

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 26 September 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 the audience research to support the broadcasting of cricket on Radio 4 long wave. 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. He therefore upholds the BBC's position and requires no remedial steps to be taken in this case.

Request and response

3. The complainant wrote to the BBC on 29 June 2013 and asked for:

"On 19th October 2012 BBC Radio 4 Feedback programme included my complaint and phone interview about blanket cricket coverage on Radio 4 LW (and additional complaints from other listeners) and an interview with a seemingly nonchalant Radio 4 Network manager, Mr. Dennis Nolan. Mr Nolan was repeatedly asked why cricket is given special treatment compared to other sports by using the LW service (a lifeline service to many remote parts of the UK, which cannot received digital DAB, internet or FM service at fixed locations and in vehicles). He was also asked why cricket cannot use some of the many new digital channels instead of clogging up BBC Radio 4 LW. Other sports manage to do this without difficult.(sic) An additional point is that the cricket is 99% English yet carpets Radio 4 long wave in Scotland, Wales & Northern Ireland as well as England itself. This seems contrary to the BBC's operational remit and appears very biased. In the programme Mr

Nolan quoted "recent [BBC] audience research" showing that cricket is very popular on BBC Radio 4 LW. I hereby request any and all details and data in respect of the aforementioned surveys referred to by Mr. Nolan under The Freedom Of Information Act.'

4. The BBC responded on 7 August 2013. 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'.
5. 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 requests for information.

Scope of the case

6. The complainant contacted the Commissioner on 8 August 2013 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 '*...the survey(s) ... are therefore public information of interest to the BBC audience and the public in general.*

7. In response to the Commissioner's letter of 23 August 2013, he again argued that

'Mr. Dennis Nolan introduced on air.... the existence of the BBC Radio 4 audience opinion survey material in support of his position to use BBC Radio 4 LW for English cricket coverage. It must therefore be correct for the public to be able to see and analyse the data....The audience research material is not covered by the exclusion" art, journalism or literature"'

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 of *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 information that has been requested is for listener audience surveys on cricket on Radio 4 long wave is well within the expected remit of the BBC for the purposes of creating content and producing output. This in turn closely relates to the editorial decision making process and resource allocation.
18. The Information Commissioner has issued a number of decisions supporting the BBC view that information relating to audience surveys is held for the purposes of 'journalism, art or literature'.
19. In the decision notice [FS50318444](#) the Commissioner understood 'that in order to maintain its editorial independence the BBC does not release details of audience feedback including feedback from the Royal Family. The Commissioner considers that the BBC is provided in this way with a source of feedback about the content of its programming which can then be utilised to inform future creative and editorial decisions.'
20. The decision notice ([FS50355160](#)) also considered a request for information concerning audience research. Research is used to help inform future decisions about ways to improve content and services and is therefore part of the editorial decision making process.

21. In both cases the refusal of the BBC to provide the information was upheld by the Commissioner as he was satisfied that it was held for journalistic purposes and therefore fell under the derogation.
22. The Commissioner has accepted on a number of occasions (such as in case reference [FS50314106](#)) that the BBC has a fixed resource in the Licence Fee and resource allocation goes right to the heart of creative decision making. The Commissioner is satisfied that the same rationale connects the information to the derogated purposes.
23. 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

24. 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

25. 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.

26. 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
Group Manager, Complaints Resolution
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF