

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 1 July 2019

Public Authority: British Broadcasting Corporation

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

Decision (including any steps ordered)

1. The complainant has requested information relating to the BBC's lack of coverage of a Judicial Review. The BBC said that the requested information was covered by the derogation and excluded from FOIA.
2. The Commissioner's decision is that this information is held by the BBC for the purposes of 'journalism, art or literature' and does not fall within the scope of FOIA. She therefore upholds the BBC's position and requires no remedial steps to be taken in this case.

Request and response

3. On 12 May 2019 the complainant sent the following information request to the BBC:

"I would like to make an official request for information surrounding the BBC coverage of the Judicial Review between the English Democrats and the Prime Minister plus the Secretary of State for Exiting the European Union, case No CO/1322/2019.

The information I would like is as follows:

1/ communications between the civil service and the BBC regarding coverage of this case,

- 2/ communications between the governing body of the BBC and the main TV and radio news programmes, including local and regional radio and TV news and current affairs programmes regarding the case coverage.
- 3/ any communications between the Government and the BBC regarding this case, including the BBC Home Affairs Department”.
4. On 15 May 2019 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’.

Scope of the case

5. The complainant contacted the Commissioner on 29 May 2019 to complain about the way his request for information had been handled.
6. The Commissioner considers the scope of the case is to determine whether the information requested is excluded from FOIA because it would be held for the purposes of ‘journalism, art or literature’.

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 ‘the derogation’.
9. 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)

10. 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.
11. 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.
12. 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.
13. 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.”

14. 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'.

15. 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.
16. The complainant has argued that his request falls outside of the composite expression 'journalism, art, or literature' as defined in the Supreme Court Judgment of 2012. He has said that he asked for information regarding the communications on the coverage of this case rather than anything to do with the journalistic process. The intent of the request was to discover the reason for the complete lack of journalism. He has argued that his request is regarding the underlying policy rather than the output, and it could not fall under the 'editorial' definition of journalism as there has been no coverage at all, and therefore no need for the exercise of editorial judgement on the selection of which matters to broadcast or publish. If there is an underlying policy to ban any coverage then no editorial input is necessary, and there is no output.
17. The Commissioner considers that the material relates to information regarding the coverage of the case and in particular the selection of material for broadcast (even if this is a decision not to broadcast material).
18. The complainant has noted that the BBC is a public authority under FOIA in respect of information held for purposes other than those of journalism, art, or literature. He has therefore argued that if there have been communications between Government departments and the BBC instructing that the policies outlined in the BBC Charter are to be ignored or suspended for this news story, then the purpose is not journalistic, it is political, and therefore the request falls under FOIA.
19. The requested information only needs to be held 'to any significant degree' for the purposes of journalism, art or literature. It can be held for other purposes as well as journalistic purposes and would still fall under the derogation.
20. The complainant has said that there is no doubt that, were the case to succeed, it would have a massive impact on the UK and therefore it is a newsworthy story that should be covered by the BBC.

21. These are public interest arguments that are not relevant to determining whether the requested information falls under the derogation.
22. The information requested, relating to coverage of a Judicial Review, is information held for the purpose of 'journalism, art or literature' as it is linked to decisions regarding BBC output. It relates to the selection of material for broadcast. This falls squarely within this definition.
23. The Commissioner has therefore found that this information is held for the purposes of journalism, art or literature and that the BBC was not obliged to comply with Parts I to V of FOIA.

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@Justice.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.....

Gemma Garvey
Senior Case Officer

Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF