

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 23 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 information regarding a documentary which was aired in 2004. The BBC explained the information was covered by the derogation and excluded from the 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 request was in relation to a BBC documentary shown in early 2004. In particular, the complainant specified the following information:
"I am particularly interested in obtaining the contracts you had with Sussex Police (Operation Keen), including the payments that were made to them and their officers for participating in this programme. I also require the production schedule/chronology, and a list of the evidence the BBC had access to and the dates of this access. Of course any and all other documents you have are also required in this request."
4. The BBC responded on 10 July 2012. It stated that it believes that the information requested is excluded from the FOIA because it is 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 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

5. On 17 September 2012 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.

Reasons for decision

6. 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."

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. The Commissioner's analysis will now focus on 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 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)

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 will apply.
12. 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.
13. 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'.

14. 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.

15. The information that has been requested in this case is regarding a documentary aired in 2004. In particular the complainant has requested details about the production schedules and chronology and any contracts between the programme makers and the Police.
16. In light of submissions made by the BBC in previous cases and in the refusal notice to the complainant dated 10 July 2012, the Commissioner has considered all of the information before him. 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 and its journalistic activities relating to such output.
17. Overall, the Commissioner considers that the BBC holds the information for the purposes of journalism because the information requested directly links to the exercise of judgement on the selection of materials to broadcast. Decisions made as to how information should be obtained and the accuracy of such information are clearly part of the journalistic process. This is linked to how information is gathered and verified which is further inextricably linked to the maintenance of standards and the quality of journalism.
18. Consideration of the evidence and the sources from where it is gathered is a fundamental part of journalism and is crucial to maintaining editorial independence. Likewise scheduling information is an editorial decision and therefore derogated.
19. The Commissioner understands that the BBC regards the decision as to how much resource to dedicate to a particular piece of BBC output to be a fundamental programme making decision. The BBC has a fixed resource (the licence fee) and resource allocation goes right to the heart of creative decision making. The Commissioner has accepted this argument on a number of occasions (such as in the decision notices for the case references FS50314106 and FS50422017).
20. The journalistic output of the BBC is therefore affected by budgetary constraints. Operational information such as type and nature of any payments made to individuals interviewed on a programme will be held for budgetary reasons. This also applies to the total cost of making a programme. The records of the related costs will have been created for

the purpose of managing the production and associated costs of the programme.

21. 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 FOIA.

Right of appeal

22. 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

23. 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.
24. 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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