

Freedom of Information Act 2000 (FOIA) Decision notice

Date: 20 October 2021

Public Authority: The British Broadcasting Corporation
Address: BBC Broadcasting House
Portland Place
London W1A 1AA

Decision (including any steps ordered)

1. The complainant has requested information relating to the BBC spend for the 2020 Olympics coverage. The British Broadcasting Corporation (BBC) explained the information was covered by the derogation and 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 did not fall inside FOIA. She therefore upholds the BBC's position and requires no remedial steps to be taken in this case.

Request and response

3. The complainant wrote to the BBC on 29 July 2021 and made a request for information in the following terms:

"This submission under FOIA 2000 constitutes a legitimate request for information relating to the following and should be disclosed in accordance with FOIA 2000, and in the manner commensurate with law.

Such request relates to: Information on the BBC spend for 2020 Olympics coverage, namely costs associated with constructing a BBC studio in Tokyo and; amount of money spent on flights, expenses and accommodation for commentators, presenters, guests and ancillary staff and; Amount paid for broadcast rights to Discovery and; Sums spent on salaries for such as those mention [sic] in point two, namely those commentators, presenters, guests and ancillary staff. As a public body in receipt of public money you are obliged to furnish the information, all of which cannot be hidden from the public domain. Failure to do so will

necessitate additional action as necessary for the BBC to comply with the legitimate disclosure under the Act."

4. The BBC responded on 6 August 2021 and refused to provide the requested information. It stated that it was exempt from disclosure under the 'derogation'

Standard BBC position:

It explained that it believes that the information requested is excluded from the Act because it is held for the purposes of 'journalism, art or literature.' It explained that Part VI of Schedule 1 to FOIA provides that information held by the BBC and the other public service broadcasters is only covered by FOIA if it is held for 'purposes other than those of journalism, art or literature'. It concluded that the BBC was not required to supply information held for the purposes of creating the BBC's output or information that supports and is closely associated with these creative activities. It therefore would not provide any information in response to the request for information.

Scope of the case

5. The complainant contacted the Commissioner on 11 August 2021 to complain about the way his request for information had been handled.
6. The Commissioner considers the scope of the case is to determine if the requested information, for the cost of broadcasting football and other sports, is excluded from FOIA because it would be held for the purposes of 'journalism, art or literature'

Reasons for decision

7. Under section 1(1) of the 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.
8. The 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 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 – is not covered by the 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.
10. 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 the FOIA. Releasing information about its output, or related to its output, could therefore commercially disadvantage the BBC.
11. Broadly, BBC information that is covered by the 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 is not covered by the 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 she 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. 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.

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

14. 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

15. The complainant has argued that the request under FOIA does not relate to journalistic integrity (in short), rather how public money is spent. He further stated:

"This in no way falls within what could be described as journalism, and the public interest in maintaining any exemption does NOT outweigh the public interest in disclosing the information.

The ICO website itself states, "Public authorities spend money collected from taxpayers, and make decisions that can significantly affect many people's lives. Access to information helps the public make public authorities accountable for their actions and allows public debate to be better informed and more productive.

The licence fee is a mandatory payment for those wishing to use the service of the public broadcaster. It is right and proper that individuals know that the money they give to the BBC is spent in a way which reflects the principles of the charter, and is not subject to public waste. All those employed at the BBC are to all intents and purposes, public officers, and must comply with statutory bindings as a public officer for which there is ample legal provision.

Again, this matter relates to how these public officers used public money, and not any matter relating to journalism. In R v Whitaker (1914) KB 1283 the court said:

'A public office holder is an officer who discharges any duty in the discharge of which the public are interested, more clearly so if he is paid out of a fund provided by the public.' Additionally, "a person may fall within the meaning of a 'public officer' where one or more of the following characteristics applies to a role or function that they exercise with respect to the public at large:"

Responsibility for public funds

This matter relates to the use of, and spending of public money, not the conduct of individuals, their journalistic views, or any matter which may impinge upon, or give direct effect to the case referred in the ICO decision letter."

Commissioner's view

16. The information that has been requested in this case is *"costs associated with constructing a BBC studio in Tokyo and; amount of money spent on flights, expenses and accommodation for commentators, presenters, guests and ancillary staff and; Amount paid for broadcast rights to Discovery and; Sums spent on salaries for such as those mention [sic] in point two, namely those commentators, presenters, guests and ancillary staff"*
17. Whilst the Commissioner acknowledges that the withheld information in this case differs to that considered in *Sugar v BBC* (2012), she is reminded that the Supreme Court's second limb of the definition of 'journalism' included any financial information directly related to the making of programmes (or content) likely being held for the purposes of journalism.
18. Having applied the approach to the derogation set out by the Supreme Court and the Court of Appeal, which is binding, the Commissioner is satisfied that the requested information falls under the definition of journalism and is therefore derogated. The Commissioner sees no basis for deviating from the approach as the complainant argues; the information clearly falls within the derogation. The derogation is engaged as soon as the information is held by the BBC to any extent for journalistic purposes.
19. The Commissioner also notes the First Tier Tribunal's decision in *BBC v Information Commissioner EA/2009/00153*². The appeal involved a nine part request for information to the BBC relating to its spending on radio stations and radio budgets, including spend on production and external promotions. It was the Tribunal's decision that, information relating to spend on production costs and budgets was held for the purposes of journalism, whilst information relating to spend on external promotion was not and fell within the scope of the Act.
20. The Commissioner further notes that in her decision notice *FS507797994*³, which involved a request for information relating to costs to broadcast football, decisions taken on costs can relate to editorial decisions about the content the BBC wishes to offer and that

³ <https://ico.org.uk/media/action-weve-taken/decision-notice/2018/2553934/fs50779799.pdf>

this in turn relates to the overall editorial decision making process and resource allocation.

21. Any decision taken on costs has a direct impact on the creative scope for the programme and for other programmes because more money spent on one area or one programme means less available for another. The Commissioner recognises that these decisions relate to editorial decisions about the content that the BBC wants to offer its customers and this in turn relates to the overall editorial decision making process and resource allocation.
22. It is therefore intimately linked to the BBC's output, that is the relationship between the purposes for which the information was held and the BBC's output on news and current affairs, including sport, and/or its journalistic activities relating to such output, and it is clear that the Commissioner has no jurisdiction in this matter.
23. The Commissioner has previously issued a number of decision notices (case references FS50404473, FS50497318, FS50319492, FS50363611) which considered requests for information concerning costs during large events. The BBC has explained that televising large public events all involve the same sort of editorial decisions on logistical scenarios, resource allocation, creative output and the costs involved. Furthermore, the expenditure involved in the coverage of such events will be used to inform editorial and budgetary decisions for future events.
24. The Commissioner has also accepted on a number of occasions (FS50314106) that the BBC has a fixed resource in the Licence Fee and resource allocation goes right to the heart of creative decision making. The Commissioner is satisfied that the same rationale applies in this case.
25. For all of the reasons above, the Commissioner is therefore satisfied that the information requested is derogated. Therefore, the Commissioner has found that the request is for information held for the purposes of journalism and that the BBC was not obliged to comply with Parts I to V of FOIA.

Right of appeal

26. 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

27. 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.
28. 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

Susan Duffy
Senior Case Officer
Information Commissioner's Office
Wycliffe House
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Wilmslow
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