

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 21 May 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 information about the number of complaints the BBC received about a particular Radio 4 drama. The BBC explained that 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 is not caught by the FOIA. He therefore upholds the BBC's position and does not require the BBC to take any further steps.

Request and response

3. On 4 February 2014, the complainant wrote to the BBC and requested information in the following terms:

How many complaints were received concerning the broadcast on Radio 4, in the afternoon, and, in at least one week, during school holidays, of 'The Corrupted', by GF Newman, a drama thick with scenes of a violent and/or sexual nature?

4. The BBC responded on 4 March 2014. It said that the requested information was excluded from the FOIA because it was held for the purposes of 'journalism, art or literature'.

Scope of the case

5. The complainant contacted the Commissioner on 24 April 2014 to complain about the way their request for information had been handled. In particular they challenged the operation of the derogation to their request and this was the focus of the Commissioner's investigation.

Reasons for decision

6. Schedule One, Part VI of the 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.

7. 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'.

8. 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.

9. 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 said 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)

10. 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.

11. 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 applied.
12. 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'.

13. 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. 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.

14. 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.
15. The information that has been requested in this case concerns the number of complaints the BBC has received about a radio drama it had broadcast.
16. The complainant argued that the BBC appeared to be "picking and choosing" when it was holding information for the purposes of 'journalism, art or literature', so that it was exempt from the FOIA. This is because it had recently released through the media information similar to that which the complainant had requested, namely the number of complaints it had received about a particular television drama.
17. In its response to the complainant, the BBC put forward the following arguments for why the information they had requested is caught by the derogation:
 - (i) The BBC's independence and impartiality would be at risk if it were to disclose information on editorial complaints and it is concerned to preserve the integrity of the independent review process for such complaints.
 - (ii) The BBC has the right to protect its journalistic and editorial independence by maintaining a private space in which to produce its content. This extends to the sifting and review of praise and criticism from audiences, as well as the seeking of an independent view of criticism in order to undertake this review process. The BBC says this is an important part of its process of creating and improving programmes.
 - (iii) Despite the BBC's obligation to be independent and impartial, many bodies, groups and individuals attempt to influence its output. This pressure takes many forms and has to be resisted by programme makers across the BBC.
 - (iv) If the content of individual criticisms were available for public scrutiny on a regular basis then programme makers would be under even greater pressure to respond to lobbies or vocal individuals than they are already. They might be reluctant to make changes that reflect the views in the complaints in that they could be accused of 'caving in to pressure' and other viewers would make judgements about the apparent impartiality of the programme. Conversely, if their judgement was to ignore the complaints, as they believed them to be invalid or outweighed by

other factors, they will be accused of ignoring public opinion, without the opportunity to explain the reasons for their editorial judgement. Publication could lead to a tit-for-tat escalation of complaints, particularly from lobbying groups or political parties, as opponents competed with each other in terms of volume and strength of a complaint to the BBC.

- (v) In addition, and outside the scope of the FOIA, the BBC proactively publishes public responses to recent issues of audience concern which have caused a significant number of complaints, or to any significant issue raised by complaints received. The BBC also publishes quarterly archived reports covering the main themes in all complaints received and information about second-stage and third-stage complaints ie those considered by the Editorial Complaints Unit and the Editorial Standards Committee.
18. The Commissioner accepts the BBC's position in relation to the information requested and notes that 17(v) addresses the complainant's specific concern that the BBC appears to 'pick and choose' what information about complaints it releases.
 19. The Commissioner considers that there is a direct link between the information being sought and the BBC's output. The BBC has provided sufficient evidence that it holds the information for the purposes of journalism. Specifically, he is satisfied that the information is held for the purposes outlined in the second and third point of the definition at paragraph 12, namely for editorial purposes and for maintaining and enhancing the standards and quality of journalism. Consequently, he has found that the information falls within the derogation, which means that the BBC is not obliged to comply with Parts I to V of the FOIA.

Right of appeal

20. 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: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

21. 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.
22. 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
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF