

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 28 August 2014

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 from the BBC about its 'Don't Drop the Baton' television programme. The BBC explained that the information was covered by the derogation and excluded from the FOIA.
2. The Commissioner's decision is that this information is held by the BBC for the purposes of 'journalism, art or literature' and is not caught by the FOIA. He therefore upholds the BBC's position and does not require the BBC to take any further steps.

Request and response

3. On 21 July 2014, the complainant wrote to the BBC and requested information in the following terms:

"...all the information held on the subject Dont drop the baton programme by BBC Scotland I want all the information on the subject of 2014 submission by [Complainant] and [Named person 1] and Partikular films. I want all the information correspondance and writer notes between [Named person 2] [Named person 3] [Named person 4] [Named person 5] and [Named person 6] in relation to ideas and pre production meetings for Dont drop the baton"

4. The BBC responded on 22 July. It said that it did not believe the information was caught by the FOIA because it was held for the purposes of 'art, journalism or literature'.

Scope of the case

5. The complainant contacted the Commissioner on 23 July to complain about the way their request for information had been handled. The Commissioner has investigated whether the BBC is correct when it says that the requested information is not covered by the FOIA.

Reasons for decision

6. Schedule One, Part VI of the 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 says:

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.
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 said 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 applied.
12. 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.*
13. 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. 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 concerns a particular BBC television programme. The complainant did not provide any specific arguments in support of their position that the BBC should release the information. In the absence of any arguments to the contrary therefore, it is clear to the Commissioner that there is a direct link between the information being sought and the BBC's output, and that it holds the information for the purposes of journalism. Specifically, he is satisfied that the information is held for the purposes outlined in the second and third point of the definition at paragraph 12, namely for editorial purposes and for maintaining and enhancing the standards and quality of journalism. Consequently, he has found that the information falls within the derogation, which means that the BBC is not obliged to comply with Parts I to V of the FOIA

Right of appeal

17. 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: 0870 739 5836

Email: grc@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

18. 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.
19. 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

Pamela Clements
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