Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 7 December 2020

Public Authority: British Broadcasting Corporation (BBC)
Address: Broadcasting House
Portland Place
W1A 1AA

Decision (including any steps ordered)

1. The complainant submitted a three part request for information regarding the BBC's "Own It" app. The BBC provided information in response to one part of the request. It refused to comply with the remaining parts of the request as it considered that the requested information was covered by the derogation and was therefore outside the scope of the FOIA. The complainant disputed that the information was derogated.

2. The Commissioner's decision is that the information was held by the BBC for the purposes of journalism, art or literature and so was not covered by the FOIA. She therefore upholds the BBC's position and requires no remedial steps to be taken in this case.

Request and response

3. On 27 April 2020, the complainant wrote to the BBC and requested information in the following terms:

> *"I wish to know the latest data regarding the 'Own It' app developed and distributed by the BBC:*
>
> *a) How much did the development of this app cost? (Please include ALL internal and external costs)*

b) How many times has this been downloaded? (Not just viewed)

c) Which directorate or executive dept. authorised its development and the expenditure?"

4. The BBC responded on 18 May 2020 and stated that it considered the information requested at parts a) and b) was held for derogated purposes and hence fell outside of the FOIA. The BBC provided the information requested at part c) of the request, but stated that individuals' names were exempt under section 40(2) of the FOIA (personal information). The Commissioner notes, however, that the names of individuals were not requested.

5. The complainant wrote to the BBC on 21 May 2020 to request an internal review and expressed his dissatisfaction with the response to parts a) and b) of the request.

6. The BBC responded on 22 May 2020 and explained that in cases where the requested information was not caught by the FOIA it was not obliged to carry out a review.

Scope of the case

7. The complainant contacted the Commissioner on 22 May 2020 to complain about the way his request for information had been handled.

8. The Commissioner's initial assessment was that the information the complainant requested was derogated and that, as such, the BBC was not obliged to respond to the request under the FOIA. The Commissioner wrote to the complainant to advise him of her preliminary view and invited him to withdraw his complaint. However, the complainant did not accept the Commissioner's preliminary view and the Commissioner is therefore formally setting out her decision in this notice.

9. The scope of this case and the following analysis is to consider whether the information requested at parts a) and b) of the request was derogated and was therefore outside the scope of the FOIA.

Reasons for decision

10. Schedule One, Part VI of the FOIA provides that the BBC is a public authority for the purposes of the 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."

11. This means that the BBC has no obligation to comply with Parts I to V of the FOIA where information is held for the purposes of journalism, art or literature. The Commissioner calls this situation "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 the 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."

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 the 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. In this case the information that was requested was the development costs and download figures for the Own It app.

19. Own It is a BBC Childrens and Education initiative which launched in 2017. This initiative includes the Own It app, which is a wellbeing app aimed at children and young people, which was available to be downloaded from 2019.

20. In correspondence to the Commissioner the BBC explained:

"The Own It app is a means of delivering the BBC's core public purposes of supporting learning for people of all ages and producing creative, high quality and distinctive output. In particular, it supports the BBC's Royal Charter[1] mandate to 'provide specialist educational content to help support learning for children and

[1] http://downloads.bbc.co.uk/bbctrust/assets/files/pdf/about/how_we_govern/2016/charter.pdf.

teenagers across the United Kingdom'. It is also an example of the discharge of the BBC's Royal Charter mandate to take 'creative risks, even if not all succeed, in order to develop fresh approaches and innovative content'. As explained in the background above, the Own It app incorporates specially commissioned content. The app is also a mode of delivery of output. In this way, the Own It app is part and parcel of the BBC's creative output and offer to children and young audiences."

Development costs

21. With regard to part a) of the request, the BBC explained that the budget for the development of the app, which includes specially commissioned content, forms part of the overall programme budget for BBC Childrens and Education.

22. It argued that the requested information fell within the second and third limbs of the Information Tribunal's analysis, as referenced at paragraph 16 above. The BBC said:

"This is because information about the costs involved in the development of the app, which features specially commissioned content, is held for the purposes of managing the budget and resources of the Own It programme area. In particular, this information informs the editorial processes of reviewing and planning for future investment in the technology behind the app, as well as the content that is commissioned for the app. At a broader level, this information has a flow on effect in terms of the decisions that are made regarding the allocation of resources to other programme areas within BBC Childrens and Education.

In Sugar, the Supreme Court accepted that 'if financial information is directly related to the making of a particular programme, or group of programmes, it is likely to be held for purposes of journalism[2]'"

23. The BBC argued that it had the right to protect its journalistic and editorial independence by maintaining a private space in which to produce its output. It stated that this extended to decisions relating to, and information about, the amount of resources allocated in creating

[2] Sugar v BBC [2012] UKSC 4 at [42], per Lord Wilson, https://www.bailii.org/cgibin/format.cgi?doc=/uk/cases/UKSC/2012/4.html&query=(sugar)+AND+(information)+AND+(commissioner).

output, and the mode of delivery of that output. The ability of the BBC to make such editorial and creative decisions freely is central to freedoms which the derogation is designed to protect.

24. In its submissions to the Commissioner the BBC referred to several previous decision notices (including FS50590819[3], FS50422017[4] and FS50314106[5]) where the Commissioner found that information regarding costs was related to editorial decisions and therefore the BBC's output.

25. The Commissioner has accepted on a number of occasions that the BBC has a fixed resource (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.

26. The Commissioner recognises that any costs or payments relate to editorial decisions about the content that the BBC wants to offer its customers and this in turn relates to the overall editorial decision making process and resource allocation. It is therefore linked to the BBC's output.

Download figures

27. With regard to part b) of the request, for information regarding the number of times the Own It app has been downloaded, the BBC stated that this was for audience measurement information, akin to traditional listening and viewing figures. It argued that the information was held for editorial and review purposes, again falling within the second and third limbs of the journalistic derogation.

28. The BBC stated:

> *"This information is used by Own It programme executives and content commissioners to learn about the app's success, particularly with regards to the app's uptake and use by children*

[3] https://ico.org.uk/media/action-weve-taken/decision-notices/2015/1560055/fs_50590819.pdf

[4] https://ico.org.uk/media/action-weve-taken/decision-notices/2012/703250/fs_50422017.pdf

[5] https://ico.org.uk/media/action-weve-taken/decision-notices/2010/566958/fs_50314106.pdf

and young people. As the Own It app is a new product, this information has a direct bearing on the level of future investment in the app's technology and the content commissioned for the app. At a higher level, this information also informs the BBC's learning and understanding of the effectiveness of using emerging technologies and innovating approaches, and how best to use such technologies, to better connect with children and young audiences and discharge the BBC's public purposes.

A key part of the BBC's work is obtaining feedback on its products and services (both ongoing and experimental), reflecting on that feedback, and making informed decisions about the quality and value of that output and how to improve that output. Audience measurement information is one way that the BBC measures an audience's reaction to output and, whether alone or combined with other feedback, this is then used to inform decisions about what content is created and how content should be delivered to audiences. The audience measurement information for the Own It app is held for the purposes of allowing the BBC to make informed editorial decisions and, as a prerequisite of it doing so, to undertake exacting reviews of the quality of its output and the effectiveness of new technologies in delivering content and connecting with children and young people."

29. The BBC argued that information about download figures was no different to information about listening and viewing figures. It explained that the Own It app was an audience facing app that featured specially commissioned BBC content. Information about the number of times the app has been downloaded informs the BBC's assessment of the app's success. In turn, this has a direct bearing on decisions regarding the level of future investment in the app's technology and the content that is commissioned for the app.

30. The Commissioner has previously accepted that listening and content viewing figures were held for derogated journalistic purposes. For example, the BBC referenced a previous case (FS50749893[6]) in which the Commissioner considered a request for BBC Three iPlayer and YouTube viewing figures. In that case the Commissioner accepted the BBC's submissions that the information related to how the BBC sought

[6] https://ico.org.uk/media/action-weve-taken/decision-notices/2018/2259725/fs50749893.pdf

to monitor and promote its output, as well as how it strove to increase the number of people accessing BBC programmes and accessing BBC online services.

31. Additionally, the BBC argued that the information was also used in assessing the success of the BBC's promotional activities for the Own It app. The BBC's Marketing and Audiences division (M&A) is responsible for pan-BBC marketing activities and decides which content will be promoted to audiences in any given year. The monies spent on promotional activity come from M&A's budget.

32. The BBC told the Commissioner that it had been carrying out marketing campaigns in respect of the Own It app, both on the BBC's channels and externally. Information about the download figures was a key indicator of the success of the BBC's promotional activities and was used to inform the BBC's decisions about the allocation of M&A's budget and air time for trails[7] dedicated to the Own It app. This information therefore informs M&A's editorial and creative decisions, including the prioritisation of particular marketing campaigns.

33. The derogation is engaged as soon as the information is held by the BBC to any extent for journalistic purposes. In this case, the Commissioner is satisfied that the information requested at part b) was held for the purposes of facilitating editorial decisions and journalistic review and was therefore directly linked to the BBC's journalistic output.

Conclusion

34. The Commissioner understands that the complainant has concerns about the Own It app. However, she can only consider concerns within the scope of the FOIA and therefore the matter of derogation is considered first. The Commissioner is unable to compel the BBC to provide information outside its obligations under the FOIA.

35. 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 information requested at parts a) and b) of the request was held for the purposes of journalism, art or literature.

[7] The BBC refers to promotional slots in its own channel schedule as trails as they are not advertisement in the traditional sense.

36. In conclusion the Commissioner finds that the information was covered by the derogation and, as a result, the BBC was not obliged to comply with Parts I to V of the FOIA in relation to parts a) and b) of the request.

Right of appeal

37. 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

38. 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.

39. 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 ……

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