

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 15 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 requested information from the BBC about programme commissioning. 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, if held at all, is held by the BBC for the purposes of journalism, art or literature and so is 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 26 July 2024, the complainant wrote to the BBC and requested information in the following terms:

"Currently statistics are available and revealed around the top 10 independent production companies supplying TV programmes to the BBC in terms of spend and hours. This was outlined in a recent commissioning report published this week.

"I should like to know this information for the independent production companies supplying radio programmes and podcasts to the BBC.

"In addition i would be interested to know the list of the top 10 production companies by hours and spend supplying radio and tv programmes to the BBC from outside of London (so in the nations and regions)."

4. On 22 August 2024 the BBC responded to the request. The BBC explained that it believed that 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 did not consider it was obliged to provide the information.

Reasons for decision

5. The following analysis covers whether the information requested is excluded from FOIA because it was held for the purposes of "journalism, art or literature".
6. 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."
7. 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.
8. 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.
9. 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.

10. 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.
11. Key to the derogation is the Supreme Court decision in *Sugar (Deceased) v British Broadcasting Corporation and another* [2012] UKSC 4.
12. 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. 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.
13. 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

14. The complainant argued that the information ought to be disclosed because:

"I was merely requesting the same information [the BBC] provide for their work with the independent TV production sector for the radio and podcast sector - ie a list of companies by hours and spend across the UK but also outside London.

They claim it's for journalistic, art and literature reasons that they can't supply the information. This is clearly nonsense since they make it available in television - and i don't intend to use it in a journalistic manner.

It seems they are blocking us from finding out this information which isn't very transparent and against the spirit of the legislation. In a competitive market it's obviously seen as a positive thing to be open about these things in TV, so why not in radio? It's really important to know that the BBC is spending and collaborating across the UK and i would have thought they'd be very keen to prove this. The TV stats clearly show that. Why no similar radio stats?"

15. As explained above, information about the commissioning of programmes, if held at all, is derogated information. This type of information would be associated with the BBC's output because it is derived from the decisions the BBC makes about which programmes it will commission and from whom.
16. The BBC is entitled to publish any information it wishes to – regardless of whether it would be covered by FOIA. However, it is only obliged to provide, under FOIA, information which it holds for purposes other than journalism, art or literature.
17. 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. It is therefore not covered by FOIA, and the BBC is not obliged to provide it.
18. The Commissioner finding is, therefore, that the BBC was not obliged to comply with the complainant's information request.

Right of appeal

19. 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

20. 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.
21. 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

Roger Cawthorne
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