

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 17 December 2015

Public Authority: British Broadcasting Corporation

Address: Room BC2 A4
Broadcast Centre White City
Wood Lane
London
W12 7TP

Decision (including any steps ordered)

1. The complainant has requested information relating to reporting of the America's Cup. The BBC explained that 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 within the scope of FOIA. He therefore upholds the BBC's position and requires no remedial steps to be taken in this case.

Request and response

3. On 27 July 2015 the complainant sent the following information request to the BBC:

*"We've seen some extraordinary one-sided reporting over the America's Cup by your BBC News team down in Portsmouth. Lines to take by the press barely showing the kind of corporate interests at the heart of this, particularly with regards to the Emirates Spinnaker Tower. You claim to wish to report alongside local papers to get the local view but your presenters are doing nothing of the sort. So under the Freedom of Information, please can you confirm the BBC holds the following and if so to disclose
(a) details of hospitality received by BBC journalists by Team Origin during the week beginning 20th July to 28th July*

(b) details of hospitality received by BBC journalists at Team Origin events during 2014

(c) the embargoed press releases sent to you on behalf of Team Origin in July 2015

(d) the value of the commercial rights to broadcast the America's Cup in 2015

(e) your figures on audience numbers of the broadcast on (a) July 23rd (b) July 24th (c) July 25th (d) July 26th

(f) correspondence with Portsmouth City Council and councillors over the America's Cup, including with or on behalf of Cllr Donna Jones"

4. On 30 July 2015 the BBC responded to the request. The BBC explained that it did not believe that the information was caught by FOIA because it was held for the purposes of 'art, journalism or literature'.

Scope of the case

5. The complainant contacted the Commissioner on 30 July 2015 to complain about the way her request for information had been handled.
6. The Commissioner considers the scope of the case is to determine whether the information requested is excluded from FOIA because it would be held for the purposes of 'journalism, art or literature'.

Reasons for decision

7. 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."

8. 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 '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 information that has been requested in this case is information relating to the reporting of the America's Cup, including hospitality received, commercial rights and audience figures.
16. The BBC has confirmed that the requested information is held for the purposes of creating the BBC's output and is closely associated with creative activities.
17. The Commissioner considers that the embargoed press release is clearly material collected by the BBC for the purpose of publication. The value of commercial rights is clearly linked to the BBC's decisions in relation to selection/prioritisation of broadcast. The viewing figures are directly relevant to reviewing output. Finally correspondence with Portsmouth City Council and councillors over the America's Cup is the subject matter which was being reported upon and is again therefore directly relevant to the BBC's output.
18. The Commissioner did however ask the BBC to provide further explanation why it considered any hospitality received by journalists was held for the purposes of journalism, art or literature.
19. It argued that if BBC journalists did record details about the hospitality received while reporting at Portsmouth, the requested information would be held by the BBC production teams and journalists covering the event and their associated offices. In this situation, the information would be held by staff from the BBC English Regions, Sport, and News divisions.
20. It said that the purpose for which the requested information would be created includes ensuring compliance with the BBC's Editorial Guidelines. The Editorial Guidelines apply to all BBC's content and they

"set out the standards expected of everyone making or presenting the BBC's output. They will help anyone, in-house or independent, public service or commercial, to deal with difficult editorial issues, meet the expectations of the audience, and produce distinctive and challenging content to the highest ethical and editorial standards."

21. It went on that part 15 of the BBC Editorial Guidelines concerns conflicts of interest which states that:

There must never be any suggestion that commercial, financial or other interests have influenced BBC editorial judgements.

...

Individuals should not accept personal benefits, or benefits for their family or close personal relations, from organisations or people with whom they might have dealings on the BBC's behalf. Any exception to this must be referred to their head of department, who should normally consult Editorial Policy, to establish whether accepting the offer constitutes a conflict of interest.

...

In all other areas, including for example entertainment, it is essential that programme makers, other content producers and on-air talent do not undermine their own integrity, and that of their content, by off-air involvement in inappropriate activities or commercial interests. Their off-air activities must not bring the BBC into disrepute.

22. It said that these Guidelines also state that:

Under no circumstances should anyone working for the BBC receive personal benefits from suppliers or accept goods or services as inducements. Any acceptance of hospitality from outside bodies or companies must be considered carefully to ensure it does not constitute a conflict of interest or otherwise undermine the BBC's integrity or impartiality.

23. As recognised by the courts in *Sugar*, an element of journalism is the maintenance and enhancement of the standards and quality of journalism. Therefore, as the information is collected for the purposes of upholding editorial standards, the information is held for the purposes of journalism.

24. The BBC appreciates that details about hospitality received by journalists may also be held to ensure a BBC staff member's compliance with BBC staff policy on receiving hospitality and BBC Anti-Bribery Code of Conduct and Anti-Bribery Policy. For example, the BBC policy for receiving hospitality states:

Whilst modest hospitality is an accepted courtesy of a business relationship, the recipient should not allow a position to be reached whereby its acceptance might be deemed by others to have influenced a decision or lead to potential allegations of conflict of interest.

25. However, it argued, as Lord Walker emphasises in *Sugar*, “information can be held for the purposes of journalism, even if it is also held for other, possibly more important, purposes”. Therefore, while details of hospitality received may be held for a number of reasons, the information is held for a journalistic purpose and the derogation remains applicable.
26. The BBC said that if held, the information may be used by those with an editorial role from the BBC English Regions, Sport, and News divisions, and also staff within Editorial Policy and Standards. Therefore, the information is used directly by people involved in making editorial decisions and in the production of BBC outputs.
27. Finally the BBC explained that journalism is intended to encompass the entirety of the BBC’s output, which includes the maintenance and enhancement of the journalistic standards. As mentioned, the requested information would be used to review and assess compliance with the BBC’s editorial obligations. If concerns were raised about the impartiality of a published news story, details of the hospitality received may inform editors and/or Editorial Policy and Standards of crucial background information to the publication and provide valuable evidence in accessing compliance with Part 15 of the BBC’s Editorial Guidelines to ensure impartiality and balance in the reporting. Therefore, the requested information is directly linked to BBC output.
28. Allowing the BBC to consider and review its past performance and freely discuss and analyse its future content is central to the freedoms which the designation is designed to protect. Disclosure of information held in respect of hospitality received could hamper a programme-maker or editor’s ability to consider a complaint or impartiality issues, and come to a considered and objective journalistic judgment on future content. This is particularly the case when the BBC is required to consider complaints regarding impartiality.
29. The Commissioner considers that the information requested relating to hospitality received by BBC journalists, is collected for the purposes of upholding editorial standards and is therefore held for the purposes of journalism.
30. Having applied the approach to the derogation set out by the Supreme Court and the Court of Appeal, which is binding, the Commissioner is

satisfied that the requested information falls under the definition of journalism and is therefore derogated. The derogation is engaged as soon as the information is held by the BBC to any extent for journalistic purposes.

31. The Commissioner has therefore 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

32. 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: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

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

33. 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.
34. 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

Gemma Garvey
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