

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 8 December 2011

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 the questions that the audience submitted as part of a specific Question Time programme. 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 9 April 2011 and asked for [in relation to the Question Time show that featured Nick Griffin that was broadcast on 22 October 2009]:

"... a list of the questions the audience submitted on the day. So I can look at the BBC choice of which questions to ask. If I am not allowed a copy of these question forms to help with my complaint, could I then please make a freedom of information request to have a copy of the original hand written forms."

4. The BBC responded on 12 May 2011. It stated that it believed 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. However, it did provide a link to the editor's blog about the programme that can be found at the following link:

http://www.bbc.co.uk/blogs/theeditors/2009/10/nick_griffin_on_questi_on_time.html

Scope of the case

5. The complainant contacted the Commissioner to complain about the way his request for information had been handled. In particular, he challenged the operation of the derogation in this case. He explained that it was not possible to consider the impartiality of the BBC without the release of the requested information.
6. The Commissioner invited the complainant to make further arguments after the receipt of his preliminary verdict in this case. The complainant did not take this opportunity. The Commissioner has therefore based his decision on all the evidence that he has available to him including the experience that he has acquired in considering other complaints about the BBC.

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 Commissioner considers that it follows from this that if the information is genuinely held for any of the three derogated purposes – i.e. journalism, art or literature - it is not subject to the FOIA. His role is to consider whether the information was genuinely held for the derogated purposes or not.
12. With regard to establishing the purpose for which the information was held, Lord Neuberger of Abbotsbury MR (at paragraph 55) drew a distinction between information which had an effect on the purposes of journalism, art or literature and information that was actually being held for one of those purposes. Based on this judgment the Commissioner considers that for information to be held for a derogated purpose it is not sufficient for the information to simply have an impact on the BBC's journalistic, artistic or literary output. The BBC must be using the information in order to create that output, in performing one of the activities covered by journalism, art or literature.
13. The Court of Appeal adopted the Information Tribunal's definition of journalism which set out that journalism comprises three elements.

"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."

14. The Commissioner has considered all of the information before him, but for conciseness he has focussed on explaining why he considers that the information requested falls within the derogation. He has also considered three previous cases about the production of Question Time and the complaints received about it (**FS50311665**, **FS50319445** and **FS50401168**) and he has considered the BBC's arguments in those cases where they are also relevant for the information requested in this one.
15. The information that has been requested in this case is both the questions that were asked on a particular episode of Question Time and those that were not chosen.
16. In light of submissions made by the BBC in previous cases and mentioned in the refusal notice, the Commissioner considers the second element of journalism within the definition above - the editorial process - as relevant in this case. The questions that are asked are a crucial component of an interactive question and answer panel show. Information about potential questions would be used by the editors of the programme to ensure that the selection and balance of them reflected the programme's output objectives. 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 previous questions to inform the selection in future programmes. The Commissioner therefore considers that there is a relationship between it and the derogated purposes.
17. In addition, the Commissioner considers that the information is also covered by the third element of the definition above. The episode of Question Time was controversial and generated two sorts of complaints. The first set of complaints related to the providing of a public platform for Nick Griffin. The second set of complaints focussed on the treatment of the panellists and whether the programme could be said to be impartial or balanced. The questions (both used and discounted) are a crucial component of the evidence to consider whether the BBC has complied with its editorial objectives. The Commissioner appreciates that the consideration of complaints, such as those of political bias, is an important tool, used by the BBC to monitor, maintain and enhance its journalistic, artistic and literary output and to ensure the impartiality of that output. It should be noted that on 9 April 2011 (the date of the request) at least one editorial complaint about this information was still ongoing.

18. It is necessary to consider whether information was still held genuinely for the purposes of journalism on the date of the request [9 April 2011 - around eighteen months after the programme was broadcast]. It is not material whether the information is also held for other purposes too, providing that it is held genuinely for the purposes of journalism.
19. The Commissioner considers that the information was still genuinely held for the purposes of journalism at the date of the request. To support his analysis, the Commissioner considers that the status of information should be judged against the following three key criteria:
 - The purpose for which the information was created;
 - The relationship between the information and the programmes content which covers all types of output that the BBC produces; and
 - The users of the information.
20. The information that has been requested relates to the information used in question selection by the BBC or Mentorn (a third party production company who is contracted by the BBC). It was generated to ensure that the audience contributed to the panel show and was kept to ensure that the questions were appropriate in future programming. It follows that this criterion supports the BBC's contention that the information was held for the purposes of journalism.
21. The second criterion also favours the BBC. The questions are a key part of an interactive show where they constitute the foundation of the programme. There is a real relationship between this information and the content. This relationship continues considering that the balance of the questions and the audience are assessed on an ongoing basis in order for there to be balance in the series of programmes as a whole. Furthermore, as noted above the information amounted to key evidence to consider in a series of editorial complaints that the BBC received about the programme. In relation to the open complaints, it is self evident that the information is connected to the determination of editorial complaints which influences the content of the BBC. In relation to the closed complaints, the BBC has evidenced in case **FS50401167** that it keeps the evidence about editorial complaints whether they are upheld or not in its archives in order to influence future production decisions.
22. The third criterion also favours the BBC. The users of this information are the editors responsible for coordinating the creative output of the show. For the same reasons as above, the relationship continues beyond the time that the programme was broadcast. The users are also those who consider the editorial complaints and this relationship also extends beyond the time the show was broadcast.

23. It follows that the Commissioner supports the BBC in its view that this category of information is held for one of the derogated purposes – journalism. It is not therefore caught by the FOIA.
24. To further support his analysis the Commissioner has considered the fourth factor and been mindful of the purpose of the derogation, which was articulated by Lord Neuberger of Abbotsbury MR at paragraph 45 of his judgment in *Sugar*:

"The purpose of limiting the extent to which the BBC and other public sector broadcasters were subject to FOIA was 'both to protect freedom of expression and the rights of the media under article 10 of the European Convention on Human Rights, and to ensure that [FOIA] does not place public sector broadcasters at an unfair disadvantage to their commercial rivals.' This is apparent, to my mind, as a matter of common sense, looking at FOIA on its own, but it was also stated in terms to be the policy in a letter from the Department of Constitutional Affairs in 2003, which was admitted in evidence by the Tribunal – hence the quotation marks."

25. The Commissioner finds in this case that the disclosure of unused content would be likely to impinge the BBC's editorial independence. It would lead to considerable comment about information about the BBC's input that is not made available by commercial rivals. It would therefore be placed at an unfair disadvantage to its commercial rivals and this supports the Commissioner's conclusions that the information is held for derogated purposes too.
26. The Commissioner has also considered the arguments made by the complainant and has chosen to address them below for the sake of completeness:
 - the complainant argued that he requires the information in order to make a complaint about the programme;
 - the complainant alleged that the programme exhibited political bias and a lack of impartiality;
 - these questions were written by the public and not by a journalist;
 - the members of the public wishes for their questions to be broadcast nationally; and
 - the public requires the information to consider whether the programme complied with the BBC's Charter obligations.
27. The Commissioner cannot make any judgment about these arguments because they do not influence how the BBC holds the information as a

matter of fact and as noted above this is the only issue that he can consider.

28. The Commissioner has also noted that the complainant made an alternative request for the handwritten forms containing both the proposed questions and other personal data of the audience members. For the sake of clarity, the Commissioner considers that the whole forms are held in the same manner as the questions that are on them. The Commissioner considers that all the information on the forms is held genuinely for the purposes of journalism.
29. The Commissioner has actually considered the other information on the forms (that is not the questions) in case **FS50401168** and considers that the reasoning in that case applies equally to this one.
30. 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 journalism and that the BBC was not obliged to comply with Parts I to V of the FOIA.

Right of appeal

31. 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

32. 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.
33. 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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