

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 2 April 2019

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 relating to the BBC's Crimewatch programme number 253. The BBC has refused to provide the information on the basis that it is covered by the derogation and excluded from FOIA.
2. 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 within the scope of the FOIA. She therefore upholds the BBC's position and requires no remedial steps to be taken in this case.

Request and response

3. On 19 October 2018, the complainant wrote to the BBC and requested information in the following terms:

"I would like access to any or all notes, files, letters, phone notes, emails and correspondence in regard to the reconstruction and outcome of Crimewatch programme No.253 in relation to the Rayleigh cash-in-transit robbery and shooting which was broadcast on BBC TV on 02 July 2007."

4. The BBC responded on 21 November 2018. It stated that it did not believe that the information was caught by FOIA because it was held for the purposes of 'art, journalism or literature'.
5. On 24 November 2018 the complainant responded to the BBC disagreeing with the decision and explained his belief that "Crimewatch

is not journalism because it is not for entertainment purposes. Its aim is to catch those that have escaped justice and that is not classified as journalism."

6. The BBC responded on 29 November 2018. It stated that it *"does not offer an internal review when the information requested is not covered by the FOI Act."*

Scope of the case

7. The complainant contacted the Commissioner on 2 December 2018 to complain about the way his request for information had been handled. In particular, he challenged the operation of the derogation in this case.
8. On 11 December 2018, the Commissioner communicated to the complainant her preliminary assessment of the complaint. She explained to the complainant that she considered the information he had requested was covered by the derogation. The Commissioner invited the complainant to therefore withdraw his complaint.
9. The complainant did not accept the Commissioner's preliminary assessment and requested a decision notice.
10. The Commissioner considers the scope of this case is to determine whether the information requested is excluded from the FOIA because it is held for the purposes of 'journalism, art or literature'.

Reasons for decision

11. 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."
12. 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'.
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. The Commissioner's analysis will now focus on the derogation.

14. 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)

15. 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.
16. 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.
17. 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.
18. 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".

19. 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.
20. 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.
21. In this case, the complainant has requested information relating to the BBC Crimewatch programme number 253.
22. The BBC has confirmed that the requested information is held by the editorial team that produces the Crimewatch programme and its spinoff shows. The BBC has stated that Crimewatch Roadshow is one of its current spinoff Crimewatch shows that regularly uses material from previous Crimewatch episodes to show how crimes are solved in its "How They Caught" strand of the show.
23. When considering the purposes for which the information was held, the BBC has stated *"that the requested information falls within the first and second limb of the Information Tribunal's analysis in Sugar at §§107-109, as it (i) is information underpinning broadcast material; and (ii) is held and used by the editorial team responsible for producing Crimewatch in the context of producing BBC content."*
24. When considering the connection between the information itself and its output on news and current affairs and/or the BBC's journalistic activities relating to such output, the BBC has stated that *"any potential use of the requested information or material from the Crimewatch episode referenced in the request would involve a significant degree of editorial decision-making and discretion, as well as the need to have*

regard to the BBC's Editorial Guidelines. Consideration of the requested information, underpinning a previous episode of Crimewatch as it does, would clearly be instrumental in that editorial decision-making process and the evaluation of any editorial and compliance issues."

25. In light of the submission made by the BBC in this case, the Commissioner considers that the information relating to the Crimewatch programme falls under the first and second elements explained in paragraph 18 of this decision notice - the collecting or gathering, writing and verifying of materials for publication and editorial judgements. The information requested therefore falls squarely within the definition of journalism and the Commissioner is satisfied that the information requested is derogated.
26. 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.
27. In conclusion, 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

28. 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

29. 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.
30. 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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