

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 18 February 2013

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

Address: 2252 White City,
201 Wood Lane
London
W12 7TS

Decision (including any steps ordered)

1. The complainant has requested information about numbers of disabled presenters on specific BBC broadcasts. The BBC explained the information was covered by the derogation and excluded from the FOIA.
2. The Commissioner's decision is that this information was held by the BBC genuinely for the purposes of 'journalism, art or literature' and did not fall inside the FOIA. He 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 18 October 2012 and asked for:
*"1) The number of new DISABLED female presenters on BBC TV News Channel since the 1st of May 2011?
2). The number of new DISABLED female weather presenters on BBC TV News Channel since the 1st of May 2011?
3). The number of new DISABLED female presenters on BBC ONE since the 1st of May 2011 ?
4). The number of new DISABLED female presenters on BBC TWO since the 1st of May 2011?
5). The number of new DISABLED female presenters on BBC THREE since the 1st of May 2011?
6). The number of new DISABLED female presenters on BBC FOUR since the 1st of May 2011?"*

4. The BBC responded on 18 October 2012. It explained that it believes that the information requested is excluded from the FOIA because it is held for the purposes of 'journalism, art or literature.' 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 the 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.

Scope of the case

5. The complainant contacted the Commissioner on 19 October 2012 to complain about the way his request for information had been handled. In particular, he challenged the operation of the derogation in this case.
6. The complainant argued that his request is made in relation to the Equality Act and is requested for purposes *other* than those of journalism, art or literature.

Reasons for decision

7. 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."
8. This means that the BBC has no obligation to comply with Part I to V of the FOIA where information is held for 'purposes of journalism, art or literature'. The Commissioner calls this situation 'the derogation'.
9. 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.
10. The scope of the derogation has been considered by the Court of Appeal in the case *Sugar v British Broadcasting Corporation and another* [2010] EWCA Civ 715. The leading judgment 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)*

11. 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.
12. 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.
13. 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.
14. 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."

15. 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 (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.
17. The Commissioner therefore 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. In his view, art is comprised of the same three elements, that is:
 - The preparation and creation of the artistic output.
 - The editorial process.
 - The maintenance and enhancement of the standards and quality of artistic output.
18. The information that has been requested in this case is about presenters of BBC shows.
19. In light of the present submissions of the BBC the Commissioner understands that the requested information is held for a number of purposes. The Commissioner recognises that information about BBC presenters is used in the analysis of and review of individual programmes and therefore is held for the purposes of editorial decision making.
20. The Commissioner has considered all of the information before him, but for conciseness he has focussed on explaining why he has decided that the information requested falls within the derogation.
21. In determining whether the information is held for the purposes of art, the Commissioner has considered the following factors:
 - The purpose(s) for which the information was held at the time of the request;
 - The relationship between the purposes for which the information was held and the BBC's output on news and current affairs, including sport, and/or its journalistic activities relating to such output.

22. When considering the purposes for which the information was held, the BBC has explained that information it holds about its presenters supports the creation of programme content in the following way. The engagement of presenters is one of many “factors of production” in the creation of a programme; each programme can be said to have a unique set of characteristics all of which help generate viewing and value.
23. When considering the connection between the information itself and its output on news and current affairs and/or its journalistic activities relating to such output, the BBC has explained that the information requested is about the people who appear on the BBC’s broadcast output and therefore is information about the BBC’s ‘talent’. The BBC explained that the term ‘talent’ encompasses a wide range of individuals from lead actors, presenters, DJs and pundits to musicians and ‘walk on part’ actors, from news correspondents to comedians, entertainers, celebrity chefs and sports personalities.
24. When considering the connection between the information itself and the programmes’ content, the BBC has explained that decisions about the engagement and selection of talent are creative in nature, involving the review of such considerations as the skills of that presenter and the particular abilities that they will bring to the role that the BBC is asking of them. The engagement of one presenter over another is therefore **an editorial decision, closely related to** the editorial and creative requirements of the programme itself, and one which necessarily influences the subsequent output.
25. Overall, the Commissioner considers that the BBC has evidenced that it genuinely holds the information for the purposes of art. He is content that the information is held for the purposes outlined in the second point of the definition namely ‘*the analysis of, and review of individual programmes*’. He considers that the information falls within the derogation.
26. For all of the reasons above, the Commissioner is therefore satisfied that the information requested is derogated. Therefore, the Commissioner has found that the request is for information held for the purposes of art and that the BBC was not obliged to comply with Parts I to V of the FOIA.

Right of appeal

27. 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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

28. 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.
29. 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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