

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 8 June 2015

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 particular episodes of the BBC television programmes 'HARDtalk' and 'Notorious'. The BBC explained that this information is covered by the derogation and excluded from the FOIA. The Commissioner's decision is that the BBC holds the requested information for the purposes of 'journalism, art or literature' and it does not fall inside the FOIA. He therefore upholds the BBC's position and does not require the BBC to take any further steps.

Request and response

2. On 12 December 2014, the complainant wrote to the BBC and requested information in the following terms:

"I require all notes, emails, letters, faxes, meeting notes, telephone attendance notes regarding:

a. My 'Hardtalk' interview conducted by David Jessel. All information why Mr Jessel was chosen and all correspondence between the BBC and the police, security services, including any statements made by David Jessel from the period 1999 – 2012.

b. The BBC2 documentary 'Notorious' which followed my life between 2002/03 all correspondence, emails, notes, letters with the police and security services."

3. The BBC responded on 8 January 2015. 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'. However, the BBC also said that some of the information could be the complainant's personal data and that the request he had submitted could possibly be considered a subject access request under section 7 of the Data Protection Act (DPA).
4. The BBC went on to say that the DPA provides an exemption for the processing of personal data where the personal data are processed for the special purposes of journalism, art and literature. It considered that in relation to the information the complainant had requested, this exemption is engaged and that the BBC would not be required to respond or comply with the requirements of section 7 of the DPA. The complainant would therefore not be entitled to this information under the DPA.

Scope of the case

5. The complainant initially contacted the Commissioner on 6 January 2015 to complain that he had not received a response to his request. It emerged that he had sent a number of communications to the BBC's former address and the majority of these had gone astray during the BBC's relocation to a new building. The information request that is the subject of this notice did find its way to the BBC's new address however, and the BBC had responded to it on 8 January 2015. The BBC re-sent its response to the complainant.
6. Having considered the response, the complainant disputes that the information he has requested is not covered by the FOIA. The complainant argues that he was never an obvious candidate for the 'HARDtalk' programme and that the only reason the BBC invited him to appear was not for journalistic purposes but as a means of asking questions that the police were unable to ask. The complainant says the 'HARDtalk' interview was used in his criminal trial in 2013. He considers the BBC therefore became an extension of law enforcement, with the information in question consequently being 'evidence' rather than 'journalism'.
7. The Commissioner opened a separate DPA case to deal with any personal data aspects of the complainant's request and the BBC's response. This aspect is not covered in this decision notice.
8. The Commissioner has focussed his investigation on whether the information the complainant has requested from the BBC, that is not his personal data, is derogated, and so excluded from the FOIA.

Reasons for decision

9. 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."

10. 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'.

11. 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.

12. 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)

13. 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.
14. 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.
15. 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 :

"i. The first is the collecting or gathering, writing and verifying of materials for publication.

ii. 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.*

iii. 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."

16. 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'.
17. 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.
18. 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.
19. In its submission to the Commissioner, the BBC provided some background to the information request. The two programmes mentioned in the request were broadcast in 2004. 'Notorious' was an observational documentary about the complainant and 'HARDtalk' an interview with the complainant conducted by David Jessel.

20. The BBC's position is that the programmes were created for the purposes of journalism with a significant public interest and legitimate journalistic concern at their core, namely exposing and detecting corruption, injustice and crime.
21. It says that both programmes remain available as part of the BBC's internal journalistic archive/library for the purposes of journalistic research. They also remain available for republication, either by being rebroadcast or by possibly including them as part of the archive that is going to be made available to the public as part of its BBC Store project.
22. According to the BBC, a search of its BBC News website shows that the complainant has been a high profile figure, with numerous references to him between 2009 and 2013. The BBC envisages that the complainant could easily be the subject of further coverage in the future.
23. The BBC has confirmed that information falling within the scope of the request, that it has identified that it continues to hold, was gathered and verified exclusively for the purposes of journalism in the creation of the two programmes concerned. It is for journalistic purposes that it continues to be held: to provide context and background to the programmes, and as research material, should the programmes be rebroadcast/republished, or to inform fresh programming about the complainant.
24. The material that the BBC continues to hold includes legally privileged advice, research material and notes evidencing the journalistic enquiries conducted, including notes of conversations with sources and correspondence with the City of London Police.
25. Having considered the definition of 'journalism' cited in *Sugar*, the BBC has confirmed that this journalistic research (including notes and source material), pre-broadcast correspondence and legally privileged advice was, and continues to be, held for:
 - research
 - as context and background to programmes
 - future reference regarding the complainant's activities
 - direct use in future output; and
 - to inform future output and/or editorial decisions around ongoing or further publication, including in relation to associated publications such as online articles.
26. The BBC says it is therefore holding the information exclusively for 'production' and 'editorial' purposes and it is not held or used for any other purpose.

27. This includes that information that identifies journalistic sources or 'tends to identify' journalistic sources. The BBC says such information is clearly held for the purposes of journalism and falls squarely within the scope of the derogation.
28. The BBC has nonetheless gone on to consider the consequences of releasing information that 'tends to identify' journalistic sources, for which it says there is no protection. This contrasts with the actual identities of journalistic sources which would be protected under section 40(2) of the FOIA. The BBC says that disclosing information that 'tends to identify' journalistic sources would have a 'chilling effect' on the free flow of information generally, as potential sources of information would lose confidence in the BBC's ability to protect their identities. In this case, given the complainant's association with high profile criminals, disclosing the identity of such sources would expose particular individuals to the risk of retribution and harm.
29. The BBC has stressed to the Commissioner that the derogation is of key importance because it operates to make sure the FOIA does not stifle freedom of expression and to make sure publishing information is unrestrained, but does not identify, or tend to identify, journalistic sources.
30. The BBC has told the Commissioner that it also holds some information within the scope of the request – correspondence with the City of London Police concerning release of certain journalistic material to them – that was created post publication (ie after the programmes were broadcast). Again, the BBC says that this particular information only exists because the BBC created and broadcast the '*HARDtalk*' and '*Notorious*' programmes.
31. This information is therefore clearly held solely in connection with those programmes and not for any other purpose relating to managing and running the BBC. The information would also have a wider strategic value to the BBC. This is because the editorial decisions taken in this instance – to release certain material to the police – could inform future editorial considerations about whether to release material to the police or whether the BBC has complied with its Editorial Guidelines by disclosing material, and the impact disclosure has on its journalism.
32. The BBC referred to the Commissioner's decision in FS50541646. In that case the Commissioner acknowledged that un-broadcast material created after the broadcast of a particular edition of a programme is held for the purposes of 'journalism, art or literature' and is therefore derogated information under the FOIA.

33. Having considered the BBC's submission, it is clear to him that all the information within the scope of the request that the BBC has identified that it continues to hold, and which is not the complainant's personal data, is held for journalistic purposes. The link between these purposes and the production of the BBC's past output, and possible future output, is also clear. The Commissioner is therefore satisfied that this information is derogated and excluded from the FOIA.
34. The BBC disputes the complainant's assertion that the BBC only invited him to appear on '*HARDtalk*' as a means of asking questions that the police were unable to ask, so that the complainant became an extension of law enforcement. The BBC says these claims are without foundation.
35. At the time the programmes in question were commissioned, the complainant was a "controversial character" with connections to various, high profile figures such as Nicholas van Hoogstraten, Saddam Hussein and Harold Shipman. In their editorial decisions to broadcast the programmes, the Editors of both programmes took into account the wider public interest in the complainant's activities against the level of intrusion into his private life.
36. Moreover, the BBC says that the complainant chose to appear on both programmes of his own free will, in the case of '*HARDtalk*' without receiving a fee for doing so. The BBC argues that if the complainant had genuinely believed that the BBC was conspiring with the police and security services, it is likely that he would have chosen not to appear on either programme.
37. The Commissioner is convinced by the BBC's position and, in the absence of any evidence from the complainant, remains satisfied that the information the BBC continues to hold is held only for journalistic purposes. The requested information is therefore not subject to the FOIA.

Right of appeal

38. 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

39. 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.
40. 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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