

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 7 August 2013

Public Authority: British Broadcasting Corporation (BBC)

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

Decision (including any steps ordered)

1. The complainant has requested a copy of the Balen Report "Reporting the Middle East" paper JB(04)40 (the Balen Report). The BBC explained that the information was covered by the derogation and excluded from FOIA. The Commissioner's decision is that the Balen Report is held by the BBC for the purposes of 'journalism, art or literature' and does not fall inside FOIA. The Commissioner therefore upholds the BBC's position and requires no remedial steps to be taken in this case.

Request and response

2. On 22 December 2012 the complainant wrote to the BBC and requested an electronic version of the following document:

The Balen Report "Reporting the Middle East" paper JB(04) 40

3. The BBC responded on 22 January 2013. It advised that the Balen Report is excluded from FOIA because it is held for the purposes of 'journalism, art or literature'.
4. The BBC explained that Part VI of Schedule 1 to FOIA provides that information held by both it and other public service broadcasters is only covered by FOIA if it is held 'purposes *other* than those of journalism, art or literature.' It stated that the BBC is 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. By way of background, the BBC informed the complainant that

a decision not to disclose the Balen Report had recently been upheld by the Supreme Court and provided a link to the judgment.

Scope of the case

5. The complainant contacted the Commissioner on 16 February 2013 to complain about the way the BBC handled his request. Specifically, he has challenged the BBC's view that the Balen Report is derogated.
6. The question for the Commissioner is therefore to decide whether the Balen Report is covered by FOIA.

Reasons for decision

7. Schedule One, Part VI of FOIA provides that the BBC is a public authority for the purposes of the legislation 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 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 information is caught by the derogation.
10. 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 effect of the judgment on the approach to the derogation has been outlined in a number of the Commissioner's previous decisions (see, for example, paragraphs 11 to 18 of the decision notice issued on case [FS50491386](#) (19 June 2013)).
11. The report requested in this case is the same information considered by the Supreme Court. In challenging the application of the derogation, the complainant does not seek to contest the validity of the Supreme Court's findings. Rather, he considers that the BBC has overlooked the material differences between the circumstances as they stood at the

time of the request in the *Sugar* case (February 2005) and the request in question here (December 2012). In other words, the complainant has argued that while the Balen Report may have been held for journalistic purposes in early 2005, there is not sufficient evidence to indicate that this was still the case in 2012.

12. The Commissioner accepts that, in principle, the purpose for which information is held by a public authority may vary over time. He has therefore asked the BBC to clarify how the Balen Report is still used and demonstrate that at the time of the request a link existed between the Balen Report and a journalistic purpose.
13. In response, the BBC has explained that:

"[The Balen Report] continues to be held within the BBC News division where the contents are used to inform the post-transmission review of broadcast output, and as a point of reference and source for editorial considerations in respect of future coverage.

Key to this is the use of the report as the benchmark for assessing present and future coverage. It should be borne in mind that the political situation in respect of the Israeli-Palestinian conflict is still in place, as are the associated reporting challenges; the analysis, observations and commentary contained in the report therefore remain relevant to the present time. The author, Malcolm Balen, describes the report as 'a template for future coverage' [...]"

14. The BBC went on to provide a number of examples of the way in which the Balen Report was utilised within the News Division and advised that the Report was made available to all Middle East correspondents and senior news staff.
15. In respect of the Balen Report itself, the BBC has noted the contents are not simply a critique of coverage specific only to the time it was produced. Instead, the BBC has informed the Commissioner that through its analysis, commentary and findings, the Balen Report sets out the best practice for coverage of the region. In essence, the Balen Report sets the model for future coverage and helps establish a basic set of editorial values for the journalistic coverage of the region. The author himself has also described the point of the Report as being 'to aim at a timeless set of standards and values to inform our reporting of the conflict, as well as a range of practical measures which have been implemented.'

16. To help demonstrate how the model is exploited within its News division, the BBC has drawn the Commissioner's attention to the decision of the Information Tribunal in *Stephen Gee QC v The Information Commissioner and The BBC* [EA/2010/0042, 0121, 0123, 0124, 0125, 0187]¹. While the *Gee* decision also considered the derogation, the specific circumstances of the cases are patently different, in that the appeal in *Gee* concerned requests for information relating to a television programme – 'What Next for Craig' – that explained and discussed matters relating to the treatment of children with Attention Deficit Hyperactivity Disorder.
17. However, the BBC considers that the account contained in the decision of the way in which information is used by the BBC is transferable to the Balen Report. Specifically, it has referred to paragraph 75 of that decision, albeit seen in the light of the use of the Balen Report as a monitoring tool in respect of the coverage of a political rather than a health issue. Paragraph 75 states:

*"The Tribunal accepts Mr Edwards' [for the BBC] evidence and indeed would have no justification at all in challenging it. It seems almost self-evident that if as was claimed by Mr Edwards, Panorama or some other BBC programme maker or related journalist attached to the BBC were to make similar programmes or more programmes about ADHD or the particular drug or drugs related to that condition, **it would be expected that they would have recourse to, or at the very least, refer to the underlying journalistic materials held and retained in respect of the original broadcast as well as the material generated by virtue of the complaints process. The Tribunal accepts this** [the Commissioner's emphasis]."*

18. The Commissioner considers that it would be reasonable to expect that the BBC will practice 'benchmarking' as a way of deciding how future broadcasts should be presented. Further, he is satisfied from the BBC's explanation that the values and standards identified in the Balen Report are used to review recent coverage of the Israeli-Palestinian geo-political situation and continue to inform the consideration of complaints about that coverage.

¹http://www.informationtribunal.gov.uk/DBFiles/Decision/i884/20121120_Judgment_EA20100042+5.pdf

19. As a consequence of this finding, the Commissioner must respectfully disagree with the complainant that the BBC has failed to demonstrate that the Balen Report was having a direct and meaningful impact on BBC output at the time the request was made. The key issue here is that at the time of the request the Balen Report was used to enhance the standards of the BBC's journalism and thus has an effect on journalistic output. In the Commissioner's view, any other considerations or factors outside of this are extraneous to the question of whether the Balen Report is derogated. To return to the judgment of the Supreme Court in *Sugar*, if 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.
20. For the reasons outlined above, the Commissioner is satisfied that the Balen Report had been, and was still at the time of the request, held for the purposes of journalism. Accordingly, the Commissioner has found that the Balen Report is derogated and therefore the BBC is not obliged to comply with Parts I to V of FOIA.

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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

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

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

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