

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 27 June 2023

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

Address: BBC Broadcasting House
Portland Place
London
W1A 1AA

Decision (including any steps ordered)

1. The complainant requested information from the BBC about a Panorama programme. The BBC responded that the requested information was covered by the derogation and hence 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 so was not covered by FOIA. He therefore upholds the BBC's position and requires no steps to be taken in this case.

Request and response

3. On 17 May 2023 the complainant wrote to the BBC and requested information in the following terms:

"I am writing to request data in regards to BBC Panorama "Private ADHD Clinics Exposed" show shown on 15th May 2023/

1. All corresponding information between the team and NHS in regards to this episode as it included several journalistic interview sections.
2. How was the ADHD community consulted on the documentary? All corresponding information.
3. How the documentary was assessed for risks or harms to the ADHD community itself? All corresponding information.
4. What is the BBC policy on conducted documentaries on vulnerable groups? All corresponding information."

4. On 5 June 2023 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".
5. It therefore would not provide any information in response to the requests.

Scope of the case

6. The complainant contacted the Commissioner on 6 June 2023 to complain about the way their request for information had been handled. In particular, they challenged the operation of the derogation in this case.
7. The scope of this case and the following analysis is to determine whether the information requested is excluded from FOIA because it was held for the purposes of "journalism, art or literature".

Reasons for decision

8. Under section 1(1) of 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.
9. FOIA only applies to the BBC to a limited extent. Schedule One, Part VI of FOIA provides that the BBC is a public authority for the purposes of 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."
10. 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 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.
11. 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

FOIA. Releasing information about its output, or related to its output, could therefore commercially disadvantage the BBC.

12. Broadly, BBC information that is covered by 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.
13. BBC information that is not covered by 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.
14. 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 4¹
15. 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.
16. 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.
17. The complainant argued that "transparency and public interest are crucial in light of the episode's repercussions. It is important to address the request for data and ensure the well-being of vulnerable individuals. Conducting an independent review or releasing the requested data would provide clarity and accountability. The BBC's refusal to disclose the information and their lack of review raise concerns about their commitment to transparency, especially regarding healthcare and medical information, which are of public interest".

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

18. As explained above, information about the Panorama programme and background investigations about its subject topic is derogated information. This type of information is associated with the BBC's output because analysis and review of information relates to editorial decisions about programming, and enhancement of the standards and quality of journalism (particularly with respect to accuracy, balance and completeness) and is related to the BBC's output.
19. The Commissioner is satisfied, based on the very well established precedent set in the numerous other decisions he has made in cases involving the BBC, that, if held at all, the information requested by the complainant would be held for the purposes of journalism, art or literature.
20. The Commissioner finding is, therefore, that the BBC was not obliged to comply with the complainant's information requests.

Right of appeal

21. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

22. 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.
23. 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

Michael Lea
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