

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 22 October 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 concerning the number of missing Doctor Who episodes. 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 20 and 22 June 2013 and asked for:
 1. *You advise me whether any episodes of Doctor Who have been returned since January 2011*
 2. *The number of episodes still missing from the archives*
 3. *Please list any episodes that have been returned since January 2011*
 4. *Are you aware of any on-going enquires that could result in further finds?*
4. The BBC responded on 15 July 2013. It explained that it believes that the information requested is excluded from the Act because it is 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 provide any information in response to the requests for information.

Scope of the case

5. The complainant contacted the Commissioner on 16 July 2013 to complain about the way his requests for information had been handled. In particular, he challenged the operation of the derogation in this case.
6. The Commissioner has therefore had to consider whether the BBC was correct to claim that the requested information is derogated.

Reasons for decision

7. 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."
8. 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'.
9. 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.
10. 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)

11. 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.
12. 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.
13. 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.
14. 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'.

15. 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.
16. 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.
17. The information that has been requested in this case broadly concerns information surrounding the number of missing episodes of Doctor Who. This includes how many episodes have been returned and how many are still missing. It also includes a request for whether there are any on-going enquires that could result in further finds. The requests themselves were made against the background of an appeal made by the BBC for help in recovering Doctor Who episodes that had previously been deleted.
18. The complainant's main argument relates to the fact that Doctor Who is of great public interest and that the appeal for missing Doctor Who episodes was a public appeal. He therefore considers it is only appropriate that the requested information should be disclosed to the wider world.
19. The Commissioner accepts that there is huge public interest in this information but has also reminded himself that this factor in itself does not have a bearing on the central question of whether information is derogated. In this case the Commissioner has found that the information requested has a direct link to the BBC's output and therefore is derogated. The reasons for this are explained in the subsequent paragraphs.
20. The BBC explains that the key reason for the retrieval of missing material is to restore material to the BBC's programme archive

where it is retained for the purpose of further broadcast and distribution. The Commissioner accepted in case FS50358104¹ the BBC's position that copies of broadcast programmes are held so that they can be used for repeat broadcasts and, in addition to this, as potential content in other BBC programmes and as a source of research for the creation of further output. It is important to note that any decisions about the future uses of any such retrieved material are editorial in nature and therefore have a direct link with the BBC's output.

21. The BBC further argues that information relating to programmes can be retained in order to inform the creation of new and different output, in effect as a resource or a source of reference. The BBC refers the Commissioner to an example of where previous missing episodes of Doctor Who were used as content in the BBC's output in a 1998 documentary entitled 'The Missing Years'. The Commissioner acknowledges that the output was a result of the editorial decision making process which led to the selection of the particular aspect of the history of Doctor Who for development into output. This illustrates a previous use of the information about the missing episodes of Doctor Who for the purposes of journalism, art and literature specifically in the creation of output.
22. The BBC acknowledges that the release of this information is of great interest to the audience of Doctor Who but the BBC remains of the view that it is for the programme makers themselves to conduct their consideration in respect of what output is to be created. Furthermore, it is for programme makers to make their choices from the range of ideas and options available to them in line with their editorial ambitions for the scope and nature of their intended output. From this, the Commissioner agrees that there is a direct link between the information requested and the BBC's creative output.
23. The Commissioner accepts the view that the information requested would be used by the BBC to market and publicise Doctor Who. The BBC states that the information is held to promote its output, in essence to increase the audience for that output. The premature disclosure of this information would therefore have impaired the BBC's ability to produce and promote its output to achieve maximum audience reach. In relation to this, the Commissioner will adopt a similar position to the one taken in case FS50206742².

¹ http://www.ico.org.uk/~media/documents/decisionnotices/2011/fs_50358104.ashx

² http://www.ico.org.uk/~media/documents/decisionnotices/2010/FS_50206742.ashx

That case considered a request for information concerning a breakdown of costs of marketing by the BBC. The Commissioner decided that there was a clear link between the BBC's creative output and marketing activity which sought to promote that output; a principle that he believes extends to the requested information in this instance.

24. The Commissioner must note that during the investigation into this complaint, the BBC made an announcement which answered in part request 1, 2 and 3 of the complainant's requests. It should be stressed, however, that the release of this information into the public domain does not change the fundamental position of the BBC that the information at both the time of the request and also at the present time is held for the purposes of journalism, art and literature.
25. Overall, the Commissioner considers that the BBC has provided evidence that it holds the information for the purposes of journalism. In particular, he is content that the information is held for the purposes outlined in the second and third points of the definition referred to previously, namely editorial purposes and for the maintenance and enhancement of the standards and quality of journalism. Consequently, he has found that the information falls within the derogation, which means that the BBC was not obliged to comply with Parts I to V of FOIA in relation to the requests

Right of appeal

26. 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

27. 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.
28. 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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