

Freedom of Information Act 2000 (FOIA)

Decision Notice

Date: 15 May 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 concerning documents contained in a "Closed Bundle" which was provided to the First-tier Tribunal (Information Rights) in the course of proceedings relating to an appeal brought by the complainant. These included a detailed schedule, an agenda, a briefing note on the aims of a seminar held by the BBC, list of attendees (including contact details) and various documents for the conduct of the seminar including opening remarks by one of the attendees. The BBC explained the information was covered by the derogation and excluded from the FOIA.
2. The complainant also advised that the BBC provided a late response to his request.
3. The Commissioner's decision is that this information is held by the BBC for the purposes of 'journalism, art or literature' and does not fall inside FOIA. He therefore upholds the BBC's position and requires no remedial steps to be taken in this case.
4. The Commissioner also finds that the BBC has failed to provide a response to the request within the statutory time frame of 20 working days. He upholds this part of the complaint but requires no further action to be taken.

Request and response

5. The complainant wrote to the BBC on 30 November 2012 and asked for:

"The information I wish the BBC to release is that contained in the Closed Bundle provided to the Tribunal in the course of proceedings and referred to in the BBC's written submission to the Tribunal of 20th September 2012 §23-25. It was also briefly described in written evidence to the Tribunal dated 31st August 2012 from Helen Boaden as follows:

" ... a detailed schedule, an agenda, a briefing note on the aims of the Seminar, lists of attendees (some including contact details), various documents for the conduct of the Seminar including signs and labels, and opening remarks by Jana Bennett (the 'Information Held')." "

6. The BBC responded to the complainant by way of acknowledgement on 3 December 2012.
7. On 7 January 2013 the complainant sent a further email to the BBC requesting that it dealt with his request.
8. The BBC responded to the complainant on 9 January 2013 and provided him with a letter advising about the BBC's derogation under the FOIA in respect of all matters connected with "journalism, art or literature." It explained that Part VI of Schedule 1 to the 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 stated 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.
9. The complainant submitted a complaint to the Commissioner on 25 January 2013.

Scope of the case

10. 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 also advised that the BBC had failed to respond to his request within the statutory time limit of 20 working days.

11. The scope of this case has been to consider whether the BBC was entitled to rely on the derogation under the FOIA and whether it has met the requirements of the FOIA in respect of the time it took to respond to the complainant's request for information.

Reasons for decision - Derogation

12. 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."

13. 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'.
14. 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.
15. 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)
16. 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.
17. 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.

18. 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 the FOIA.
19. The Supreme Court said that the 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."

20. 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'.
21. 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 the 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.
22. 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.

23. The information that has been requested in this case concerns documents contained in a "Closed Bundle" which was provided to the First-tier Tribunal (Information Rights) in the course of proceedings relating to an appeal brought by the complainant. These included a detailed schedule, an agenda, a briefing note on the aims of a seminar held by the BBC, list of attendees (including contact details) and various documents for the conduct of the seminar including opening remarks by one of the attendees.
24. In light of submissions made by the BBC in previous cases, the Commissioner understands that the collation and retention of information from many sources 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.
25. 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.
26. In determining whether the information is held for the purposes of journalism, the Commissioner has considered the following factors:
 - the purpose(s) for which the information was held at the time of the request; and
 - the relationship between the purposes for which the information was held and the BBC's output on news and current affairs, including sport, and/or its journalistic activities relating to such output.
27. When considering the purposes for which the information was held at the time of the request, the BBC has explained that the information was obtained and held for the purposes of creating content and producing journalistic output. The purpose of the seminar, which is the subject of the request, was to bring together experts in a particular field and journalists to stimulate the creative output of ideas. The purpose was to allow the free discussion of ideas and to inform as to the direction of scientific thinking in a particular field to enable journalistic output of the BBC to be aware of and reflect current and potential possibilities within the field. The area of journalistic interest in this case is climate change.
28. The Commissioner finds that it would be reasonable to expect that information concerning climate change would inform the future creation of news and other related output. The retention of this information would also enable the re-use of existing material and facilitate research for future programming. The holding of seminars and similar meetings between journalists, editors and experts in a given field clearly assist the

journalistic activities that the BBC engages in. It enables the collection of information and ideas by the journalists involved, promotes the creation of journalistic expert contacts and stimulates editorial decision making as to future programming.

29. The Commissioner finds that the requested information could also be held for editorial purposes - for the analysis and review of individual pieces of output and for the provision of context and background to the output. It would also enable a review of the standards and quality of particular programme making, in order to further enhance standards.
30. When considering the connection between the information itself and the journalistic activities relating to such output, the BBC has explained that the information obtained relates directly to output and would be used to inform programme making both present and in the future. The Commissioner is satisfied that there is a direct relationship between the purposes for which the information was held and the BBC's output as the issue of climate change is a current and active area of debate.
31. The issue of the passage of time since the information was collated has been raised by the complainant as a reason why the derogation does not apply in this case. He contends that that the material concerned is over seven years of age and that the information could be considered "archival" not "journalistic".
32. The decision in the case (Reference EA/2009/0118) is relevant. This is an appeal brought by the complainant in respect of the same information that is currently the subject of the request that is being considered. At paragraph 66 in this decision the Tribunal refer to the specific issue of information being of an age where it could be considered to the archived. It found that the requested information is "neither archival nor archived, but live".
33. In respect of the current request the BBC has advised that the information has not been archived and is held in the same place for the same reasons. Also that the nature of the present use has not changed and it is held for journalistic purposes.
34. Having considered the response of the BBC to the request the Commissioner is satisfied that the nature of the present use of the information has not changed and the BBC has provided sufficient evidence that it holds the information for the purposes of journalism. He is content that the information is held for the purposes outlined in the definition namely the collecting or gathering, writing and verifying of materials for publication, editorial purposes and for maintenance and enhancement of the standards and quality of journalism.

35. 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.

Reasons for decision – Time for compliance

36. The Commissioner considered whether the BBC responded to the request of 30 November 2012 in line with the provisions of the FOIA.
37. Section 1(1) of FOIA requires a public authority in receipt of a request for information to confirm whether it holds the requested information, and, if so, disclose it to the applicant. Section 10(1) of FOIA provides that this must be done within 20 working days of receiving a request.
38. From the information provided to the Commissioner in this case it is evident that the BBC did not respond to the complainant within the statutory time frame as the response to the request was not sent to the complainant until 5 working days after the required date.
39. The BBC has advised the Commissioner that the delay in response was due to an increase in FOIA requests over a 3 month period which coincided with the complainant's request. It has apologised for this breach.
40. It is noted that there has been a breach of section 10 of the FOIA in this matter but the Commissioner does not require any further action to be taken.

Right of appeal

41. 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

42. 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.
43. 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

Rachael Cragg
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF