

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 23 February 2015

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 requested the audience composition of an election debate. The BBC confirmed that this information was not held and even if it were held, such information would be excluded from FOIA because it would be held for the purposes of 'journalism, art or literature'. The complainant considered that the information must be held by the BBC.
2. The Commissioner's decision is that the BBC does not hold the information and if held it would be derogated and therefore excluded from FOIA.
3. The Commissioner does not require the BBC to take any steps.

Request and response

4. On 18 November 2014, the complainant wrote to the BBC and requested information in the following terms:

'I am not sure of the exact date but it was a local debate with the candidates from Rochester and Strood. I have complained to Michael G but his bias in his was very apparent. I requested the number of non constituents in the audience, (not addresses) and he has refused to provide these. Please take this as a Freedom of Information request.'
5. On 5 December 2014 the BBC responded that it did not hold the requested information and, if it was held, the information would be

excluded from FOIA as it would be held for derogated purposes and fall outside of FOIA.

6. On 8 December 2014 the complainant complained to the ICO about this response. She disputed that the information is not held and also disputed that the information requested is held for the purposes of journalism, art or literature:

'their letter is untrue and is contrary to their procedures in accepting audience participation, who they not only sift, but also telephone prior to the showing of televised events. They do this for security reasons as well as assurances of audience participation, and other reasons.

Michael Graves (BBC Southeast) told me this during our telephone conversation after my complaint to BBC Southeast news regarding the programme.

He also told me they kept audience participants' addresses - so this would involve audience postcodes, which would certainly reveal how many in the audience were, in fact, constituents of Rochester and Stroud.

It is the BBC as a public broadcaster, who should be honest about this information, if they've nothing to hide.

Michael Graves was clearly biased against Mark Reckless in our conversation, which he is perfectly entitled to be, but NOT on behalf of the electorate.

As we are approaching a General Election it is imperative that such bias is not reflected in a publicly funded broadcaster.'

7. The Commissioner invited the complainant to withdraw her case on 19 January 2015 as it was his opinion that, if held, the requested information would be held for the purposes of journalism, art and literature and that the BBC was correct in its refusal to disclose this information.

8. On 20 January 2015 the complainant declined to withdraw her case:

*'Inviting audience participation to a *by-election* debate who 'work' in Rochester and Stroud, as opposed to 'living' in Rochester and Stroud, and then presenting the programme as a by-election debate with constituency participation, was both *inaccurate & misleading* journalism, as supported by their acknowledgement eventually that they *did* in fact know the*

percentage of non constituents participating, when at first denying it.'

Background

9. On 10 November 2014 the BBC hosted a one-off debate, '*The Battle for Rochester and Strood: A BBC South East Special*', in the lead up to the by-election for the parliamentary seat in Rochester and Strood. Broadcast simultaneously on BBC One South East, BBC Radio Kent and the BBC News Channel, the purpose of the debate was to discuss the key issues in the by-election triggered by Mark Reckless' defection from the Conservatives to the UK Independence Party. Mark Reckless retained his seat in the resulting election which took place on 20 November 2014.
10. The 150 members of the audience invited to attend the debate were encouraged to question the potential parliamentary candidates on the biggest topics affecting the area and the country.
11. The members of the audience were recruited by an external company on behalf of the BBC.

Scope of the case

12. The Commissioner considers the scope of the case is to determine if the BBC holds the requested information on the composition of the audience and, if held, to consider whether the information is excluded from FOIA because it would be held for the purposes of 'journalism, art or literature'.

Reasons for decision

Section 1

13. Section 1 of the FOIA states that any person making a request for information to a public authority is entitled to be informed in writing by the public authority whether it holds information within the scope of the request, and if so, to have that information communicated to him.
14. Where there is some dispute between the amount of information identified by a public authority and the amount of information that a complainant believes may be held, the Commissioner, following the lead of a number of First-tier Tribunal decisions, applies the civil standard of the balance of probabilities. The Commissioner must decide whether, on the balance of probabilities, the public authority holds any information which falls within the scope of the request (or was held at the time of the request).
15. The BBC has explained that the members of the audience were recruited by an external company on behalf of the BBC.
16. The BBC stated that it *'only holds a small sample of addresses (approximately 20) and does not hold the full list. Accordingly the BBC does not know how many non-constituents were in the audience. Furthermore, it was never intended by the programme makers that every member of the audience must be from the Rochester and Strood area.'*
17. The Commissioner asked the BBC a number of questions to explain the searches it carried out for this information.
18. The BBC responded that they had asked the programme's producer (Michael Gravesend) and director (Quentin Smith) if they held the requested information. They had not made electronic searches as the information, *'if it exists, is not held by the BBC.'*
19. In answer to the question 'Was any recorded information ever held relevant to the scope of the complainant's request but deleted/destroyed?' the BBC replied:

'No. As explained above, a small sample of addresses is held, but without the complete list it is not possible to determine what proportion of the members of the audience live in the constituency. There is a plan to destroy the sample of addresses at a future date.'

20. Having considered the BBC's responses to the Commissioner's investigations, the Commissioner is satisfied that, on the balance of probabilities, the BBC does not hold sufficient information on the number of non-constituents in the audience of the election debate to answer the request.
21. In any event the Commissioner will now consider if the sample of addresses of the audience in the debate that it does hold falls within the scope of FOIA or is excluded from FOIA because it is held for the purposes of 'journalism, art or literature'.

Derogation

22. 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."

23. 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'.

24. 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)

25. 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.
26. 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.

27. 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.

28. 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'.

29. 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.

30. The information that has been requested in this case is the composition of the audience for an election debate. The BBC has stated that it only holds a small sample of addresses of the audience.

31. In light of previous cases, the Commissioner considers that the requested information falls under the definition of journalism and is therefore derogated.
32. The decision notices for the case references [FS50401168](#) and [FS50394881](#) are relevant as these cases also considered a request for information concerning the composition and selection of audiences. The refusal of the BBC to provide the information was upheld by the Commissioner as he was satisfied that it was held for journalistic purposes and therefore fell under the derogation.
33. 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

34. 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

35. 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.
36. 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
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF