

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 30 October 2018

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

Address: BC2 A4 Broadcast Centre
White City
201 Wood Lane
London
W12 7TP

Decision (including any steps ordered)

1. The complainant has requested a copy of the Balen Report. The BBC explained the information was covered by the derogation and excluded from 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. She therefore upholds the BBC's position and requires no remedial steps to be taken in this case.

Request and response

3. The complainant wrote to the BBC on 3 April 2018 and asked for:

'Please provide me with a copy of the Balen Report on BBC coverage of the Israeli-Palestinian conflict commissioned by Richard Sambrook, then Director of BBC News, in 2003 and completed in July 2004.'

At the time of writing, BBC news programmes are leading on, and devoting considerable time to, accusations of widespread anti-Semitism within the Labour Party. This is a controversy that has been developing for some time and is likely to continue to be prominent in current affairs for some time to come. A significant aspect of news coverage is the extent to which criticism of Israel, and anti-Israel sentiment, amounts to or is inspired by anti-Semitism. The BBC's reporting has included archive

recordings of politicians, and others, expressing controversial views on this subject, some of these dating back many years.

For over a decade there has been criticism that the BBC's reporting of the Middle East conflict has been pro-Palestinian and anti-Israel. It is therefore reasonable that the BBC should be subject to the same level of scrutiny as the people who they are now reporting on as possibly holding anti-Semitic views, and that this should include making archival documents that it holds about its own conduct publicly available.

As the UK's publicly funded leading provider of broadcast and on-line news, the BBC has certain obligations set out in its Royal Charter and the associated agreement with the Secretary of State for Culture Media and Sport. These include a duty of impartiality and also of openness and transparency.

In January 2005 Mr Steven Sugar, a respected London solicitor, made a request to the BBC under the terms of the Freedom of Information Act for a copy of the Balen Report. This was refused and led to litigation spanning seven years which culminated in a judgement handed down by the Supreme Court in February 2012. The cost to the licence fee payers, and damage to the BBC's reputation, was considerable.

The Supreme Court found that, at the time that Mr Sugar requested the Balen Report in 2005, it was held for the purpose of journalism and therefore exempt from the requirements of the Freedom of Information Act. However a significant part of that judgement was devoted to determining the meaning of 'the purpose of journalism' and how it should be applied under the Act. This greatly assisted me in October 2013 when, after six years of litigation the BBC disclosed information I had requested about a seminar entitled Climate Change – the Challenge to Broadcasting in face of an impending Information Tribunal hearing. Once again, the cost to the licence fee payer and damage to the BBC's reputation resulting from the delay in disclosing the requested information was considerable.

The Supreme Court Judgement, was unequivocal that the BBC's exemption under the Act relating to information held for the purpose of journalism cannot apply to information that, although it may initially have been held for the purpose of journalism, and with the immediate object of using it for that purpose, through the passage of time, is instead held for archival purposes when it is requested.

I consider that it would be unreasonable, and indeed absurd, for the BBC to continue to withhold the Balen Report some 14 years after its completion thereby risking harm to its reputation and further unnecessary costs to the licence fee payer. I look forward to hearing

from you promptly, as required by the legislation, and in any case within twenty working days.'

4. The BBC responded on 27 April 2018. It explained that *'the Balen Report remains relevant to ongoing reporting on Israeli and Palestine, as well as reporting on allegations of anti-Semitism including those raised by you in your request. These remain live issues of public interest.'*
5. 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.

Scope of the case

6. The complainant contacted the Commissioner on 15 May 2018 to complain about the way the request for information had been handled. In particular, he challenged the operation of the derogation in this case.
7. He argued that *'I do not consider that the BBC's reasons for refusing to disclose the Balen Report some fourteen years after its completion, as expressed in their refusal letter, satisfy the requirements of the legislation...'*
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 information that has been requested in this case is for a copy of the Balen Report from 2004.
19. The Commissioner notes that this is the same Report considered by the Supreme Court in 2012. In challenging the application of the derogation, the complainant did not seek to contest the validity of the Supreme Court's findings but argued that although the Balen Report may have been held for journalistic purposes in early 2005, there is not sufficient evidence to indicate that this was still the case in 2018:

'Even if the Balen Report is still consulted from time to time within the BBC — for instance in the course of training and maintaining standards — it still falls firmly within the categories of information identified by Lord Phillips as not being held for the purpose of journalism, although it may have originally been acquired for those purposes. It is archival material that is still held in order to 'revisit, or produce evidence of, past events' and it is no longer 'work in progress'. Lord Phillips is clear that archival material does not fall within the BBC's exemption from the FOIA, and three of his fellow justices intimated their agreement. (Sugar paras 66-67)'

20. The BBC stated that the Balen Report remains of significant editorial value to the BBC. The author of the Report, Mr Balen, is regularly asked to provide guidance and context on the Report. It is held by the BBC's News division and continues to be used by members of the BBC's News

and editorial teams: *'there is a direct connection between the purpose for which the information is held – to monitor the editorial quality of BBC news output on the Israeli-Palestinian conflict - and the legislative purpose that supports the journalism derogation.'*

21. The BBC has explained that the information falls under the third element explained above (the maintenance and enhancement of the standards and quality of journalism -particularly with respect to accuracy, balance and completeness):
 - The information is held for the purpose of moderating and refining BBC output to ensure content meets BBC standards in order to produce quality programming. As Lord Wilson described in paragraphs 6-7 of the *Sugar v BBC* judgment, the Report was commissioned by then Director of News at the BBC, Mr Richard Sambrook. Mr Sambrook commissioned the report from Mr Balen in Mr Balen's role as a senior editorial advisor to include, for instance, 'practical suggestions, perhaps only tentative, for improvement of the quality of its coverage'.
 - The Balen Report is used as a benchmark to assess present and future coverage of an issue that sadly remains live in world politics. The Report includes analysis of best practice approaches to reporting on the conflict and provides a set of important editorial values to be followed by the BBC in future reporting. As such, the contents of the Report continue to be of significant value to the work of the BBC News team.
22. In light of the submissions made by the BBC in this and a previous case (https://ico.org.uk/media/action-weve-taken/decision-notices/2013/893030/fs_50486137.pdf) which also considered a request for the Balen Report the Commissioner accepts that decisions concerning the Balen Report fall under the third element explained above - the maintenance of standards and quality. The information requested therefore falls squarely within the definition of journalism and the Commissioner is satisfied that the information requested is derogated.
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: <http://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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