

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 8 March 2016

Public Authority: British Broadcasting Corporation (BBC)
Address: Broadcasting House
Portland Place
London
W1A 1AA

Decision (including any steps ordered)

1. The complainant made a request to the BBC for anonymised conflict of interest forms of BBC Newsnight staff. The BBC responded to the request by explaining that the information was derogated in that it was held for the purposes of journalism, art or literature and therefore not subject to FOIA.
2. The Commissioner's decision is that this information was held by the BBC for the purposes of 'journalism, art or literature' and did not fall inside FOIA. He therefore upholds the BBC's position and requires no remedial steps to be taken in this case.

Request and response

3. On 16 January 2016 the complainant made a request for information to the BBC which read as follows:

Please provide the anonymised staff conflict of interest disclosure forms for BBC Newsnight research, editorial policy and news presenter staff, for the financial years.

1. 2013/14
2. 2014/15

3. 2015/16

4. The BBC responded to the request on 28 January 2016 when it explained that the requested information was excluded from the FOIA as it was held for the purposes of journalism, art or literature.
5. No internal review was offered.

Scope of the case

6. On 29 January 2016 the complainant contacted the Commissioner to complain about the BBC's decision to refuse to comply with his request on the basis that the requested information was derogated.

Reasons for decision

7. 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."

8. 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'.
9. 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. The Commissioner's analysis will now focus on the derogation.
10. 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)

11. 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.
12. 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.
13. 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.
14. 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.

15. 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'.

16. 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.
17. 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.
18. In this case the complainant has requested copies of conflict of interest forms which BBC Production and Editorial staff are obliged to complete as part of their employment with the BBC. In response the BBC said that it was not required to supply information held for the purposes of creating the BBC's output or information that supports and is closely associated with these creative activities. It added that maintaining its editorial independence is a crucial factor in enabling it to fulfil the function of imparting information and ideas on all matters of public interest.
19. Having considered the nature of the requested information and submissions made by the BBC in previous cases the Commissioner has found that the information falls within the third element of journalism referred to above - the maintenance and enhancement of the standards and quality of journalism.
20. In the Commissioner's view information about the impartiality and potential conflicts of interest of BBC employees clearly relates to the maintenance of standards and quality of journalism. The requested information would be used, in part at least, to ensure that Newsnight is impartial in its journalism and that its coverage is balanced. The Commissioner considers that the requested information is collected for the purposes of upholding editorial standards and in particular ensuring compliance with the BBC's editorial guidelines. Indeed the Commissioner notes that the BBC's published Editorial Guidelines deal extensively with conflicts of interest which is an important part of ensuring the integrity and objectivity of its editorial teams. Therefore the information can be said to clearly relate to the BBC's output and held for the purposes of journalism.

21. In making his complaint the complainant had expressed concern that the BBC were not effectively monitoring or managing potential conflicts of interest and that there was a public interest in disclosure. However, the Commissioner is unable to consider these issues because if the information is derogated it is not subject to FOIA and any arguments about public interest are irrelevant.
22. Overall, the Commissioner is satisfied that the requested information is held for the purposes of journalism. He considers that the information falls within the derogation and that the BBC was not obliged to comply with Parts I to V of FOIA.

Right of appeal

23. 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

24. 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.
25. 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

Paul Warbrick
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