

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 4 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 from the BBC relating to the BBC's radio shipping forecast. The BBC explained the information was covered by the derogation and excluded from FOIA.
2. The Commissioner's decision is that this information, if held, would be 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. The complainant wrote to the BBC on 4 July 2012 and made the following request:

"Please can you send me information which explains the BBC's current thinking on the future and the need for the radio shipping forecast"
4. The BBC responded on 26 July 2012. It explained that it believes that the information requested would be excluded from the Act because it would be 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 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 is not obliged to provide any information in response to the request for information.

Scope of the case

5. The complainant contacted the Commissioner on 8 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.

Reasons for decision

6. 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."

7. 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'.
8. 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.
9. 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)

10. 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.
11. 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.
12. 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.
13. 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'.

14. 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.
15. 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.
16. The information that has been requested in this case is information relating to the BBC's radio shipping forecast. In light of submissions made by the BBC in previous cases and also in light of the present submissions of the BBC, the Commissioner understands that the requested information is not held by the BBC, however, if it were held, it would be held for a genuine editorial purpose. This is because the information would be created and retained as an integral part of the editorial decision making process in respect of the review of Shipping Forecast output, and the inception, planning and delivery of the future of the Shipping Forecast.
17. 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.
18. In determining whether the information, if held, would be held for the purposes of journalism, the Commissioner has considered the following factors:
 - The purpose(s) for which the information, if held, would be held at the time of the request;
 - The relationship between the purposes for which the information would be held and the BBC's output on news and current affairs, including sport, and/or its journalistic activities relating to such output.
19. It is the BBC's view that the purpose for which any information held that goes towards and forms a part of the BBC's editorial decision making as to whether the Shipping Forecast continues to be an output is directly linked to its subsequent output and as

such clearly falls within the definition of journalism, literature or art as set out above at paragraph 13.

20. An appeal regarding a similar case, that is where no information was held, was considered by the Information Commissioner in December 2011 (FS50379739). In that decision the Information Commissioner considered it followed:

"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."

21. If the requested information were held, it would clearly fall within the second arm of the accepted definition of journalism, that 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; and
- the provision of context and background to such programmes.

22. Any consideration as to whether the Shipping Forecast was to continue to be an output for the BBC would be an editorial decision, taking into account numerous factors that include the prioritisation of programming, resources and the users of the output. It follows that the information would fall within the derogation as journalism and as such fall outside of the FOIA.

23. Overall, the Commissioner considers that the BBC has provided evidence that, if held, it holds the information for the purposes of journalism. He is content that the information, if held, is held for the purposes outlined in the second point of the definition, namely editorial purposes.

24. 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 FOIA.

Right of appeal

25. 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

26. 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.
27. 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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