

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 3 April 2024

**Public Authority:** British Broadcasting Corporation (BBC)  
**Address:** BBC Broadcasting House  
Portland Place  
London  
W1A 1AA

#### Decision (including any steps ordered)

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1. The complainant requested communications between Adam Smyth and representatives of political parties in Northern Ireland during a particular period. The BBC responded that the majority of the requested information was covered by the derogation and so was excluded from FOIA. However, the BBC also applied section 40(2) of FOIA (personal data) to a small amount of relevant information it held.
2. The Commissioner's decision is that the majority of the information is held by the BBC for the purposes of journalism, art or literature and so isn't covered by FOIA. The remaining information is exempt from disclosure under section 40(2) of FOIA. The BBC breached section 10(1) and 17(1) of FOIA as it didn't issue a response, or a valid refusal notice in respect of the personal data, within 20 working days of the request.
3. It's not necessary for the BBC to take any steps.

#### Request and response

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4. On 5 August 2023, the complainant wrote to the BBC and requested information in the following terms:

"Can the BBC provide all communications between Adam Smyth of BBC NI and any representatives of political parties in Northern Ireland between June 2022 and July 2023?"

5. On 11 December 2023 the BBC responded to the request. The BBC explained that it believed that the majority of the information would be held for the purposes of “art, journalism or literature” and would therefore not be caught by FOIA. As a result, the BBC didn’t consider it was obliged to provide the information.
6. However, the BBC also said that a small amount of relevant information was exempt from disclosure under section 40(2) of FOIA.

## Reasons for decision

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7. The following analysis first covers whether most of the information requested is excluded from FOIA because it was held for the purposes of “journalism, art or literature”. The Commissioner will also consider the BBC’s application of section 40(2) to a small amount of information and the timeliness of its response.
8. 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.”
9. 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 – isn’t covered by FOIA. If information falls within the derogation, then that’s the end of the matter; there’s no public interest test or similar provision to consider the merits of disclosure.
10. Although it’s publicly funded through the licence fee, the BBC competes with other commercial broadcasters who aren’t subject to FOIA. Releasing information about its output, or related to its output, could therefore commercially disadvantage the BBC. However, for the derogation to apply, the BBC doesn’t need to demonstrate that it would suffer commercial harm if the information were to be disclosed. It only has to demonstrate that the information is held for a derogated purpose.
11. Broadly, BBC information that’s 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.

12. BBC information that isn't 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.
13. The derogation as it applies to the BBC is discussed in more detail in numerous published decisions made by the Commissioner, such that he doesn't 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>.
14. 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 or the BBC's journalistic or creative activities involved in producing such output.
15. 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.

### **The complainant's view**

16. The complainant argued that it isn't acceptable that the BBC has been able to withhold information from every single request they've ever submitted to it. The complainant says that the BBC can't be an exception to FOIA rules that all other public bodies are expected to adhere to and that the BBC adopts a blanket refusal based on flimsy reasoning in their view.
17. The complainant's request concerns communications between Adam Smyth and representatives of political parties. Adam Smyth is the Director of BBC Northern Ireland. As explained above, information about BBC programmes including editorial decisions or output is derogated information. The Commissioner is satisfied that if Adam

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

Smyth – as Director of BBC Northern Ireland - had communicated with representatives of political parties during the period specified in the request it would have been for the purposes of the BBC's programming, or potential programming.

18. The Commissioner is satisfied, based on the very well-established precedent set in the numerous other decisions he's made in cases involving the BBC, that the majority of the information requested by the complainant would be held for the purposes of journalism, art or literature. It's therefore not covered by FOIA and the BBC isn't obliged to provide it.

#### **Section 40 – personal information**

19. The BBC applied section 40(2) of FOIA to a small amount of information within scope of the request which it considers is caught by FOIA. The BBC has provided the Commissioner with a copy of this information. It's a short, personal text message between Adam Smyth and another individual and can't be categorised as concerning the BBC's output.
20. Section 40(2) says that information is exempt information if it's the personal data of another individual and disclosure would contravene one of the data protection principles.
21. The Commissioner is satisfied that the information in question is the personal data of Adam Smyth and the other individual – the data subjects. They can be identified from the information and the information relates to them.
22. The Commissioner accepts that the complainant's interest in Adam Smyth's communications with representatives from political parties is a legitimate interest for them to have.
23. The Commissioner next considered whether disclosing the information is necessary to meet the complainant's legitimate interest and the general interest in transparency. He will accept that it's necessary as it would shed some light on Adam Smyth's interactions with the other individual.
24. Finally, the Commissioner has balanced the complainant's legitimate interest against the data subjects' fundamental rights and freedoms.
25. Given the personal nature of the text – ie it doesn't concern BBC business, as such - the Commissioner considers that the data subjects would reasonably expect that their personal data wouldn't be disclosed to the world at large under FOIA and that disclosure would therefore cause them harm or distress.

26. Based on the above factors, the Commissioner has determined that there's insufficient legitimate interest to outweigh the data subjects' fundamental rights and freedoms. The Commissioner therefore considers that disclosing the withheld information would be unlawful as it would contravene a data protection principle; that set out under Article 5(1)(a) of the UK General Data Protection Regulation. This says that "Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject."

### **Procedural matters**

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27. Under section 10(1) of FOIA a public authority is required to respond to a request for information within 20 working days. It must usually inform the requester if it holds the requested information and, if it does, either provide copies or issue a refusal notice.
28. Under section 17(1) a public authority must issue a refusal notice in respect of any exempt information within the same timescale.
29. In the case of the BBC, even if information is derogated, it must still inform the requester of that fact within 20 working days. This was confirmed in *Sugar v BBC & Another* [2009] UKHL 9.
30. The BBC breached section 10(1) and 17(1) of FOIA in this case. That's because it didn't confirm whether it held the requested information for the purposes of FOIA or issue a refusal notice in respect of the information to which it applied the exemption under section 40(2), within 20 working days.

## Right of appeal

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31. 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)

32. 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.
33. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

**Cressida Woodall**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**