

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 7 November 2024

Public Authority: British Broadcasting Corporation (BBC)

Address: BBC Broadcasting House
Portland Place
London
W1A 1AA

Decision (including any steps ordered)

1. The complainant submitted an information request to the BBC for a specific email sent from Laura Kuenssberg to Boris Johnson. The BBC responded that the requested information, if held, would be covered by the derogation and excluded from FOIA.
2. The Commissioner's decision is that this information, if held at all, is held by the BBC for the purposes of journalism, art or literature, so is not covered by FOIA. He therefore upholds the BBC's position.
3. The Commissioner does not require further steps, as a result of this decision notice.

Request and response

4. On 3 October 2024, the complainant wrote to the BBC and requested information in the following terms:

"I refer to the BBC announcement on Twitter ("X") dated 2 October, referring to the email the subject of my FOI request below, at the following link:

<https://x.com/BBCNewsPR/status/1841592374838874506?t=ji7cTegKLONNIHEHyH0A>

I submit herein a formal FOI request for a copy of the entire email referred to (email addresses suitably redacted for GDPR/DPA compliance)."

5. On 15 October 2024, the BBC provided its response in which it explained that, if held, the information would be held for the purposes of "journalism, art or literature" and would therefore not be caught by FOIA. As a result, the BBC did not consider it was obliged to provide the information.

Reasons for decision

6. The following analysis covers whether the information requested is excluded from FOIA because, if held, it would be held for the purposes of "journalism, art or literature."
7. 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."
8. 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.

9. Although it is publicly funded through the licence fee, the BBC competes with other commercial broadcasters who are not 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 does not 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.
10. 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.
11. BBC information that is not covered by FOIA includes 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.
12. 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 the case *Sugar (Deceased) v British Broadcasting Corporation and another* [2012] UKSC4¹.
13. 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).

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

14. Therefore, in order for the information to be derogated and fall outside of 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 the derogation does not apply in this matter.

The Commissioner's view

17. The requested information is an email relating to a BBC programme.
18. The Commissioner is satisfied, based on the 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. This is because the request relates to the BBC's output on a news and current affairs programme. It is therefore not covered by FOIA, and the BBC is not obliged to provide it.
19. The Commissioner's finding, therefore, is that the BBC was not obliged to comply with the complainant's information request.

Right of appeal

20. 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

21. 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.
22. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Daniel Kennedy
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Wycliffe House
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