Freedom of Information Act 2000 (FOIA)

Decision notice

Date: **5 December 2012**

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 concerning a radio broadcast on 16 February 2006, which was repeated on 18 February 2006; details of new procedures in respect of the BBC's complaints process; and matters arising from a complaint made by him to the BBC about the broadcast. 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 inside FOIA. He 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 8 May 2012 and asked for:

    i. Matters discussed at the Governors' Committee which considered his complaint about a specific programme, broadcast on BBC Radio Stoke on 16 February 2006 and repeated on 18 February 2012. This includes the considerations in its decision making process.

ii. Matters concerning the use or otherwise of the BBC language guideline and related discussions with named individuals with reference to the specified programme.

iii. Matters in relation to his complaint to the BBC.

iv. Details on "new procedures" regarding complaints handling, information concerning the individuals who formed the production team for the broadcast in question and any comments made by any member of that team.

v. Details provided to the Governors' Committee, specifically whether the Governors' Committee was made aware by anyone that the original broadcast did not contain a warning.

The above is a summary as the request from the complainant consisted of a letter with 7 appendices. The Commissioner considers this to be a fair reflection of the request and, during the investigation of the case, provided the complainant with a copy of this summary. The complainant has not sought to amend it.

4. The BBC responded on 12 June 2012 and provided the complainant with a link to its website where the requested procedures could be found. This is the information required under part (iv) of the request. The BBC stated it had also sent the complainant a copy of these procedures. The complainant later confirmed that the procedures had not been sent but they were provided in November when the error was brought to the BBC's attention.

5. In relation to the rest of the requested information the BBC stated that this was excluded from the FOIA because it was held for the purposes of 'journalism, art or literature.' It explained that Part VI of Schedule 1 to 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, including information relating to the subject of editorial complaints. It therefore did not provide any information in response to the request for information (other than in relation to part (iv) of the request).

6. The complainant submitted a complaint to the Commissioner on 28 June 2012.

Scope of the case

7. 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.

8. As the BBC provided the complainant with information in relation to part (iv) of the request, its handling of this part of the request is not included in the scope of this case.

Reasons for decision

9. 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:

   "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 FOIA where information is held for 'purposes of journalism, art or literature'. The Commissioner calls this situation 'the derogation'.

11. 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.

12. 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)

13. 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.

14. 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.

15. 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.

16. The Supreme Court said that the 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'.

17. 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 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 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.

19. The information that has been requested in this case concerns the editorial content of this broadcast, the complaint arising from this, how the complaint was dealt with and related matters. These include the use or otherwise of the BBC language guideline, editorial decisions in relation to its use, details of the individuals who formed the production team, and matters considered at the complaints committee including whether they were aware that the original broadcast did not contain a warning.

20. The requested information is therefore concerned with a complaint made to the BBC regarding the content of the broadcast and the BBC's response to that complaint.

21. In light of submissions made by the BBC in previous cases, in its letter to the complainant dated 12 June 2012, the Commissioner understands that the consideration of complaints is an important tool used by the BBC to monitor, maintain and enhance its journalistic, artistic and literary output, and to ensure the impartiality of that output.

22. The Commissioner has considered all of the information before him, but for conciseness he has focussed on explaining why he has decided that the information requested falls within the derogation.

23. In determining whether the information is held for the purposes of journalism, the Commissioner has considered the following factors:

    - the purpose(s) for which the information was held at the time of the request; and

    - the relationship between the purposes for which the information was held and the BBC's output on news and current affairs, including sport, and/or its journalistic activities relating to such output.

24. When considering the purposes for which the information was held, the BBC has explained that editorial complaints constitute a review of the standards and quality of particular programme making, in order to further enhance standards. It stated that the outcome of the complaint and any information relating to the complaint plays a significant role in

helping editorial decisions going forward which could involve a complaint or programme about a similar or identical matter.

25. When considering the connection between the information itself and its output on news and current affairs and/or its journalistic activities relating to such output, the BBC has explained that information relating to editorial complaints continues to be held for editorial purposes to influence editorial direction and inform future content. In this way the information plays a significant role in improving the quality of journalistic output.

26. The Commissioner has accepted on a number of occasions that complaints to the BBC are considered in the process of creating and improving programmes and integral to this process is the ability to maintain an independent and impartial position with respect to criticism (such as in case reference FS50404473).

27. In another case the complainant made a request to the BBC for details of its procedures for handling editorial complaints and correspondence and documentation generated in the course of handling this complaint. The refusal of the BBC to provide the information in this case was upheld by the Commissioner as he was satisfied that it was held for journalistic purposes and therefore fell under the derogation (case reference FS50316361). The Commissioner is satisfied that the same rationale connects the information in this case to the derogated purpose.

28. A recent Tribunal decision (EA/2012/0042, 0121-0125 & 0187) considered requests made in connection with a broadcast, complaints arising from this, and the way in which the complaints were handled. The Tribunal noted, at paragraph 37, that the *"key question is….whether the information in question is held 'directly', 'to any significant degree' or in 'sufficient proximity' to the journalistic functions of the BBC. These functions are to be understood as including monitoring, reviewing and correcting programme output, as well as the act of broadcasting."* The Tribunal confirmed that information about complaints is used to review future output, and as such falls under the derogation.

29. Overall, the Commissioner considers that the BBC has provided evidence that it holds the information for the purposes of journalism. He is content that the information is held for the purposes outlined in the second and third points of the definition namely editorial purposes and for maintenance and enhancement of the standards and quality of journalism.

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 FOIA.

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 .....

Rachael Cragg
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