

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 25 August 2015

Public Authority: British Broadcasting Corporation (BBC)

Address: White City
Wood Lane
London
W12 7TP

Decision (including any steps ordered)

1. The complainant has requested information from the BBC about a 'File on Four' program broadcast on Radio 4. In its response to the complainant, the BBC explained that it held the requested information for the purposes of 'journalism, art or literature' and it therefore fell outside the scope of the FOIA.
2. The Commissioner's decision is that the requested information is derogated and the BBC is not obliged to comply with the request under the FOIA. He does not require the BBC to take any steps.

Request and response

3. On 27 May 2015, the complainant wrote to the BBC and requested information in the following terms:

'On Tuesday 12th May 2015, Radio 4's File on Four broadcast a program titled "Who Killed Emma", which related to the murder in 2005 of a Glasgow woman, Emma Caldwell. Can you please provide the following information?

1 The date that this program was contracted by the BBC

2 The date the program was allocated a 12th May broadcast slot

3 The date that the presenter, Eamon OConnor, was contracted to present the broadcast.'

4. The BBC responded on 15 June. It explained that it did not believe that the information was caught by the FOIA because it was held for the purposes of 'journalism, art or literature'. It said that the BBC is not required to supply information held for the purposes of creating its output, or information that supports and is closely associated with these creative activities.

Scope of the case

5. The complainant contacted the Commissioner on 18 June to complain about the way his request for information had been handled.
6. He considers that the 'File on Four' program in question misled and deceived the public by portraying the material broadcast as original, investigative reporting. He says that the program was plagiarised from newspaper articles published in the Scottish Sunday Mail, the first of which was published on 5 April 2015.
7. The Commissioner's view was that the requested information is derogated because it is clearly held for the purposes of the BBC's journalism. He considered that the BBC holds the information for the purposes of creating output and that it is closely associated with these creative activities. The Commissioner provided the complainant with this preliminary assessment of the case and invited him to withdraw his complaint. The complainant preferred to progress to a decision notice.
8. The Commissioner has therefore further considered whether the information the complainant has requested is caught by the FOIA or is derogated.

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 this case, the information requested concerns dates when a specific radio program was contracted, allocated its particular slot and when its presenter was contracted.
20. As mentioned at paragraph 17, the Supreme Court has defined 'journalism' as 'output on news and current affairs'. The Commissioner has noted that the BBC's website describes its 'File on Four' strand as a '*current affairs* documentary series'. The Commissioner considers that, therefore, there is a clear and direct link between the information being sought and the BBC's journalistic activities. Specifically, the editorial activities it undertakes to produce its journalistic output.
21. Consequently, he finds that the information falls within the derogation and that the BBC is not obliged to comply with Parts I to IV of the FOIA in respect of the complainant's request.

Right of appeal

22. 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

23. 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.
24. 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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