

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 22 June 2020

**Public Authority:** British Broadcasting Corporation (BBC)

**Address:** Broadcasting House  
Portland Place  
W1A 1AA

#### **Decision (including any steps ordered)**

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1. In an eight part request, the complainant has requested information about the programme *'Confronting Holocaust Denial with David Baddiel'*. The BBC refused to comply with the request as it considered that all the requested information was held for the purposes of journalism, art or literature and was therefore outside the scope of the FOIA. The complainant disputed this. The BBC subsequently re-considered its response to part 3 of the request. It confirmed that it does not hold some of the information requested in that part and has refused to release other information under section 40(2) of the FOIA as it considers it to be the personal data of third persons.
2. The Commissioner's decision is as follows:
  - The information requested in parts 1, 2, 4, 5, 6, 7 and 8 of the request, and elements of part 3 of the request, is derogated and does not fall within the scope of the FOIA.
  - The BBC does not hold some of the information covered by three parts of part 3 of the request and has now complied with section 1(1)(a) of the FOIA in respect of this information.
  - The remaining information that the complainant has requested in the above three parts is exempt from disclosure under section 40(2) of the FOIA as it is the personal data of third persons and disclosing it would not be lawful.

- Regarding its response to part 3, the BBC breached section 10(1) and 17(5) of the FOIA as it did not confirm that it does not hold some of the requested information or issue an appropriate refusal notice with regard to other information, within the required timescale.
3. The Commissioner does not require the BBC to take any remedial steps.

## **Request and response**

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4. On 17 February 2020, the complainant wrote to the BBC and requested information in the following terms:

*"I wish to access all information available on the making of the above programme, broadcast on the BBC on 17 February 2020, with the following iPlayer link:*

*<https://www.bbc.co.uk/iplayer/episode/m000fjqk/confronting-holocaust-denial-with-david-baddiel>*

*I am a history graduate and wish to write an academic (or near-academic) article on the key decisions that went into making the programme, the qualifications and experience of the key decision makers and the information they had at hand. This is with a view to evaluating the BBC's influence on Holocaust Studies.*

*The programme was made by Wall to Wall Productions of Bristol and the key decision makers appear to include:*

*Alice Fraser (Producer, Wall to Wall)  
David Baddiel (Writer and Presenter)  
Abigail Priddle (Commissioning Editor, BBC)  
Tom Macdonald (Commissioning Editor, BBC)  
Emily Shields (Executive Producer)*

*If these people were answerable to line managers who took an active interest in the project, these too may have made key decisions.*

*Whilst my inquiry may develop, I begin with the following questions:*

*1. When was the programme commissioned, why and by whom? What was required of the makers? What budget were they given?*

*2. Over what period was information on revisionism/denial collected and evaluated? Who by? Why was this period chosen?*

3. [1] *What qualifications or experience did the creators have in history, historiography or other relevant subjects (e.g. epistemology)? [2] Have any of them studied history at school or university, or [3] written history papers or books? [4] What decisions were made on bringing in outside expertise?*
4. *Why was a scholar not chosen as the writer, but someone best known as a comedian and clearly with strongly held views? Who decided this and why?*
5. *What information was provided to the programme makers by the revisionist/denier community (I appreciate that this may have to be redacted for anonymity, but the content is relevant to my inquiry)? How was this evaluated and selected and by whom? What oversight occurred and by whom?*
6. *Who made the decision to speak to only one revisionist/denier? Apparently this was David Baddiel's decision, but did anyone challenge him on it?*
7. *What constraints were placed on Mr Baddiel, either in the terms of the commission or as the project proceeded? Who reviewed his script, or the position from which he spoke impromptu [sic]?*
8. *What decisions were made by the BBC and which by Wall to Wall/ What records exist of these? Are there minutes of significant meetings?"*
5. The BBC responded on 27 February 2020. The BBC explained that it did not consider that any of the requested information was caught by the FOIA because it was held for the purposes of 'art, journalism or literature' ie the information was derogated.
6. Once the matter was passed to the Commissioner, her initial assessment was that the information the complainant has requested was derogated and that, as such, the BBC was not obliged to respond to the request under the FOIA. The complainant disputed this.
7. The Commissioner was satisfied that the majority of the information the complainant had requested is derogated. However, she asked the BBC to justify its position regarding part 3 of the request. After re-considering its response to that part, the BBC provided the complainant with a fresh response to this part on 27 May 2020. It had considered it under the FOIA. The BBC confirmed that it does not hold some of the information requested in part 3 of the request. It considered that the remaining information requested is the personal data of third persons

and so exempt from disclosure under section 40(2) of the FOIA. The BBC directed the complainant to where some information about David Baddiel and his involvement with the programme in question is published.

## Scope of the case

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8. The complainant contacted the Commissioner on 23 March 2020 to complain about the way his request for information had been handled.
9. The Commissioner has first considered whether the majority of the requested information is derogated ie falls outside the scope of the FOIA.
10. With regard to parts 3.1, 3.2 and 3.3 of the request, the Commissioner has considered whether the BBC can be said to hold information associated with some individuals who worked 'behind the scenes' of the programme in question, under the FOIA. The Commissioner has then considered whether the BBC can rely on section 40(2) of the FOIA to withhold information that was requested in these three parts and that concerns its own 'behind the scenes' staff.
11. Finally, the Commissioner has considered whether the BBC has complied with section 10(1) and section 17(1) in respect of the timeliness of its response to part 3 of the request.

## Reasons for decision

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### **Section 1 – general right of access to information held by public authorities**

12. 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.
13. The FOIA only applies to the BBC to a limited extent. Schedule 1 of the FOIA defines the BBC as a public authority for the purposes of the FOIA only "*...in respect of information held for purposes other than those of journalism, art or literature.*"
14. 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.

15. 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.
16. 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.
17. Broadly, BBC information that is not covered by the FOIA includes the following: information about the BBC's on-screen or on-air 'talent' ie 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.
18. 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 4*<sup>1</sup>
19. Parts 1, 2, 4, 5, 6, 7 and 8 of the complainant's request concern the programme '*Confronting Holocaust Denial with David Baddiel*' – its commissioning, timescales, the writing of it and editorial decisions that were made about it before and during its production.
20. The complainant has argued that the information he has requested has a public interest. However, as above, matters of public interest cannot be considered if the information is not caught by the FOIA.

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<sup>1</sup> [http://www.supremecourt.gov.uk/docs/UKSC\\_2010\\_0145\\_ps\\_v2.pdf](http://www.supremecourt.gov.uk/docs/UKSC_2010_0145_ps_v2.pdf)

21. The complainant has also put forward an argument that in this case “journalism” has been interpreted too narrowly. He considers that this exemption cannot reasonably be extended to “an intervention in public debate” (by which the Commissioner understands the complainant to mean the debate about holocaust denial) as it fails the test of reasonableness implicit in the BBC’s commitment to education in its Charter. In the complainant’s view it is only reasonable to claim an intellectual authority when views conform to minimal scholarly standards. The Commissioner disagrees. As she explained to the complainant, she is satisfied, based on the very well established precedent set in the numerous other decisions she has made in cases involving the BBC, that the information requested in the above seven parts of the request, if held, is held for the purposes of journalism, art or literature – it concerns the BBC’s output and is therefore derogated.
22. Parts 3.1, 3.2 and 3.3 of the complainant’s request cover information about the programme’s presenter, David Baddiel. The Commissioner is satisfied that this is information about the BBC’s ‘on screen talent’. It is also therefore derogated information, ie it does not fall within the scope of the FOIA because it can be categorised as being held for the purposes of journalism, art or literature.
23. Finally, the Commissioner considers the information requested in part 3.4 is derogated information. As above, information that the BBC holds for the purposes of journalism, art or literature is not covered by the FOIA. In this case, any decisions to bring outside expertise to the programme in question is an editorial decision ie it concerns the BBC’s output. If held, any information about such decisions would be categorised as journalism and would fall outside the scope of the FOIA.

### *Conclusion*

24. The Commissioner is satisfied that information requested in parts 1, 2, 4, 5, 6, 7, 8 of the request, the information requested in parts 3.1, 3.2 and 3.3 that concerns David Baddiel and the information requested in part 3.4 of the request is derogated information and the BBC is not obliged to comply with the FOIA in respect of these parts.
25. The Commissioner has next considered the BBC’s response to parts 3.1, 3.2 and 3.3 of the request to the degree that those elements concern information about ‘behind the scenes’ staff. The BBC has now handled these parts under the FOIA.
26. Section 3(2)(b) of the FOIA says that information is held by a public authority if it is held by another person on behalf of the authority.

27. In part 3 of his request the complainant has requested (1) what qualifications or experience the creators of the programme in question have in history or other relevant subjects, (2) whether any of them studied history at school or university and (3) whether any of the creators have written history papers or books.
28. In that introduction, the complainant had listed the names of individuals (in addition to David Baddiel) who, it appeared to him, presumably from the programme's credits, had created that programme.
29. In its submission to the Commission the BBC told her that it commissioned a production company [which the Commissioner notes was Wall to Wall Productions] to create the programme in question and, therefore, some of the creators involved were not BBC staff. The BBC went on to confirm that information about those creators – who the Commissioner understands to be Alice Fraser and Emily Shields - is not held by the production company on its behalf ie the BBC cannot be said to hold that information.
30. It said that, for context, whilst the BBC may be involved in the casting, it would not ordinarily be involved in recruiting production staff when commissioning content. The BBC confirmed that, further, the production company is the data controller in the commissioning agreement. In the BBC's view this demonstrates that the production company, not the BBC, is responsible for determining the purposes for which data is collected including decisions about hiring production staff.

### *Conclusion*

31. The Commissioner is satisfied that the BBC does not hold information requested in parts 3.1, 3.2 and 3.3 of the request that concerns Wall to Wall Productions staff. This information, if held, is held by Wall to Wall Productions on its own behalf and is not held on behalf of the BBC. The Commissioner therefore now finds that the BBC has complied with section 1(1)(a) of the FOIA in respect of this particular information.
32. The Commissioner makes the observation that, even if the BBC could be said to hold information covered by parts 3.1, 3.2 and 3.3 that concerns the production company's staff, as will be discussed below, information about these individuals' qualifications is their personal data and would be exempt from disclosure under the FOIA.

### **Section 40 – personal data**

33. Section 40(2) of the FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the requester, and one of the conditions listed in section 40(3A), (3B) or 40(4A) is satisfied.

34. In this case the relevant condition is contained in section 40(3A)(a)<sup>2</sup>. This applies where disclosing the information to any member of the public would contravene any of the principles relating to the processing of personal data ('the DP principles'), as set out in Article 5 of the General Data Protection Regulation ('GDPR').
35. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ('DPA'). If it is not personal data, then section 40 of the FOIA cannot apply.
36. Second, and only if the Commissioner is satisfied that the requested information is personal data, she must establish whether disclosing that data would breach any of the DP principles.

### **Is the information personal data?**

37. Section 3(2) of the DPA defines personal data as:  
*"any information relating to an identified or identifiable living individual"*.
38. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
39. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.
40. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
41. In this case, the request is for the qualifications and experience of the 'creators' of the programme '*Confronting Holocaust Denial with David Baddiel*'. As discussed above, the BBC does not hold this information in relation to the individuals employed by the production company. The information that the BBC holds and is withholding under section 40(2) concerns Abigail Priddle and Tom McDonald, who are employed by the BBC.

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<sup>2</sup> As amended by Schedule 19 Paragraph 58(3) DPA.



42. The Commissioner is satisfied that the requested information relates to these two individuals. She is satisfied that this information both relates to and identifies these individuals. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
43. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under the FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
44. The most relevant DP principle in this case is principle (a).

### **Would disclosure contravene principle (a)?**

45. Article 5(1)(a) of the GDPR states that:

*"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject"*.

46. In the case of an FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair and transparent.
47. In order to be lawful, one of the lawful bases listed in Article 6(1) of the GDPR must apply to the processing. It must also be generally lawful.

### **Lawful processing: Article 6(1)(f) of the GDPR**

48. Article 6(1) of the GDPR specifies the requirements for lawful processing by providing that "*processing shall be lawful only if and to the extent that at least one of the*" lawful bases for processing listed in the Article applies.
49. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f) which states:

*"processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child"*<sup>3</sup>.

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<sup>3</sup> Article 6(1) goes on to state that:-

50. In considering the application of Article 6(1)(f) of the GDPR in the context of a request for information under the FOIA, it is necessary to consider the following three-part test:
- **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information
  - **Necessity test:** Whether disclosure of the information is necessary to meet the legitimate interest in question
  - **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject
51. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.

### **Legitimate interests**

52. In considering any legitimate interest(s) in the disclosure of the requested information under FOIA, the Commissioner recognises that a wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, and commercial interests as well as wider societal benefits. These interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests. However, if the requester is pursuing a purely private concern unrelated to any broader public interest, unrestricted disclosure to the general public is unlikely to be proportionate. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.

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*"Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks".*

However, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA) provides that:-

*"In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the GDPR would be contravened by the disclosure of information, Article 6(1) of the GDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted".*

53. The complainant has described himself as a history graduate, interested in writing an article on the key decisions that went into making the programme in question, the qualifications and experience of the key decision makers and the information they had at hand. This is with a view to evaluating the BBC's influence on the area of Holocaust Studies. In the Commissioner's view this is the complainant's own interest, but it is nonetheless a legitimate interest for him to have.

**Is disclosure necessary?**

54. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under the FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
55. In its submission to the Commissioner, the BBC has noted the need for accountability and transparency in the work public authorities undertake. Therefore, it says, a BBC employee will have some expectation that data relating to their professional role may in some limited circumstances be disclosed.
56. From the complainant's perspective, given his specific interest in the information he has requested, disclosing the withheld information would be necessary to meet that interest. The Commissioner has therefore gone on to conduct the balancing test.

**Balance between legitimate interests and the data subjects' interests or fundamental rights and freedoms**

57. It is necessary to balance the legitimate interests in disclosure against the data subjects' interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For example, if the data subjects would not reasonably expect that the information would be disclosed to the public under the FOIA in response to the request, or if such disclosure would cause unjustified harm, their interests or rights are likely to override legitimate interests in disclosure.
58. In considering this balancing test, the Commissioner has taken into account the following factors:
- the potential harm or distress that disclosure may cause
  - whether the information is already in the public domain
  - whether the information is already known to some individuals

- whether the individual expressed concern to the disclosure; and
  - the reasonable expectations of the individual
59. As the BBC has noted in its submission, in the Commissioner's view, a key issue is whether the individuals concerned have a reasonable expectation that their information will not be disclosed. These expectations can be shaped by factors such as an individual's general expectation of privacy, whether the information relates to an employee in their professional role or to them as individuals, and the purpose for which they provided their personal data.
60. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
61. The BBC says that in this case the information concerns specific personal information in relation to a small number of BBC staff members. Whilst some information relating to the work and experience of individual staff members may be in the public domain, there is a difference between an employer providing this information to a third party [in response to an FOIA request] and the individual having control of the dissemination of their own personal information.
62. There is nothing to suggest that the BBC staff members did not have sufficient and appropriate qualifications and experience to work on the programme in which the complainant is interested. More importantly, those same individuals would, the Commissioner agrees, have the reasonable expectation that the specifics of their qualifications and experience would not be placed into the public domain as a result of a request for information under FOIA. Disclosing this information would therefore be likely to cause those individuals harm or distress. The Commissioner does not consider that information has sufficient wider public interest to override those BBC staff members' rights and freedoms. As such, she considers that disclosing the information would not be lawful under Article 6(1)(f) of GDPR.

### *Conclusion*

63. The Commissioner has decided that the BBC is entitled to withhold the information requested in parts 3.1, 3.2 and 3.3 of the request that it holds and that concerns its own staff, under section 40(2) of the FOIA, by way of section 40(3A)(a).
64. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that she does not need to go on to consider separately whether disclosure would be fair or transparent.

### **Section 10 – time for compliance**

65. Under section 10(1) of the FOIA, a public authority should comply with section 1(1) promptly and no later than 20 working days following the date of receipt of the request.
66. The Commissioner finds that the BBC breached section 10(1) of the FOIA. This is because, in relation to part 3 of the request, the BBC did not confirm that it did not hold certain information within the 20 working day requirement.

### **Section 17 – refusal of request**

67. In cases where a public authority is relying on a Part II exemption to refuse to disclose information it holds, under section 17(1) the authority must issue a refusal notice within the time for complying with section 1(1). In this case, the BBC has now advised the complainant that it is relying on the section 40(2) exemption to withhold certain information requested in part 3 but did not do so within the 20 working day requirement. The BBC therefore breached section 17(1).

## Right of appeal

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68. 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: 0300 1234504  
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)

69. 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.
70. 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

**Pamela Clements**  
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