

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 8 September 2014

Public Authority: British Broadcasting Corporation
Address: 2252 White City
201 Wood Lane LONDON W12 7TS

Decision (including any steps ordered)

1. The complainant has requested information about its television news bulletins. The British Broadcasting Corporation (BBC) said that this information is covered by the derogation and is exempt from the FOIA.
2. The Commissioner's decision is that the BBC holds the requested information for the purpose of journalism. It is therefore covered by the derogation and exempt from the FOIA.
3. The Commissioner does not require the public authority to take any further steps.

Request and response

4. On 19 July 2014, the complainant wrote to the BBC and requested information in the following terms:

"Until a few weeks ago, the background of all BBC TV News programmes, was an impressive birds-eye panoramic view of 100 or so staff - always in sharp focus.

This has now changed to a "desk top level" view, with only a few staff visible (up to five?) - always out of sharp focus. What was the reason for this change?"

5. The BBC responded on 22 July and said that it did not consider that this information was caught by the FOIA because it was held for the purposes of 'art, journalism or literature'.

Scope of the case

6. The complainant contacted the Commissioner on 14 August to complain about the way their request for information had been handled. The complainant was not convinced that the BBC can withhold the information for the reason it had given. They consider that the BBC is withholding the information because news staff, who were formally visible behind the newscasters, were not being adequately supervised, and that this would concern licence fee payers.
7. In a subsequent email to the Commissioner the complainant provided a fuller explanation. They explained that they had telephoned the BBC on 10 July 2014 to complain that BBC news staff, who were on the newsroom floor and visible in a news bulletin's panoramic, background view, were not being adequately supervised. These staff appeared to be participating in social rather than work-related activities. Within one or two days of this phone call the panoramic view was replaced with a desktop level view. The complainant considers that the BBC changed the background to its news bulletins as a result of their complaint and that to release related information would embarrass the BBC as it would reveal a staff management problem.
8. The Commissioner focussed his investigation on whether the requested information has been withheld because, as the BBC has said, it is not covered by the FOIA and is therefore exempt from disclosure.

Reasons for decision

9. Schedule One, Part VI of the 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 says:
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.
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 said 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 applied.
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. 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. The information that has been requested in this case concerns how the BBC presents its television news bulletins.
19. The Supreme Court has defined 'journalism' as 'output on news and current affairs'. The Commissioner considers that there is a direct link between the information being sought – the reasons why the BBC changed the background to its news bulletins – and the BBC's journalistic activities. Specifically, the creative activities it undertakes to produce its journalistic output.
20. Consequently, he has found that the information falls within the derogation and that the BBC is not obliged to comply with Parts I to V of the FOIA in respect of the request.

Right of appeal

21. 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

22. 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.
23. 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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