

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 07 November 2018

Public Authority: The British Broadcasting Corporation ('the BBC')

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

Decision (including any steps ordered)

1. The complainant requested information about the comment section on the online news articles. The BBC explained the information was covered by the derogation and excluded from FOIA. 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. She therefore upholds the BBC's position and requires no remedial steps to be taken in this case.

Request and response

2. On 25 May 2018, the complainant requested the following information:
'How do you decide which articles on BBC online news have a comment section?'
3. On 31 May 2018 the BBC responded and 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'.
4. 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.

5. On 21 June 2018 the complainant contacted the Commissioner to complain about the way the request for information had been handled. He argued *'an exception should be made in the case that the BBC may be blocking certain discussions due to a political or nefarious agenda, going against its supposed impartiality'*.
6. The Commissioner invited the complainant to withdraw his case on 5 July 2018 as it was her opinion that the requested information was held for the purposes of journalism, art and literature and that the BBC was correct in its refusal to disclose this information.
7. However, the complainant declined to withdraw his case. He understood that *'the BBC is not required to answer this FOI due to the exception ("purposes other than those of journalism, art or literature") but that this prevents legitimate investigation into the impartiality of the BBC which is the kind of thing that FOI requests and civil liberties are intended for.'*

Scope of the case

8. The Commissioner considers the scope of the case is to determine if the requested information is excluded from FOIA because it would be held for the purposes of 'journalism, art or literature'. It is outside the remit of the Commissioner to comment on the impartiality of the BBC.

Reasons for decision

9. 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."

10. 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'.

11. 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.

12. 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)
13. 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.
14. 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.
15. 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.
16. 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’.

17. 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.
18. 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.
19. In this case, the information requested concerns the decisions around the availability of a comment section on the BBC online news articles.
20. The BBC stated that the News and BBC Moderation Services use the information to make editorial decisions about which BBC online stories should attract comments sections to engage the BBC audiences.

‘The decision-making process will necessarily involve discussion of...the legal and/or editorial sensitivity of a news story, the topicality of the story and audience interest.’
21. In light of submissions made by the BBC in this and previous cases ([FS50586208](#)) the Commissioner considers that decisions concerning the comments section on a news article fall under the second element explained above, editorial judgements. The information requested therefore falls squarely within the definition of journalism and the Commissioner is satisfied that the information requested is derogated.
22. 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 Commissioner sees no basis for deviating from the approach as the complainant argues; the information clearly falls within the derogation. The derogation is engaged as soon as the information is held by the BBC to any extent for journalistic purposes.

23. In conclusion, and for all of the reasons above, the Commissioner finds that the information falls within the derogation and that the BBC is not obliged to comply with Parts I to IV of the FOIA in respect of the complainant's request.

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: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

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

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
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF