

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 30 September 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 has requested information about the number of video auditions to join the presenting team of 'Top Gear'. 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 4 August 2015, the complainant wrote to the BBC and requested information in the following terms:
'Can I request the total number of 30 second video applications from people that applied to be a host for top gear''
4. The BBC responded on 17 August 2015. The BBC said that the requested information was excluded from the FOIA because it was held for the purposes of 'journalism, art or literature'.

Scope of the case

5. The complainant contacted the Commissioner on 18 August 2015 to complain about the way his request for information had been handled. Specifically, he challenged the operation of the derogation.

6. He argued that the request

' is based around open competition for a job vacancy...

I am just trying to determine how many applications there was recently for the top gear presenters job. The process of which meant submitting a 30 second sample video clip showcasing your skills direct to the BBC.

The number of Applications I am seeking in my FOI request is a simple question. This large number will not be disclosive in any way, or has no bearing on art or journalism.'

7. The Commissioner considers the scope of his investigation to be to consider whether the requested information is covered by the derogation.

Background

8. On 18 June 2015 the new host of Top Gear announced the start of an audition process in which fans could apply to join the presenting team. However

'If there's nobody right for this from the videos, we will not be appointing anyone. This is not a gimmick. This is real.'

9. Hopeful presenters were asked to send in a video clip of no longer than 30 seconds to topgear@bbc.co.uk by 20 July 2015. The BBC stated that the videos submitted by members of the public were not job applications. Although the submission of a video may lead to a presenter role, as Chris Evans said in announcing the search, there was 'no guarantee' that a member of the public would form one of the final presenting team, and that it will "only happen if there's anything good". This is reflected in the relevant terms and conditions.

10. The terms and conditions also make it clear that some of the submitted videos may be featured in BBC television or radio programme(s) and/or on the BBC website and/or be shared on third party services such as YouTube, Facebook, Twitter or TopGear.com.

Reasons for decision

11. 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 states/says:

'The British Broadcasting Corporation, in respect of information held for purposes other than those of journalism, art or literature.'

12. 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'.
13. 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.
14. 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)

15. 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.
16. 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.
17. 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.

18. 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.*
19. 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'.
20. 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.
21. The information that has been requested in this case concerns the number of video clip auditions to join the presenting team of 'Top Gear'.
22. The BBC has stated that the information is held by the Top Gear Production Office and put forward the following arguments for why the information is caught by the derogation.

- the total number of videos received by the BBC is a consequence of the editorial decisions that have been made to search for a presenter (or presenters) in this way. ...[it is] a direct result of creative decisions made by those responsible for creating the programme
 - In asking for the total number of videos submitted to the BBC, the applicant is asking for information which is held in connection with the engagement of talent. As the BBC has previously submitted to the Commissioner, the engagement of talent is one of many 'factors of production' in the creation of a programme. Each programme can be said to have a unique set of characteristics all of which help generate viewing and value.
 - The number of videos submitted to the BBC at the time of the request will directly correspond to the number of videos that are available to the makers of the programme for potential on-screen or on-air broadcast. This is another way in which the requested information will shape and influence the BBC's output.
 - The videos have been created by members of the public and the Commissioner has accepted on several previous occasions that user-generated content can fall within the derogation (for example, FS50525019 about the moderation of user generated content on BBC Messageboards, and FS50488408 and FS50498129 about the moderation of user-generated content on the BBC Radio 2 Facebook page and Twitter accounts). The BBC has the right to change or edit any of the submissions it receives for operational and editorial reasons and, as with all output created by the BBC, any subsequent use of this material must be in line with the BBC's Editorial Guidelines.
23. The Commissioner has accepted on several occasions that the engagement of talent constitutes a creative decision relating to the BBC's output, and the same arguments apply in this case. For example, in decision notice [FS50554121](#) the Commissioner noted:
- 'How the BBC appoints its talent and what it pays them is part of the way in which the BBC creates its programmes and this is of course clearly linked to the BBC's output, in this case news current affairs and journalistic activities.'*
24. The Commissioner has considered the explanation given by the BBC in this and previous cases and accepts that the requested information (the number of video clips and the video clips themselves) can be said to be held for the purposes of journalism. In the Commissioner's

view the information was held for purposes including editorial and creative decision making.

25. For all of the reasons above, the Commissioner is satisfied that the information requested is derogated and therefore outside the remit of the FOIA. 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

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: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

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

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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