

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 31 August 2017

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

Address: Broadcast Centre
White City
Wood Lane
London
W12 7TP

Decision (including any steps ordered)

1. The complainant requested information about the selection of applicants for the audience of Question Time. 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. She therefore upholds the BBC's position and requires no remedial steps to be taken in this case.

Request and response

3. On 15 June 2017 the complainant made the following request for information:

'I am writing to you in order to ask for information in respect of your Question Time Programme.

First of all I would like to say that I applied to go to this Programme on the 13th June (programme taking place on the 15th June in Coventry - Coventry University)

I found it very peculiar that despite asking for a lot of info from applicants you do not even send an automated acknowledgment e-mail confirming they applied to go to the programme.

My FOI request is (FOI Act 2000): I would like to know what criteria apply re: selecting successful applicants for QT, who's involved in the

selection process (if not names provide job titles) and if a computer programme is used for the final selection.

You have 20 working days to respond to the above - please provide contact name and no when responding as per legislation.'

4. On 6 July 2017 the BBC responded and explained that it did not believe that the information was caught by FOIA because it was held for the purposes of 'art, journalism or literature'.
5. 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 Act 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.
6. On 7 July 2017 the complainant contacted the Commissioner to complain about the way the request for information had been handled. In particular, she challenged the operation of the derogation in this case. She argued that '*The info provided on the BBC website re: audience selection is very generic and makes you wonder on their so called 'objective criteria'.*
7. The Commissioner invited the complainant to withdraw her case on 26 July 2017 as it was her opinion that the requested information was held for the purposes of journalism, art and literature and that the BBC was correct in its refusal to disclose this information.
8. However, the complainant declined to withdraw her case and wrote to the Commissioner on 4 August 2017 to dispute the derogation. She made a number of points:

'I find it utterly unacceptable that FOI and DPA legislation have been diluted to a great extent by the powers to be so that the public eventually receives very little info in relation to how government bodies conduct their business...

The BBC never conducted a public consultation to seek viewers' views in respect of selecting audiences for any programme to include Question Time, claiming production companies and editors know best...

As a potential member of the audience you have to provide a few personal details to include name, address, voting preferences, ethnic background and age group. It is not right that the BCC are not prepared

to disclose the exact methodology used whether that has to do with 2 or more individuals involved, whether all applicants are considered, or whether they may use a more scientific method by employing an algorithm...

In line with the law of the land, journalistic privilege should not supersede the Equality Act 2010 and the Public Interest Disclosure Act 1998...

*referring to a case recently published in the Irish Examiner (03/03/2017) –
Journalistic privilege acknowledged in law but is not absolute*

While there is a high degree of acceptance of journalistic privilege by the courts, Judge Peter Charleton has questioned whether it extends to sources with malicious motivations – this statement is in line with the Leveson Inquiry. But who will perform the balancing act when journalistic privilege and other rights compete? Not the journalist, that's for sure...

Posing the question: "Who would decide whether the journalist's source had to be protected?" Judge Hogan said: "There can be only one answer. In the event of conflict, whether in a civil or criminal context, the courts must adjudicate and decide, while allowing all due respect to the principle of journalistic privilege. No citizen has the right to claim immunity from the processes of the law."...'

9. On 8 August 2017 the Commissioner invited the BBC to provide its more detailed arguments about why it believed that the information requested falls within the derogation.

Scope of the case

10. The Commissioner considers the scope of the case is to determine if the requested information, for the selection criteria for applicants to the audience of Question Time, is excluded from FOIA because it would be held for the purposes of 'journalism, art or literature'.

Reasons for decision

11. 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."

12. 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'.
13. 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.
14. 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)

15. 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.
16. 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.
17. 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.
18. 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'.

19. 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.
20. 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.
21. In this case, the information requested concerns the selection criteria for applicants to the audience of Question Time.
22. The Commissioner has considered the arguments from the complainant and from the BBC, but for conciseness she has focussed on explaining why she considers that the information requested falls within the derogation. She has also considered three previous cases about the selection of the panel, questions and audiences in the production of Question Time (**FS50311665** and **FS50319445** and **FS50401168**) and she has considered the BBC's arguments in those cases where they are also relevant here.

23. The Commissioner considers the second element of journalism within the definition above - the editorial process - is relevant in this case and that selecting audience members involves a significant degree of editorial decision-making by the editorial and production team.

24. In light of submissions made by the BBC in a previous case, (https://ico.org.uk/media/action-weve-taken/decision-notice/2011/667382/fs_50401168.pdf) the Commissioner understands that the audience is a crucial component of an interactive question and answer panel show:

'Information about the composition of the audience would be used by the editors of it to ensure that the selection and balance of it reflected the output objectives of the programme. It will continue to be held to assess the success or otherwise of such a selection and to inform the planning process for future programming. This is particularly so in relation to Question Time because the editorial objective is to ensure that there is balance over the series of programmes. To enable this balance to be judged, the information is necessary for the editor to use to inform allocation decisions about future programmes.' (Paragraph 17 of the decision notice FS50401168.)

25. 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 as the complainant argues; 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.

26. In conclusion, and for all of the reasons above, the Commissioner finds that the information falls within the derogation and that the BBC is not obliged to comply with Parts I to IV of the FOIA in respect of the complainant's request.

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: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

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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