

## **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)**

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1. The complainant requested information from the BBC about ADHD articles and 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**

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3. On 15 May 2023 the complainant wrote to the BBC and requested information in the following terms:

"With respect to the following two articles and television programme:

- ADHD: Private clinics exposed by BBC undercover investigation (<https://www.bbc.co.uk/news/health-65534448>)
- I don't have ADHD, but three private clinics say I do (<https://www.bbc.co.uk/news/health-65534449>)
- Private ADHD Clinics Exposed - Panorama (<https://www.bbc.co.uk/programmes/m001m0f9>)

I would like to request copies of all documents, transcripts, emails and/or minutes produced during the editorial process which document the following:

1) The extent to which consideration was given to the direct and indirect impact of:

- a) the substance of their investigations,
- b) the positioning of different elements of the story and the likely conclusions drawn by viewers/readers without special knowledge of the topic under discussion, and
- c) the language choices and tone of the pieces on people with disabilities who are affected by the issue.

Including if and how the individuals responsible for the work took consideration of their obligations under section 2.3 of the ofcom broadcasting code to place the content in a context which minimises foreseeable harm.

2) If, when and how the production team and journalist sought to consult with to discuss or understand the impact of their reportage in the context mentioned in 1 above, with:

- a) with internal resources (such as, but not limited to: the disability ambassador, and relevant EDI professionals within the creative diversity department)
- b) with internal resources (such as, but not limited to: the ADHD Foundation, ADHDadultUK, ADHD Aware, Mind , or the Royal College of Psychiatrists),

What the outcomes or outputs from these discussions (if held) was, and how this feedback was incorporated into the production process.

3) How the production team and journalist justified that:

a) the investigate methodology was sufficiently representative to be in compliance with sections 2.2 and 5.7 of the ofcom broadcasting code, in light of material difference in their approach to making contact with and recording different organisations.

b) the output complied with sections 5.8 and 5.9 of the broadcasting code,

C) the output complied with section 7.9 of the broadcasting code, specifically with respect to the failure to provide an opportunity for external stakeholders representing individuals with ADHD within wider society the opportunity to comment on the wider implications of the reportage in the light of the wording in that clause of the code:

"Before broadcasting a factual programme, including programmes examining past events, broadcasters should take reasonable care to satisfy themselves that:

...

- anyone whose omission could be under to an individual or organisation has been offered an opportunity to contribute"."

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**

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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**

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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 4<sup>1</sup>
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 the BBC applied the derogation "to avoid disclosure of information relating to its conduct of regulatory compliance activities which is distinct from information relating to those activities in a more general sense. The public body has consistently deflected complaints about the activities despite widespread evidence of harm against groups protected by the equalities act, and evidence of potential regulatory non-compliance in the output itself. Therefore, a clear public

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

interest case can be made for establishing if they adequately assessed their compliance before publication/broadcast”.

18. As explained above, information about the BBC articles and Panorama programme about ADHD 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**

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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](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://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**  
**Team Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**