

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 7 November 2011

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 requested information about the BBC decision making in deciding to share its F1 coverage with Sky. The BBC explained the information was covered by the derogation and excluded by the Act.
2. The Commissioner’s decision is that this information was held by the BBC genuinely for the purposes of ‘journalism, art or literature’ and did not fall inside the Act. He therefore upholds the BBC’s position and requires no remedial steps to be taken in this case.

Request and response

3. On 12 August 2011 the complainant made a two part request to the BBC and confirmed that he wanted the Commissioner to issue a formal Decision Notice about part one that was worded as follows:

‘I would like to see a copy of all correspondence, (electronic mail, meeting minutes, internal memorandums and any other relevant documents) relating to the recent deal agreed with Sky to share the F1 broadcast rights (as recently announced) as well as any consideration of alternative arrangements.’

4. The BBC responded on 15 August 2011. It explained that it believes that the information requested is excluded from the Act because it is held for the purposes of ‘journalism, art or literature.’ 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’.

5. 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 did provide some general information outside the Act.

Scope of the case

6. The complainant contacted 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.
7. After receiving a preliminary verdict in this case, the complainant offered further arguments about why the derogation was inappropriately relied upon. The Commissioner has considered these arguments, the arguments of the BBC in previous cases and the BBC's position as stated in its refusal notice when considering the derogation in this case.

Reasons for decision

8. Schedule One, Part VI of the Act provides that the BBC is a public authority for the purposes of the Act 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."
9. 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'.
10. 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.
11. The scope of the derogation has been considered by the Court of Appeal in the case *Sugar v British Broadcasting Corporation and another* [2010] EWCA Civ 715. The leading judgment 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 Commissioner considers that it follows from this that if the information is genuinely held for any of the three derogated purposes – i.e. journalism, art or literature - it is not subject to the Act. His role is to consider whether the information was genuinely held for the derogated purposes or not.
13. With regard to establishing the purpose for which the information was held, Lord Neuberger of Abbotsbury MR (at paragraph 55) drew a distinction between information which had an effect on the purposes of journalism, art or literature and information that was actually being held for one of those purposes. Based on this judgment the Commissioner considers that for information to be held for a derogated purpose it is not sufficient for the information to simply have an impact on the BBC's journalistic, artistic or literary output. The BBC must be using the information in order to create that output, in performing one of the activities covered by journalism, art or literature.
14. The Court of Appeal adopted the Tribunal's definition of journalism which set out that journalism comprises three elements.

“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.”

15. The Commissioner adopts a similar three pronged 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. The Commissioner considers that the BBC's broadcast coverage, and the decisions about it, can be best considered to be a mixture of art and journalism. Journalism, as the content is

presented amounts to news of current events and art because it must be presented in a way that is congenial to its audience.

16. The Commissioner will now explain why he considers that the information is covered by the derogation. He has considered all of the information before him, but for conciseness he has focussed on explaining why he considers that the information requested falls within the derogation.
17. As stated above, the information that has been requested in this case is all the correspondence that the BBC has about the deal it agreed with Sky to share the F1 broadcast rights as well as any consideration of alternative arrangements.
18. In light of submissions made by the BBC in previous cases and mentioned in the refusal notice the Commissioner understands that the decision to broadcast programmes and how to pay for them is connected intimately to the creative decisions that editors and management make about how to spend their budget to satisfy their editorial responsibilities. The Commissioner has accepted on a number of occasions (such as in case reference **FS50314106**) that the BBC has a fixed resource in the Licence Fee and resource allocation goes right to the heart of creative decision making and this offers strong support for the requested information to also be derogated.
19. The Commissioner considers that all the requested information falls within limb two and limb three of the definitions of journalism and art quoted above.
20. The Commissioner considers that the information falls within limb two because it is information that is used by the BBC when undertaking the *'exercise of judgement on issues such as: the selection and timing of matters for broadcast or publication.'* when the BBC is deciding the scope of sports coverage that it will offer. This is particularly so in the current economic climate where the BBC must carefully consider the value for money given that it must cut the amount of money spent on sports coverage – indeed at the time of the decision, after the settlement with the government, it needed to find 20% reductions. The BBC considered that it could achieve its editorial objectives yet pay less through sharing coverage.
21. The Commissioner is satisfied that information about both the option that was chosen and any that it disregarded would be held for the same purposes, because they concern the thinking that was done when making this exercise of judgment outlined in paragraph 20 above.
22. It also must be noted that the costs and the process that led to this agreement is valuable information for the Corporation while moving

forward. This information will be used to inform editorial decisions when considering coverage of future events.

23. The Commissioner also considers that the information falls within the third limb because this information relates to the enhancement of the standards and quality of creative output. The decision taken by the BBC led to public disquiet and there were a series of editorial complaints that were under consideration at the date of the request. The information requested is required to enable the BBC to review this decision and whether it met its Editorial Guidelines – to enable it to review and improve its performance.
24. To support his analysis the Commissioner has considered the fourth factor and been mindful of the purpose of the derogation, which was articulated by Lord Neuberger of Abbotsbury MR at paragraph 45 of his judgment in *Sugar*:

“The purpose of limiting the extent to which the BBC and other public sector broadcasters were subject to FOIA was ‘both to protect freedom of expression and the rights of the media under article 10 of the European Convention on Human Rights, and to ensure that [FOIA] does not place public sector broadcasters at an unfair disadvantage to their commercial rivals.’ This is apparent, to my mind, as a matter of common sense, looking at FOIA on its own, but it was also stated in terms to be the policy in a letter from the Department of Constitutional Affairs in 2003, which was admitted in evidence by the Tribunal – hence the quotation marks.”

25. The Commissioner finds in this case that the disclosure of the withheld information would also be likely to impinge the BBC’s editorial independence. This is because at a time where money is sparse there is going to be more of a need to negotiate with partner organisations to receive relevant content. The disclosure of the negotiations and/or the other options would place the BBC at an unfair disadvantage to its commercial rivals and this supports the Commissioner’s conclusions that the information is held for derogated purposes.
26. The complainant has offered detailed and considered arguments about why he disagrees with the Commissioner’s view in this case. The Commissioner considers it equitable to outline those concerns and explain why they do not change his view.
27. The complainant explained that it was important that the public are able to assess whether the BBC acts in the best interests of the licence fee payer and whether it considered all the options available to it. The complainant explained that between 3.5 and 6 million viewers watch F1 and their interests must be considered. In addition, F1 is an important

industry in the UK and is used to showcase design talent. He also explained that there is conflicting information about how the deal came about and the information would allow the public to understand the decision that was made. The Commissioner appreciates that transparency and accountability are the key principles of the Act, but they cannot be taken into account when considering whether or not information is held for a set purpose or not.

28. The complainant explained that he was concerned about the consequences of the deal – that the deal itself enabled Sky to broadcast the coverage and may have locked out other Free To Air (FTA) broadcasters. He explained that this was a very clear case where transparency is required. The Commissioner appreciates that members of the public have concerns about the agreement, but concern about the agreement does not change the fact that the information is held for a purpose that is not covered by the Act.
29. The complainant explained that he considered that the derogation only related to programme production and that this information that is one step removed was not anticipated to be covered by the derogation. The Commissioner considers that the Court of Appeal has determined the nature of correct test and it is clear that the derogation is not so limited – for example it asserted directly that editorial control over a number of programmes was part of the definition. The Commissioner must apply the law as it is and this argument cannot be given any weight.
30. For all of the reasons above, the Commissioner is therefore satisfied that the information requested is derogated. Therefore, the Commissioner has found that the request is for information held for the purposes of journalism and that the BBC was not obliged to comply with Parts I to V of the Act.

Right of appeal

31. 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

32. 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.
33. 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

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