

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 24 April 2013

Public Authority: British Broadcasting Corporation (BBC)
Address: 2252 White City
201 Wood Lane
London
W12 7TS

Decision (including any steps ordered)

1. The complainant has requested information about Disability Equality Training undertaken by members of staff at the BBC. The BBC considered the request to be vexatious under section 14(1) of the FOIA. The Commissioner's decision is that only part of the request is covered by the FOIA as some of the information relates to the BBC's activities in journalism, art or literature and is therefore not covered by the FOIA. For the part of the request within the scope of the FOIA, the Commissioner considers the BBC has correctly applied section 14(1) to refuse the request.

Request and response

2. On 10 August 2012, the complainant wrote to the BBC and requested information in the following terms:
"Details of Disability Equality Training undertaken by the following:
 1. *[name redacted] – Chief Adviser BBC Vision*
 2. *[name redacted] – BBC Information Policy and Compliance."*
3. The BBC responded on 10 September 2012 and informed the complainant that it considered his request to be vexatious and therefore refused it under section 14(1) of the FOIA.

4. Following an internal review the BBC wrote to the complainant on 11 October 2012. It stated that it considered the request to be vexatious as it was a continuation of a series of requests made to the BBC in relation to staff completing disability training and there had been a significant amount of correspondence over a number of years based on similar requests.

Scope of the case

5. The complainant contacted the Commissioner on 18 October 2012 to complain about the way his request for information had been handled. The complainant maintained his requests were not vexatious as he was seeking to obtain information to demonstrate a lack of Disability Equality Training for staff and to show that the BBC is "*systematically Disablist*".
6. The Commissioner has looked carefully at the request and has established that not all of the requested information would fall within the scope of the request because some of it is held for the purposes of journalism, art or literature and therefore not covered by the FOIA.
7. In reaching this decision the Commissioner considered the roles of the two named individuals within the BBC. *[name redacted]* is the Chief Advisor to Vision which is one of the programme making areas of the BBC, the Chief Advisor's role therefore supports programme-making. *[name redacted]* is a member of the BBC Information Policy and Compliance team and her role is clearly within the public functions of the BBC and the information requested in relation to her is clearly within the scope of the FOIA.
8. However, the Commissioner considers the information requested about *[name redacted]* to be more complex. *[name redacted]*, in her role as Chief Advisor also undertakes the role of FOI Divisional Representative for Vision which is a public role within the BBC. The request in this case was made following an earlier review of an FOIA request completed by *[name redacted]*. The Commissioner considers this could suggest the complainant was asking for information on the training undertaken by *[name redacted]* in her capacity carrying out public functions. However, when considering the request in isolation the Commissioner is of the view that the request referred to *[name redacted]* as Chief Advisor to Vision which on a literal reading would be asking about training undertaken in her role in programme-making.
9. The Commissioner therefore accepts that the information requested about *[name redacted]* is clearly covered by the FOIA as her role involves carrying out solely public functions for the BBC. However, the Commissioner considers the information requested about *[name*

redacted] may not be covered by the FOIA as it relates to her role in programme-making. That being said, the Commissioner has further considered whether information about a Chief Advisor who supports programme making and her training is information held for the purposes of journalism, art or literature.

10. 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."

11. This means that the BBC has no obligation to comply with part I to V of FOIA where information is held for 'purposes of journalism, art or literature'. The Commissioner calls this situation 'the derogation'.
12. 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.
13. 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)

14. 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.
15. 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.

16. 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.
17. 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'.

18. 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.
19. 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.

20. The information that has been requested in this case is information on Disability Equality Training undertaken by *[name redacted]*, Chief Advisor to Vision.
21. In light of the present submissions of the BBC the Commissioner recognises the information is held for a number of purposes. The Commissioner recognises that information about a member of staff with a level of responsibility for an area responsible for programme making is held for the purposes of editorial decision making.
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;
 - 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 the role of the Chief Advisor for Vision supports programme making in a number of ways, for example leading the Compliance team which deals with pre-transmission issues and the Complaints team which deals with post-transmission issues. The advice provided by the Chief Advisor informs and influences the output itself in a number of ways such as considering Editorial Guidelines to advise about the appropriateness of intended output. Therefore, the role (and any relevant training received) serves to inform the advice and guidance provided to editorial staff with responsibility for producing the output itself; in this way, one of the purposes of the role is directly linked to the editorial decision-making process by which output is created.
25. Overall, the Commissioner considers that the BBC has provided evidence that it holds the information with regards to *[name redacted]* for the purposes of journalism. He is content that the information is held for the purposes outlined in the second point of the definition namely '*the selection, prioritisation and timing of matters for broadcast or publication, and the analysis of, and review of individual programme*'. He considers that the information falls within the derogation.

26. As such the Commissioner considers the scope of his investigation to be to determine if the BBC correctly refused the part of the request relating to the training undertaken by *[name redacted]* as vexatious under section 14(1) of the FOIA.

Background

27. The complainant in this case has publicly stated he is campaigning against what he believes is the deliberate discrimination against the disabled by the BBC.
28. At the time of this request the complainant had submitted 33 requests under the FOIA on the subject of disability. Alongside this, the complainant had also submitted a number of enquiries on the same subject directly to the Chairman and Trustees of the BBC Trust.
29. In many cases the requests and enquiries have been in relation to specific individuals and programmes and 21 of these requests have been for details of Disability Equality Training, 17 requiring details of training attended by specific individuals.
30. The request in this case followed directly on from two previous requests about disability and programmes broadcast by the BBC which the BBC had considered were outside the scope of the FOIA as the information was held for the purposes of journalism, art or literature.

Reasons for decision

31. Section 14(1) of the FOIA states that, section 1(1) does not oblige a public authority to comply with a request for information if the request is vexatious.
32. The Commissioner considers the key questions for public authorities to consider when determining if a request is vexatious are:
- whether compliance would create a significant burden in terms of expense and distraction;
 - whether the request is designed to cause disruption or annoyance;
 - whether the request has the effect of harassing the public authority or its staff;
 - whether the request can otherwise fairly be characterised as obsessive or manifestly unreasonable;

- whether the request has any serious purpose or value.

33. In this case the BBC has argued that compliance with the request would create a significant burden, the request has the effect of harassing the public authority or its staff, the request can be characterised as obsessive and has no serious purpose or value. The Commissioner has therefore considered these points when making his decision.

Whether compliance would create a significant burden in terms of expense and distraction

34. The Commissioner recognises this is a consideration of more than just costs. The number of previous requests and correspondence and the demand they place on a public authority's time and resources can be a relevant factor if sufficiently demonstrated.
35. The BBC has demonstrated that this request followed on from two previous requests both made on 18 July 2012 for information relating to deaf and/or disabled panellists on specific BBC programmes which are the subject of two Decision Notices issued by the Commissioner¹. The request in this case was made following the response and internal review in these earlier requests to establish if the individuals involved in handling the earlier requests had undertaken Disability Equality Training. As discussed earlier as one of these individual's primary roles relates to programming this information is not covered by the FOIA.
36. The BBC argues that this shows that responding to similar requests on the subject of disability has led to further requests and correspondence and has evidenced other occasions when this has occurred.
37. As part of its submissions to the Commissioner, the BBC provided a table showing the history of correspondence and requests on similar subjects dating back to 2007. This table shows that on the general subject of disability and the BBC the complainant has been in contact with the BBC 108 times with questions, some of which constituted requests for information. 22 of the requests in this table are requests relating to Disability Equality Training.
38. The Commissioner notes that some of the requests and enquiries were not particularly lengthy and did not contain multiple questions or complex issues. However the Commissioner does accept that the number of and frequency of the contact with the BBC alone is likely to have created a burden on the BBC.

¹ ICO Decision Notices FS50462592 and FS50458830

39. The BBC has also explained that due to the previous correspondence with the complainant and the fact that responding to one request often leads to further requests it considered it was unlikely that responding to the part of this request within the scope of the FOIA would have satisfied the complainant and resolved his concerns about the BBC being "*systematically disablist*".
40. The Commissioner, taking into account all of the above and the fact that responding to any individual request may lead to further requests being made in relation to the same subject matter in the future, does accept that the previous requests and correspondence and the most recent request has created a significant burden on the BBC.

Whether the request is designed to cause disruption or annoyance

41. The BBC has not argued that the complainant's request is designed to cause disruption or annoyance and the Commissioner has found no evidence of this.

Whether the request has the effect of harassing the public authority or its staff

42. When considering this point the Commissioner looks at a number of factors such as the tone of the correspondence with the public authority, whether the request is seeking information which the complainant clearly already possesses, whether the request may be intended to reopen issues which have already been debated and whether the request could reasonably be expected to have a negative effect on the health and well-being of employees.
43. The BBC has provided copies of correspondence with the complainant and responses sent by the BBC. The Commissioner accepts that this demonstrates that correspondence and requests on several occasions have been submitted on the same day that a previous response has been issued.
44. The BBC also considers that the tone in some of the complainant's correspondence is tendentious and haranguing, seeking to dispute the BBC's responses even where information is disclosed. To demonstrate this the BBC provided the Commissioner with examples of occasions when the complainant referred to the member of staff he was corresponding with as '*disablist*' and in one case '*ghettoizing Deaf and disabled people as inferior members of society, much as the Nazis did in the war with the Jews and as such you positively contribute to the rise of disability hate crimes.*'

45. The BBC has referenced a Tribunal decision² in which it was determined that requests and complaints made about the alleged incompetence of the council would "*likely have been seen by any reasonable recipient as hostile, provocative and often personal.*" However, having examined the responses the BBC has shown him, the Commissioner does not consider that the emails from the complainant could reasonably be considered to be hostile or provocative. That being said he does acknowledge that some members of staff may be distressed by being referred to as disablist and certainly the Commissioner accepts that the member of staff who was the subject of the response quoted in the above paragraph is likely to have felt distressed by the comment made by the complainant.
46. Taking into account the above, the Commissioner would accept that on occasions the comments made in responses by the complainant, could be seen to be distressing but he does not consider that in general the tone of the complainant's correspondence with the BBC is unreasonable, despite clearly registering his disappointment. As such the Commissioner does not consider the request to have the effect of harassing the public authority or its staff in general but he does consider there have been occasions where the complainant has responded in a provocative manner and he will take account of this when making his decision.

Whether the request can otherwise fairly be characterised as obsessive or manifestly unreasonable

47. In the Commissioner's view, the test to apply here is one of reasonableness. In other words, would a reasonable person describe the requests as obsessive or manifestly unreasonable? In considering this the Commissioner will look at the volume and frequency of correspondence, requests for information already seen by the requester and requests intended to reopen issues that have already been debated and considered.
48. In this case the Commissioner accepts that the BBC has already evidenced the volume of correspondence it has received from the complainant when explaining it considered the requests were creating a burden on it. In addition to this the BBC has also provided evidence that its responses to requests and enquiries have led to additional requests, sometimes on the same day as the previous replies.
49. The Commissioner's view is that there is a thin line between obsessiveness and persistence but that obsessive requests are often

² *Gowers v IC & LB Camden [EA/2007/0114]*

identified by requests which continue to be made even once other evidence on the same issue has already been provided. The Commissioner has considered the previous requests made to the BBC in order to determine if this request could be characterised as obsessive as a result of containing overlapping or duplicated requests for information.

50. The most recent example provided by the BBC to demonstrate the overlapping nature of the requests is the current request which is the subject of the Notice. In this case the request was made following a direct response to a previous information request. It appears that the previous response triggered the current request as the complainant asked for information on the training undertaken by the members of staff involved in dealing with his earlier request.
51. Whilst this is the most recent example provided by the BBC it is not the only example of a response to an enquiry or information request resulting in a further request. For example a response provided to the complainant on 9 March 2011 about the structure of diversity training at the BBC generated a further information request on 10 March 2011 for more details of the training programme as well as details of the training undertaken by the person who responded to the previous email. This is a pattern the BBC has been able to evidence has been on-going since the start of its correspondence with the complainant. Another example provided shows that after responding to an information request on 13 March 2009 the complainant made a further information request on 15 March 2009 in 5 parts. As well as asking for more information under the FOIA this correspondence also disputed the previous response point by point.
52. The Commissioner acknowledges that the requests to the BBC demonstrate the complainant's determination to access a large amount of information on the disability and equality issues within the BBC and in its programmes. As stated above, the Commissioner's view is that there is a fine line between persistence and obsession and he has therefore carefully considered the request in this case and the context in which it was made.
53. The request undoubtedly demonstrates persistence on the part of the complainant when considered in the context of his previous correspondence and requests to the BBC. The Commissioner also accepts that the history of requests and correspondence and the short periods of time between correspondence show that responding to this request is unlikely to satisfy the complainant and will still lead to further requests in the future.

54. Taking into account these factors the Commissioner accepts that the request can fairly be characterised as obsessive and manifestly unreasonable.

Whether the request has any serious purpose or value

55. The Tribunal has previously found that where requestors are driven by a genuine desire to obtain information on a particular subject then they are not likely to be unreasonable requests. However, the Tribunal has also recognised there should be a point where a requestor lets the matter drop. In this case the request is very similar to requests for information on disability and equality training undertaken by other members of staff at the BBC which have sometimes considered to be linked to the BBC's journalistic purposes and therefore exempt from the FOIA. The request is also part of the broader series of requests and correspondence from the complainant with the aim of uncovering information to assess the BBC's approach to implementing Disability Equality and to, as the complainant has stated, build a case that the BBC is "systematically disablist".
56. The information requested in this case has not specifically been requested before although very similar information has been requested and in some cases answered where the BBC has considered the request is within the scope of the FOIA. The Commissioner has therefore looked at the pattern of previous requests and the history of correspondence with the complainant to consider whether the latest request supports the presence of a serious purpose.
57. The Commissioner accepts that the number of requests received has been quite high although they have been made over a period of several years but there has also been other correspondence to the BBC. The Commissioner has already acknowledged that fact that the response to one request or enquiry leads to further correspondence on the same general theme.
58. The BBC has explained to the complainant in previous responses the structure of the training that staff undertake on Disability and Equality and indicated the percentage of staff at any given time that are likely to have undergone the training taking into account staff turnaround. In addition to this the BBC has answered requests asking for details of training where it has been within the scope of the FOIA however this has not stopped the complainant making further requests for details of training of other staff. If the aim of the complainant is to obtain information about the BBC's training of its staff in Disability Equality then the complainant would have to make hundreds of requests in order to obtain information to form a complete picture of training in the BBC and in the event that this then showed that some staff at the BBC had

not attended Disability Equality training this would not necessarily demonstrate that the BBC is "systematically disablist" in isolation.

59. However, the BBC does accept that the complainant is trying to pursue an issue which is clearly of importance to him and an area where he believes the BBC is failing. The Commissioner accepts that some of the earlier requests made by the complainant relating to the representation of disabled people in BBC programming clearly did have some serious purpose or value but were not covered by the FOIA as any information held was held for the purposes of journalism, art or literature.
60. That being said, the Commissioner does not see how the repeated requests for details of training undertaken by staff at the BBC, many of whom have had contact with the complainant through dealing with this queries and requests, contribute to any serious purpose particularly as the BBC has provided the complainant with general information on Disability Equality training.
61. The Commissioner does not therefore accept that the requests relating to training undertaken by specific members of staff has any serious purpose or value as they are often repetitive and are unlikely to illicit information which will assist in proving the BBC is "disablist".
62. The Commissioner concludes that some of the initial wider requests for information about the prominence of disabled people in BBC programming may have had a serious purpose or value although in most cases the information requested was not covered by the FOIA as it was held for the purposes of journalism, art or literature. However, the requests for details of training undertaken by individual members of staff, more often than not involved in dealing with the complainant's correspondence, do not have any serious purpose or value as they are focused on one area which is far removed from the original requests and appear to be a reaction to earlier responses.

Conclusion

63. The Commissioner considers that in this case the requests would cause a significant burden in terms of expense and distraction and could fairly be seen as obsessive or manifestly unreasonable. He considers the value of the requests to be limited and although he does not agree with the BBC that the requests have the effect of harassing the public authority of its staff he does not consider this is sufficient to outweigh his other findings. He therefore concludes that section 14(1) was correctly applied to the extent that the request was within the scope of the FOIA.

Right of appeal

64. 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

65. 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.
66. 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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