

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 26 July 2022

**Public Authority:** British Broadcasting Corporation ("the BBC")

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

#### **Decision (including any steps ordered)**

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1. The complainant requested information about the moderation of hateful content posted by users on the BBC's social media channels. The BBC responded that the requested information was covered by the derogation and hence excluded from the FOIA.
2. The Commissioner's decision is that the information in part 1 of the request was held by the BBC for the purposes of journalism, art or literature and so was not covered by the FOIA. He therefore upholds the BBC's position on part 1 of the request and requires no remedial steps to be taken in that regard.
3. Following the Commissioner's intervention, the BBC advised that it does not hold information within the scope of part 2 and part 3 of the information request. This has not formed part of the Commissioner's consideration of this case.

#### **Request and response**

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4. On 7 August 2021, the complainant wrote to the BBC and requested information in the following terms:  
  
"Please provide me with:  
1. Information regarding how moderators assess whether a post contains 'an expression of hate'. This may include:  
a. Training materials

- b. Policy documents
  - c. Guidelines referred to by moderators or their managers
  - d. Feedback provided to moderators or their managers as a result of complaints or appeals about their moderation decisions
2. Information regarding the number of posts containing 'an expression of hate' identified during 2021. If available, I would like to see the numbers broken down by social media account, month and 'type of hate' ideally using the types mentioned by the BBC Sport Social Media Team in their tweet of 1st August 2021: race, colour, gender, nationality, ethnicity, disability, religion, sexuality, sex, age and class.
3. A list of posts that moderators have assessed to contain 'an expression of hate' in 2021. If available, any accompanying commentary the explain why the moderator assessed the post to contain 'an expression of hate'."
5. On 27 August 2021 the BBC responded to the request. It explained that it did not believe that the information was caught by the FOIA because it was held for the purposes of "art, journalism or literature". The BBC would not therefore provide any information in response to the request.
6. Following the Commissioner's intervention, on 28 June 2022, the BBC provided an updated response and revised its position in respect of part 2 and part 3 of the information request. The BBC stated that it did not hold information relating to these parts of the request.
7. On receipt of the BBC's updated position, the Commissioner invited the complainant to focus the complaint on part 1 of the request only, with no objection from the complainant.

## Scope of the case

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8. The complainant contacted the Commissioner on 28 August 2021 to complain about the way their request for information had been handled. In particular, the complainant challenged the operation of the derogation in this case.
9. The scope of this case focusses on part 1 of the request only and the following analysis is to determine whether the information requested is excluded from the FOIA because it was held for the purposes of "journalism, art or literature".

## Reasons for decision

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10. Under section 1(1) of the FOIA, anyone who requests information from a public authority is entitled under subsection (a) to be told if the

authority holds the information and, under subsection (b) to have the information communicated to him or her if it is held.

11. The FOIA only applies to the BBC to a limited extent. Schedule One, Part VI of the FOIA provides that the BBC is a public authority for the purposes of the FOIA but it 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 is known as the “derogation”. This means that information that the BBC holds for the purposes of journalism, art or literature - in broad terms, its output or related to its output – is not covered by the FOIA. If information falls within the derogation, then that is the end of the matter; there is no public interest test or similar provision to consider the merits of disclosure.
13. Certain information that the BBC may hold is derogated because, although it is publicly funded through the licence fee, the BBC commercially competes with other broadcasters who are not subject to the FOIA. Releasing information about its output, or related to its output, could therefore commercially disadvantage the BBC.
14. Broadly, BBC information that is covered by the FOIA includes information about: how the BBC is managed and run, including the TV licence; the BBC’s employees and its human resources practices; and the BBC’s performance.
15. BBC information that is not covered by the FOIA includes the following: information about the BBC’s on-screen or on-air “talent” including its presenters and journalists; information about BBC programmes including any spend or editorial decisions associated with its programming; materials that support the BBC’s output, such as the script of a television programme or a source drawn on for an investigation; and viewer and listener complaints to the BBC about the above.
16. The derogation as it applies to the BBC is discussed in more detail in numerous published decisions made by the Commissioner, such that he does not consider it necessary to reproduce that detail again here. However, key to the derogation is the Supreme Court decision in Sugar

(Deceased) v British Broadcasting Corporation and another [2012] UKSC 4<sup>1</sup>

17. The Supreme Court 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. The complainant argued that the information requested was intended to understand “whether or not the BBC’s moderation actions are inhibiting the freedom of expression of those users” on the BBC’s Twitter media platform. As explained above 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.
20. In its submission, the BBC explained the information requested was held within its Moderation Services team and BBC Sport. The requested information included guidance or procedures that fall within the BBC Editorial Policy and the BBC explained that it is used by its moderators when making editorial decisions about its output. This includes content generated by users contributing to the BBC’s platforms and it is that content that is moderated to ensure adherence to the BBC’s overarching editorial guidelines, standards and values.
21. The Commissioner has accepted on several occasions that the BBC’s social media pages are creative spaces for an editorial purpose<sup>2</sup>. The BBC Twitter account serves as a form of user interaction that is akin to programme content. The BBC is hosting a public discussion online, in the same way it hosts discussion and debate in television and radio programmes.
22. Decisions relating to what content BBC Sport publishes on its Twitter platform, and how BBC Sport moderate audience comments, are editorial decisions. Any discussions in relation to editorial decisions to

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<sup>1</sup> <https://www.supremecourt.uk/cases/docs/uksc-2010-0145-judgment.pdf>

<sup>2</sup> [FS50525019](#)

moderate, limit, extend or restrict posts on Twitter would clearly fall within the remit of journalist output.

23. The Commissioner's view is that the information requested, relating to the BBC's decisions in moderation of its social media platforms including its Twitter pages, is information held for the purpose of 'journalism, art or literature'. This is because this information relates to the exercise of judgement in the analysis of and review of its social media content and is directly linked to the BBC's output.
24. The Commissioner has therefore found that the BBC was not obliged to comply with Parts I to V of the FOIA in relation to part 1 of the complainant's information request.

## **Right of appeal**

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25. 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@justice.gov.uk](mailto:grc@justice.gov.uk)  
Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

26. 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.
27. 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 .....**

**Claire Churchill**  
**Team Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**