

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 2 November 2015

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 requested information about the processes around the application for a Radio 4 charity appeal. The BBC explained the information was covered by the derogation and excluded from FOIA.
2. The Commissioner's decision is that this information was held by the BBC for the purposes of 'journalism, art or literature' and did not fall inside FOIA. He therefore upholds the BBC's position and requires no remedial steps to be taken in this case.

Request and response

3. On 5 June 2015, the complainant wrote to the BBC and requested information in the following terms:

'Batten Disease Family Association (BDFA) applied for a Radio 4 Appeal on 22 September 2014. We have liaised with the Charity Appeals Advisor and requested specific information about the process, which has been side stepped or refused. However, there appears to be no grounds for withholding this information, therefore, please provide the following:

- *The assessment criteria against which the BDFA application was assessed*
- *Instructions for assessment given to the assessor*
- *A copy of the assessment report on the BDFA application carried out by the assessor*

- *A copy of any notes made when discussing the BDFA application by: the assessor; any member of the board or any member of BBC staff in Charity Appeals section*
 - *Copies of minutes of appeal process meetings that make reference to the BDFA*
 - *Any recommendations made about the BDFA application*
 - *Copies of sub-committee or committee meetings of the Independent Appeals Advisory Board where those minutes or notes contain references to the application by the BDFA where it was discussed irrespective of the outcome*
 - *Any notes/directions or instructions that mention the BDFA in respect of this matter or any others'*
4. On 27 June 2015 BDFA wrote again to the BBC as there had been no response and on 29 June 2015 the BBC allocated a reference number.
 5. On 15 July 2015 the BBC responded that the information is excluded from FOIA because it is held for the purposes of 'journalism, art or literature'. *'The BBC is therefore not obliged to provide this information to you and will not be doing so on this occasion.'*
 6. On 13 August 2015 the complainant contacted the ICO about this response.

Background

7. The FOIA request followed considerable correspondence and meetings between the BDFA charity and the BBC Charity Appeals Advisor for detailed feedback after their application for a Radio 4 appeal in 2014 had been rejected.
8. The BDFA had a number of concerns
 - that the application had been denied before the deciding committee had formally met. In November 2014 the on-line process showed the application as 'rejected' although the final decisions would be made by the Appeals Board on 9 December 2014. The BBC explained that a member of staff had 'updated' the system and had apologized to BDFA.
 - That the process for assessing appeals included an 'assessor'. The BBC has now included this part of the process on the website.
 - The selection process asked for audited accounts (Charities with an annual income of more than £500,000 are required to have Audited accounts). BDFA believed that this requirement for the

radio appeal would exclude themselves and most small to medium UK charities. Although outside the remit of the FOIA, the Commissioner notes that since 22 September 2015 the BBC website now asks for independently examined accounts.

- BDFA sought information about their own application, feedback and clarity about the process... 'It is hard to understand why the BBC cannot or will not demonstrate that it has followed a fair and equitable and transparent process in assessing the application by the BDFA.'
9. The BBC provided the following as background.
 10. The BBC has been broadcasting charity appeals since 1923. These appeals form part of the BBC's output and provide information to audiences about a range of charities which need their support and provide charities with an opportunity to raise public awareness of their activities and to raise money.
 11. The Radio 4 Appeal is a weekly 3 minute programme highlighting the work of a charity and appealing for donations to support its activities.
 12. Because charities whose appeals appear as part of the BBC's output may create the perception of BBC endorsement, the BBC takes steps to ensure that individual charities are financially sound and that donations will be used appropriately. Furthermore, this is in compliance with the BBC's Editorial Guidelines (<http://www.bbc.co.uk/editorialguidelines/> paragraph 16) which provide that '*The broadcasting of appeals for charity, or on behalf of the Disasters Emergency Committee, must be referred to the BBC's Charity Appeals Adviser*', that '*The BBC's editorial impartiality and integrity must not be compromised by any external relationship or external funding and the BBC must retain editorial control of BBC output*', and that '*The choice of external partners must be appropriate and editorially justified and must not bring the BBC into disrepute*'.
 13. It is the BBC and its staff that actually produce the charity appeals, in accordance with the BBC's Editorial Guidelines, which are then broadcast.

Scope of the case

14. Although the complainant has concerns about the application process, the Commissioner 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 public authority to provide information outside its obligations under FOIA.

15. 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

16. 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."

17. 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'.

18. 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)

19. 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.
20. 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.

21. 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.
22. 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'.

23. 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.
24. The information that has been requested in this case is the correspondence and processes around the application for a Radio 4 charity appeal.

25. The BBC argues that:

- Information relating to applications for broadcast charity appeals, and the assessment and allocation of such broadcast appeals, is necessarily related to the output of the BBC, and concerns the identification of material for broadcast and supports the exercise of editorial judgement about material for broadcast.
- The BBC has a limited amount of time in its broadcast schedule, which it must apportion across its output, and must allocate the time afforded for charity appeals. Appeals are selected across the year from a range of charities in order to offer a broad range to audiences. The requested information is used to inform the competitive process in selecting appeals for broadcast. In particular, the criteria for allocating such appeals are held to assist in determining whether a broadcast appeal can be allocated to an applicant charity.
- Minutes of appeals meetings concerning the refusal to allocate a broadcast are held to assist in determining whether applications ought to be selected for broadcast and, like information relating to editorial appeals, also to assist in ensuring that the BBC meets and maintains its editorial obligations and standards. The BBC does conduct reviews of the efficacy of its broadcast charity appeals, which serves to inform its editorial decision making.

26. The BBC referred the Commissioner to a previous Tribunal decision regarding the BBC's refusal to broadcast a Disasters Emergency Committee Gaza Charitable Appeal in 2009. (EA/2009/0100 and EA/2009/0104). The First-Tier Tribunal (Information Rights) held that:

'It is clear that there is no realistic prospect ...that information concerning the production and transmission of a humanitarian appeal falls outside the meaning of "journalism". A more difficult question is whether information about the process of considering whether or not to agree to its broadcast also falls within that category, but I am satisfied that it does, given the binding authority that applies.'

27. In light of other previous cases, the Commissioner considers that the requested information for the correspondence and the processes to apply for a charity appeal broadcast falls under the definition of 'journalism, art or literature'.

28. The Commissioner considers that the BBC has provided evidence that it holds the requested information for the purposes of journalism and that this has been supported by the First-Tier Tribunal (Information Rights).

Conclusion

29. As stated above, although the complainant has concerns about the application process for a charity appeal, the Commissioner can only consider concerns within the scope of the FOIA.
30. 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 requested information falls under the definition of journalism and is therefore derogated. The Commissioner sees no basis for deviating from the approach; the information clearly falls within the derogation. The derogation is engaged as soon as the information is held by the BBC to any extent for journalistic purposes. The conclusion reached by the Commissioner is also consistent with the previous tribunal decision cited above.
31. In conclusion, and for all of the reasons above, the Commissioner has found that the request is for information held for the purposes of journalism and that the BBC was not obliged to comply with Parts I to V of FOIA.

Other matters

32. The Commissioner notes that the complainant appears to have submitted the request to the correct BBC email address on 5 June 2015. However, the BBC has stated that it did not receive the email.
33. The Commissioner is not aware of any previous issues with this email address at the BBC but is concerned that the original request for information was not received. The Commissioner trusts that the BBC will take steps to ensure that such emails are received in the future.

Right of appeal

34. 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

35. 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.
36. 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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