

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 4 February 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 relating to a particular use of language by the BBC and any complaints generated from this. The BBC explained the information was covered by the derogation and excluded from FOIA.
2. The Commissioner's decision is that this information, if held, would be 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 15 July 2012 and made the following request:

"Please could you provide me with all documentation and internal memoranda relating to this subject. What measures, if any, has the BBC taken to ensure the correct use of the word 'Cornish' on its website? What internal guidance is given on use of the words 'Cornwall' and 'Cornish'? What actions have been taken and what decisions made by the BBC following complaints concerning this grammatical error?"

The complainant also wrote to the BBC on 20 July 2012 and made the following request:

"Who does the BBC consult on questions concerning the English language and its correct usage? Would you be ready to take my concerns to this person or body in order to obtain clarification? If not could you please explain why?"

4. The BBC responded on 20 July 2012. It explained that it does not hold information within the scope of the complainant's requests, however it believes that the information requested, if held, would be excluded from the Act because it would be 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 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 be obliged to provide any information in response to the request for information if that information were held by it.

Scope of the case

5. The complainant contacted the Commissioner on 20 October 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.

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 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.
16. The information that has been requested in this case is information relating to a particular use of language by the BBC. In light of submissions made by the BBC in previous cases and also in light of the present submissions of the BBC, the Commissioner understands that the requested information is not held by the BBC, however, if it were held, the BBC would consider that it fell within the three categories as indicated below in paragraph 19 and that as such it would incorporate all three elements in the definition outlined in paragraph 13 above.
17. 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.
18. In determining whether the information, if held, would be held for the purposes of journalism, the Commissioner has considered the following factors:

- The purpose(s) for which the information, if held, would be held at the time of the request;
- The relationship between the purposes for which the information would be held and the BBC's output on news and current affairs, including sport, and/or its journalistic activities relating to such output.

19. It is the view of the BBC that the requested information falls within three categories of information:
- a) Measures taken as part of the process for publication of material on the BBC's website
 - b) Guidance or guidelines for journalists creating output
 - c) Information relating to editorial complaints considered by the BBC
20. When considering the purposes for which the information would be held, the BBC has provided explanations for the purposes for which information in each of the above categories would be held:-

Measures taken as part of the process for publication of material on the BBC's website

This category of information was previously considered by the Commissioner (DN FS50371328) in respect of a request for information about the BBC publishing an article on its website. The Commissioner found that:

- The process that led the article to appear on the website related to part of the editorial process and information was therefore held for purposes involved in the selection and timing of matters for publication.
- Information relating to the editorial control and fact checking of the article directly relates to all three elements of the definition of journalism, specifically, the verification of material for publication (element one), the editorial analysis of it (element two) and the reviews in the standard and quality of journalism (element three).

Guidance or guidelines for journalists creating output

This category of information was considered by the Commissioner (DN FS50237371), which concerned guidance given to the BBC in respect of its treatment of the Duchy of Cornwall in its output:

- The Information Commissioner categorised the requested information as falling within the category of programme content and coverage of issues within programmes and found that guidance was used to inform the BBC's treatment of the subject in its programme content and creative output and was therefore held to a significant extent for the purposes of art, journalism or literature.

Editorial complaints

- 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). The Commissioner accepts 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. In this way the information plays a significant role in improving the quality of journalistic output.
21. The Commissioner has considered the submissions of the BBC in relation to his previous findings in respect of information falling within the above 3 categories. He is satisfied that the same rationale connects the requested information in this case to the derogated purpose, namely journalism.
 22. 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 first, second and third points of the definition namely verifying materials for publication, editorial purposes and for maintenance and enhancement of the standards and quality of journalism.
 23. 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

24. 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

25. 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.
26. 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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