

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 01 June 2016

Public Authority: The British Broadcasting Corporation ('the BBC')

Address: Broadcast Centre
White City
Wood Lane
London
W12 7TP

Decision (including any steps ordered)

1. The complainant requested information about the number of programmes on LGBT issues. The BBC explained the information was covered by the derogation and excluded from FOIA. 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

2. On 23 March 2016, the complainant wrote to the BBC and requested information in the following terms:
'Number of news items and programmes carried on LGBT issues carried by BBC Northern Ireland by year since 2010 to date.'
3. On 5 April 2016 the BBC responded and explained that it did not believe that the information was caught by FOIA because it was held for the purposes of 'art, journalism or literature'.
4. It explained that Part VI of Schedule 1 to FOIA provides that information held by the BBC and the other public service broadcasters is only covered by FOIA if it is held for 'purposes other than those of journalism, art or literature'. It concluded that the BBC 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 therefore would not provide any information in response to the request for information.

5. On 12 April 2016 the complainant contacted the Commissioner to complain about the way the request for information had been handled.
6. The Commissioner's view was that the requested information, if held, 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.
7. On 20 April 2016 the Commissioner invited the BBC to provide its more detailed arguments about why it believed that the information requested falls within the derogation.

Scope of the case

8. The Commissioner considers the scope of the case is to determine if the requested information is excluded from FOIA because it would be held for the purposes of 'journalism, art or literature'.

Reasons for decision

9. 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."

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. The Commissioner's analysis will now focus on 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 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)

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 will apply.
15. 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.
16. 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'.

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 (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.
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 the number of news items and programmes carried on LGBT issues by BBC Northern Ireland.
20. The BBC stated that it *'does not currently produce or hold statistical data on the number of programmes broadcast that relate, in whole or in part, to particular substantive issues or communities, such as the LGBT community. Accordingly, the BBC does not hold the information that the complainant has requested in the form in which he has requested it.'*
21. However, the BBC explained that it held the raw data (or building blocks) as it held the programmes from the relevant time-frame in its journalistic library. These programmes are used by journalists to facilitate future journalistic work and in the development of new output. The programmes are also used by editors for potential re-publication and who use the information as a means of ensuring that the BBC has complied with its obligations under the BBC Charter and other regulatory requirements.
22. The Commissioner considers that there is a sufficiently direct link between the archived programmes and the purposes of journalism and therefore satisfies the test for derogation.

23. The BBC went on to consider if aggregated data from derogated programmes (the raw data) would also be derogated.

'It is well established that aggregated statistical information which is drawn from derogated information is, itself, derogated. Thus, Irwin J held in BBC v Information Commissioner [2010] EMLR 6 at para 93:

"...information which comes to be aggregated continues to be held within the BBC at an operational level and for journalistic, literary or artistic purposes".'

24. However, the BBC has stated that it does not hold statistical data on 'LGBT issues' and could not be produced without detailed, subjective analysis.

- The BBC's digital archive of journalistic material is not collated by particular substantive issues, such as "LGBT issues"
- In order to identify the number of programmes that deals with those issues, the BBC would need to review each and every programme and form a subjective view as to whether it engages "LGBT issues".
- It is not easy to determine what amounts to "LGBT issues". Many issues of concern to the LGBT community will concern other communities as well.
- Many programmes will deal with LGBT issues, or depict LGBT people, in the course of a programme that deals with a broader range of topics. In such circumstances, it will be difficult to determine whether a programme deals with an "LGBT issue". For example, a programme might depict a number of characters, including LGBT persons, but where "LGBT issues" are not at the forefront.

25. The Commissioner accepts that the BBC does not hold the statistical data and even if it did, then the statistical data would be derogated.

26. Having applied the approach to the derogation set out by the Supreme Court and the Court of Appeal, which is binding, the Commissioner is satisfied that the requested information falls under the definition of journalism and is therefore derogated. The derogation is engaged as soon as the information is held by the BBC to any extent for journalistic purposes.

27. In conclusion, and for all of the reasons above, the Commissioner finds that the information falls within the derogation and that the BBC is not

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obliged to comply with Parts I to IV of the FOIA in respect of the complainant's request.

Right of appeal

28. 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: <http://www.justice.gov.uk/tribunals/general-regulatory-chamber>

29. 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.
30. 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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