

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 23 October 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 copies of all material redacted from the documents submitted to the Pollard Review. These redacted documents had been released by the BBC in February 2013. The BBC explained the information is covered by the derogation and excluded from the FOIA.
2. The Commissioner’s decision is that this information is held by the BBC genuinely for the purposes of ‘journalism, art or literature’ and does not fall under the FOIA. He therefore upholds the BBC’s position and requires no steps to be taken.

Request and response

3. On 23 February 2013 the complainant made the following request to the BBC:

"Could you please supply copies of all material which was redacted from those documents, transcripts and communications which were released by the BBC on Friday February 22 at just after 10.30am.

These documents included evidence submitted to the Pollard inquiry and according to press reports ran to several thousand pages.

I notice the redactions in the material are not supported by exemptions under the Freedom of Information Act.

It is my contention that the vast majority of the material will not be covered by the derogation”.

4. The BBC responded on 7 March 2013. It explained that the Pollard Review and its associated papers are concerned with the maintenance and enhancement of the standards and quality of the BBC's journalism and that materials related to it are held for the purposes of journalism art or literature. It considered that the information is therefore outside the scope of the FOIA.
5. The BBC explained that the publication of the transcripts and appendices to the Pollard Report was a voluntary exercise undertaken outside the remit of the FOIA. It explained that from the thousands of pages published, roughly 3% of the transcripts have been redacted for a very limited number of legal reasons, again outside the scope of the FOIA.
6. It stated 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 of 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'.
7. The BBC argued that it 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.
8. The BBC explained it had sought advice from external counsel to identify text that should be redacted in accordance with legal grounds for redaction. The proposed redactions were considered by the Executive Board before being reviewed and approved by a sub-committee of the BBC Trust. The individuals who participated in the review were provided with opportunities to make representations concerning the redactions. These were considered with advice again taken from external counsel before a final package of proposed redactions was reviewed by the Executive Board and approved by the same sub-committee of the BBC Trust.

9. The BBC explained the redactions had been made for the following reasons: data privacy, protection of confidential sources, anonymity of victims of sexual assault, defamation (of individuals), confidentiality, potential prejudice to or interference with police investigation or on-going criminal proceedings and legal professional privilege.

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 whether the derogation applied in this case.

Reasons for decision

11. 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 that the BBC is a public authority:

"...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 FOIA where information is held for 'purposes of journalism, art or literature'. The Commissioner refers to this as '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.
14. 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).

15. The Commissioner considers that it follows from this that if the information is genuinely held for any of the three derogated purposes – ie. 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.
16. 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 in fact 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.
17. 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; and*
 - *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."*
18. The information that has been requested in this case is information concerning redactions made to a published report.
19. The BBC has explained that it considers the Pollard Review and the Report with its associated Appendices were directed to the maintenance and enhancement of the standards and quality of the BBC's journalism and are therefore held for the purposes of journalism art or literature.

20. In considering whether information is held genuinely for the purposes of journalism, the Commissioner has considered the following three factors with respect the requested information:
- 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.
21. The complainant has argued that as the Pollard Review was set up to establish why the BBC did not broadcast a Newsnight report into the Jimmy Saville scandal, this matter concerns the 'systematic failings' within the BBC. He does not consider that it is concerned with creative inputs into a particular programme.
22. The complainant has explained he accepts that the BBC has a duty to protect confidential sources and the victims of sexual assault. However he argues that the view persists that much of the information redacted by the BBC has been withheld to hide management failings within the organisation.
23. However the BBC has argued that this fails to take into account both the subject matter and the purpose of the Pollard Review. It has argued that the Terms of Reference for the Pollard Review clearly set out that the Report was focused on a review of editorial decision making with regard to a particular area of the BBC's programme-making. It was specifically concerned with an examination of the exercise of editorial judgement in connection with journalistic investigation and the BBC's output by individuals directly concerned with programme making.
24. The BBC has explained that the Review made a series of recommendations and the BBC Executive Board identified immediate and longer-term actions to be taken. These were intended to address the weaknesses in editorial and management processes and ensure the effective oversight of editorial standards.
25. The Pollard Review therefore looked at the editorial decision making process involved in reaching a decision not to broadcast a programme. It focused upon the role of the BBC's management in the handling of the relevant investigation and the decision making process involved which led the editorial team to reach the decision not to broadcast the programme concerned.

26. For this reason, the BBC has argued that both the Pollard Review and the supporting material serve as a resource informing the production of future output. It has argued that as the Pollard Review constitutes a review of the standards and quality of particular areas of programme making, and is directed towards the maintenance and enhancement of the standards and quality of journalism, it clearly falls within the above definition of journalism as accepted by the Supreme Court.
27. For all the reasons above, the Commissioner is satisfied that the BBC genuinely holds the information for the purposes of journalism. He is content that the information is directed towards the maintenance and enhancement of the standards and quality of journalism and therefore considers that the requested information falls within the derogation.
28. As the Commissioner considers that the requested information is held for the purposes of journalism and is derogated, he is satisfied that the BBC was not obliged to comply with Parts I to V of the FOIA.

Right of appeal

29. 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

30. 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.

31. 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
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