

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 15 January 2013

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 the number of complaints made against Panorama broadcasts. 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. 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 24 August 2012 and asked for:

'the number of complaints that have been made against Panorama broadcasts. I am only interested in the "top ten" most complained about programmes over the last few years and specifically the "Euro12 – Stadiums of Hate" episode. I am hoping you will also be able to provide this information with the numbers at each stage of the complaint process together with how many complaints were upheld and at what stage.

More generally, for recent years, have there been any complaints about the BBC upheld before scrutiny by the BBC Trust? Some very brief details would be helpful.

If possible could you please also advise on the number of complaints that were made against "Is Football Racist?" that was shown on BBC3.'

4. The BBC responded on 18 September 2012. 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 19 September 2012 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. He argued that his request

'.. concerns the compliance of the BBC to their own Editorial guidelines and values. It is held for purposes other than journalism – specifically – the complaints procedure. Denying the information results in the BBC being unaccountable... Denying the information protects the BBC when their own Editorial guidelines and values have been breached. It ignores the abuse of standards and provides an effective and unfair cover-up. The BBC is a publically funded service and as such it should and must be answerable to the public. Information about complaints should be a mandatory requirement. Every other public service has to publish (general) complaints and performance data.'

8. In response to the Commissioner's letter of 2 November, he further argued that

'...There is public interest in the information given that this type of information has been requested before. Ofcom was able to release information on the number of complaints made against Panorama ...I just requested some numbers to be placed against a process (complaints)....The analogies I would use are 1) NHS trusts withholding information on treatment outcomes/waiting times for "medical" reasons. 2) Car or plane manufacturers withholding information on fleet safety/accidents for "transport" reasons. 3) Courts withholding information on judgements for "legal" reasons...

It is also the case that the BBC has previously released the number of complaints made against certain programmes so there is selective and inconsistent application of this principle...'

Reasons for decision

9. 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."

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 FOIA.
16. 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'."

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 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 is the number of complaints that have been made against Panorama broadcasts. The BBC argues that these are editorial complaints which form part of the on-going review of the standards and quality of programme making and is

held to help inform future editorial discussions and decisions to improve the quality of journalistic output.

19. The Information Commissioner has issued a number of decisions supporting the BBC view that information relating to editorial complaints is held for the purposes of 'journalism, art or literature'. The BBC has already referred to two decision notices (case references [FS50295017](#) on complaints on political bias and [FS50363611](#) on complaints about the World Cup) where the Commissioner upheld the BBC arguments.
20. In two further decision notices, [FS50404473](#) , (covering the number and nature of complaints about the royal wedding on 29 April 2011) and [FS50301304](#) (concerning the figures for complaints about political bias made to BBC Scotland) the refusal of the BBC to provide the information was also upheld by the Commissioner as he was satisfied that it was held for journalistic purposes and therefore fell under the derogation.
21. In providing their detailed arguments on this case on 8 January 2013, the BBC referred to the recent appeal to First-Tier Tribunal (Information Rights) (EA/2010/0042, 0121, 0123, 0124, 0125, 0187, http://www.informationtribunal.gov.uk/DBFiles/Decision/i884/20121120_Judgment_EA20100042+5.pdf) which also concerned requests for information about an edition of *Panorama* and information generated by and related to the BBC's process for handling editorial complaints.
22. The tribunal accepted that "the maintenance and enhancement of output standards (arising, by virtue of quality reviews in terms of accuracy, balance and completeness)" (paragraph 41) is held for the purposes of journalism, art or literature.
23. The tribunal identified the key issue as being to what extent information about editorial complaints formed "post-transmission editorial scrutiny and review and was held...for the purposes of journalism" (paragraph 12)
24. The BBC provided witnesses to the tribunal and has also provided evidence to the Commissioner on this and previous cases to show that complaints, investigations into complaints and the use of the whole editorial complaints process is integral to the BBC's journalistic purpose.
25. The tribunal unanimously dismissed each of the Appellant's appeals and accepted that information held for the purposes of the editorial complaints process provides a "valuable tool and resource for research for other programmes" (paragraph 110). The tribunal further accepted that it would be expected that BBC programme makers producing similar programmes would "refer to the underlying journalistic materials held and retained in respect of the original broadcast as well as the material generated by virtue of the complaints process".(paragraph 75)

26. In answer to the complainant's point that the BBC

'has previously released the number of complaints made against certain programmes so there is selective and inconsistent application of this principle'

the BBC explained that it does publish a great deal of information about complaints upheld or resolved by the Editorial Complaints Unit at stage 2 of the complaints process. However, the Commissioner (and the recent tribunal) upholds the BBC's position that such voluntary publication "does not intrude upon the defined scope of FOIA". (paragraph 57)

27. In the complainant's correspondence he also forwarded Ofcom's response to an information request to them and referred to a further request that he had sent to the BBC about complaints information previously published in the BBC Trust Annual reports. The Commissioner confirms that this decision only concerns this specific request to the ICO, namely the number of complaints to the BBC about the Panorama broadcasts.
28. Overall, the Commissioner considers that the BBC has provided evidence that it holds the complaints information for the purposes of journalism and that this has been supported by the recent appeal to the First-Tier Tribunal (Information Rights).
29. For all of the reasons above, the Commissioner is 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 FOIA.

Right of appeal

30. 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

31. 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.
32. 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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