

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 20 February 2014

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 data on website traffic for specific website pages on specific days. 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.
3. He therefore upholds the BBC's position and requires no remedial steps to be taken in this case.

Request and response

4. The complainant wrote to the BBC on 9 December 2013 and asked for:

'Please could you tell me how many page impressions were recorded for the following pages on your website on the dates shown:

<http://www.bbc.co.uk/news/uk-25237082> on 5 December 2013

<http://www.bbc.co.uk/news/uk-25253080> on 6 and 7 December 2013

http://www.bbc.co.uk/news/uk-england-25299322 on 9 and 10 December 2013

http://www.bbc.co.uk/news/world-africa-25249520 on 6 and 7 December 2013

http://www.bbc.co.uk/news/uk-25288923 on 8 and 9 December 2013

http://www.bbc.co.uk/news/world-africa-23078373 on 27 June 2013

If you are unable to retrieve the results by date, then please could you give me the total page impressions for each page since their publication.'

5. The BBC responded on 6 January 2014. It stated that the information was held for derogated purposes and fell outside of FOIA.
6. 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 would not provide any information in response to the request for information.

Scope of the case

7. 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 argued that his request

'relates directly to website traffic, namely page impressions to specific pages within the BBC News website...

However, since the BBC does not routinely publish news stories about its own website traffic, I would submit that the information I requested is not held 'for the purposes of journalism'. I believe that defence would only apply if they intended to release these figures as part of a future news article.

Website traffic is a purely technical affair. Page impressions are used to assess the effectiveness and popularity of a website, and

as such I suggest that this data falls within the scope of corporate information, not journalistic information. Indeed, such data would reveal nothing about the journalistic processes within the BBC, but instead about the behaviour of the public and their reactions to world events.

Furthermore, in 2011 the BBC did in fact disclose information relating to page impressions to its news website. I think that this set a precedent by which it can be assumed that the BBC does not regard website traffic data as being exempt information. If they answer one, they must in fairness answer all.

Given the many complaints over the BBC's handling of the two news items to which my request relates (namely the flooding in December and the death of Nelson Mandela), I believe that it is in the public interest to release the statistics that I have asked for...'

Reasons for decision

8. 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."

9. 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'.
10. 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.
11. 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)*

12. 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.
13. 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.
14. 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.
15. 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’.

16. 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.
17. 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.
18. The information that has been requested in this case is the number of page impressions on specific website pages for specific dates in June and December 2013.
19. 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.
20. 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;
 - 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.
21. When considering the purposes for which the information was held, the BBC has explained that website page impressions are used for many different purposes in relation to the creation of output and in this case, online news broadcasting output.
22. The BBC has argued that website page impressions are used to *'determine the selection of material that is offered through online publication to the general public'* and gave an example of an experiment in the presentation of statistics. Using the information from website page impressions, the BBC ascertained that readers like to consume statistics in a user friendly interactive format and have therefore increased the resources devoted to providing more data in this way.

23. Where the number of website page impressions is low, the editorial team will *'review the way the story appears on the BBC website'*. *'If a story proves popular, then a decision may be made to run related articles more prominently on the website than would have been the case without the website page impression data.'* The information is used to analyse and review individual news stories with a view to editorial decisions on future output.
24. The BBC has stated that it also uses software to analyse how the news stories are read by the public: the whole article or just the first half of it and where to place photographs. *'Website page impressions are therefore very useful in determining how the BBC compiles and promotes individual news stories, and in gauging how it should present its online material to the general public'*.
25. The BBC also responded to the complainant's claim that a previous request for information to the BBC was answered (under its reference RFI20110472). The BBC has argued that the previous generic request was for overall figures *'across BBC Online, BBC Sport and BBC News for overall figures of page views, unique users per month and the number of page views per visit.'* At the time, the BBC made it clear that information related *'to pages embedded more deeply within these directories'* would be excluded from FOIA.
26. The BBC argued that *'to drill down into individual page by page website impressions on a particular day'* is quite different to providing overall generic figures for the number of page impressions recorded across all of the BBC's websites.
27. The Commissioner notes that this response was provided in 2011, before the judgment of the Supreme Court in February 2012.
28. The Commissioner has considered the arguments provided by the complainant and the BBC and understands that website page impressions are held for review and analysis purposes by editors. The number of website page impressions constitutes records that can be said to contribute towards the maintenance and enhancement of standards and quality, to determine how readers consume content online and to decide future prospective output. The editorial process and information which is intrinsic to it, including the editorial scrutiny of website traffic and audience data, is standard production practice.
29. The Commissioner accepts that website page impressions help to inform the editorial decisions that monitor online news content for quality of output and facilitate future planning of output.
30. For all of the reasons above, the Commissioner is therefore satisfied that the information requested is derogated. Therefore, the

Reference: FS50526192

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

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: GRC@hmcts.gsi.gov.uk

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

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

Pamela Clements
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