

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 30 August 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 YouTube viewing figures. 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 7 March 2018 and asked:
'Please provide Pact with a copy of:
 - *Quarterly BBC3 iPlayer viewing figures for 2017 (aggregated live and catch up figures)*
 - *The top ten BBC3 programmes for 2017 with viewing figures attached for both BBC3 Iplayer and YouTube viewing figures for these ten programmes both worldwide and just in the UK*
 - *Total YouTube viewing figures of BBC3 content worldwide and also just UK in 2017.'*

4. The BBC responded on 6 April 2018. 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'.
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. It therefore would not provide any information in response to the request for information.
6. On 14 May 2018 the complainant wrote to the BBC making a refined request:

*'YouTube viewing figures are in the public domain and should not be subject to exemption. On that basis, please provide Pact with a copy of:

YouTube viewing figures for the top ten BBC3 programmes in 2017, both worldwide and just in the UK

Total YouTube viewing figures of BBC3 content worldwide and also just UK in 2017.'*
7. On 25 May 2018 the complainant contacted the Commissioner to complain about the way the request for information had been handled.
8. The Commissioner invited the complainant to withdraw her case on 13 June 2018 as it was her opinion that the requested information was held for the purposes of journalism, art and literature and that the BBC was correct in its refusal to disclose this information.
9. However, the complainant declined to withdraw her case and wrote to the Commissioner on 11 July 2018 to reiterate the fact that she did not believe that her request was held for the purposes listed in Schedule 1. She provided a number of arguments and referred to the previous appeal letter sent to the BBC on 14 May refining the request to only cover the YouTube viewing figures that are in the public domain.

Scope of the case

10. 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

11. 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.”

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. The Commissioner’s analysis will now focus on 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 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)

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 will apply.

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.” 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’.”

19. 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.
20. In this case, the information that has been requested is the viewing data from YouTube.
21. The BBC has explained how it holds YouTube data:

‘While there may be publicly available viewing statistics available on YouTube these are not collated by the BBC. As this is not recorded information held by the BBC, section 1(1) of FOIA is not engaged.

The BBC does, however, receive some YouTube viewing statistics from Google in relation to BBC channels. This is information that the BBC holds for the purposes of journalism.'

22. The BBC confirmed that the requested information was held by the BBC's Marketing and Audiences (M&A) team.
23. The BBC stated that the M&A team '*uses the information – in conjunction with relevant production and commissioning teams within content areas like BBC 3 – to determine the creation of content; scheduling of content; and its promotion.'*
24. The BBC argued that the requested information falls within the second limb of the Information Tribunal's analysis – editorial judgement:

'The information relates to how the BBC seeks to monitor and promote its output, as well as how it strives to increase the number of people accessing BBC programmes and accessing BBC online services.

In determining the allocation of the production budget and air time for content across BBC channels, consideration is given to the BBC's corporate objectives, the annual marketing strategy and priorities, audience analytics and how BBC content has performed. M&A work with editorial teams to achieve this. M&A also reviews the marketing campaigns that have been carried out by the BBC and the impact that they have had and this in turn feeds into future marketing strategies and content and strategies. In this way, the decisions that are made regarding the allocation of the production budget and air time are editorial in nature.'

25. In its submissions to the Commissioner the BBC referred to previous decision notices where the Commissioner had upheld the link between audience viewing figures and the purposes of journalism, art and literature. (For example, see case reference FS50590819 https://ico.org.uk/media/action-weve-taken/decision-notices/2015/1560055/fs_50590819.pdf)
26. The Commissioner has accepted on a number of occasions (such as in case reference FS50314106 https://ico.org.uk/media/action-weve-taken/decision-notices/2010/566958/fs_50314106.pdf) that the BBC has a fixed resource in the Licence Fee and resource allocation goes right to the heart of creative decision making. The Commissioner is satisfied that the same rationale applies in this case.
27. 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. The conclusion reached by the Commissioner is also consistent with her previous decision notices.

28. In conclusion, and for all of the reasons above, 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

29. 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>

30. 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.
31. 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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