

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 25 July 2017

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 users of email alerts. 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. She therefore upholds the BBC's position and requires no remedial steps to be taken in this case.

Request and response

2. On 13 May 2017 the complainant sent the following information request to the BBC:

'How many users were registered for getting the instant email alert of the important news events?'

3. On 6 June 2017 the BBC responded to the request. The BBC 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. On 12 June 2017 the complainant contacted the Commissioner to complain about the way the request for information had been handled. The complainant explained that he had been a registered user of the BBC email alert of important news facility and when the BBC stopped this facility he complained and requested reasons. This FOIA request follows that complaint.

5. The Commissioner's view was that the requested information is derogated because it is clearly held for the purposes of the BBC's journalism. She 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:

'The email alert is a very useful facility for many people like me who have a work email address and the same time do not access any social media during work time.

BBC is a public corporation that is run by licence payers money. Any decision taken by BBC should be transparent and justifiable.

The decision to stop the email alerts is only can be justifiable if the number of users using this facility is very less.'

6. On 28 June 2017 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

7. 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

8. 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."

9. 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'.
10. 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.

11. 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)

12. 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.
13. 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.
14. 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.
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

“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'.

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 information requested concerns the number of users registered to receive email alerts of important news events following a complaint that the service had been discontinued.
19. The BBC argued that the requested information was held for editorial purposes to run and monitor the BBC's breaking news email alerts system. The BBC maintained a record of individuals who had subscribed to the service:
 - to ensure BBC content is made accessible to individuals across a range of medium.
 - to monitor the use and availability of BBC services and content
 - to evaluate how and to what extent users respond to BBC content across different medium
 - to monitor the prioritisation of news content and the relevance of different news content to the preferences of registered users
 - to tailor news platforms to the public in a way that is responsive to how they prefer to consume news.

20. The BBC took an editorial decision to discontinue the service. The reasons '*pertain to the selection and distribution of news content on BBC platforms for Licence Fee payers*'. The BBC stated that it continues to provide similar services to users.
21. The Commissioner has previously accepted the link between broadcast output decisions, the whole editorial process and the purposes of journalism, art and literature in his decision notice (https://ico.org.uk/media/action-weve-taken/decision-notices/2015/1432437/fs_50586208.pdf). The information requested concerned dates when a specific radio programme was contracted, allocated its particular slot and when its presenter was contracted. The Commissioner considered that there was a clear and direct link between the information being sought and the editorial activities the BBC undertakes to produce its journalistic output and found that the information fell within the derogation.
22. 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 Commissioner sees no basis for deviating from the approach as the complainant argues; the information clearly falls within the derogation. The derogation is engaged as soon as the information is held by the BBC to any extent for journalistic purposes.
23. 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 obliged to comply with Parts I to IV of the FOIA in respect of the complainant's request.

Right of appeal

24. 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

25. 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.
26. 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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