26. 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

Rachael Cragg
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