

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 24 June 2021

Public Authority: British Broadcasting Corporation ("the BBC")
Address: 2252 White City
201 Wood Lane
London
W12 7TS

Decision (including any steps ordered)

1. The complainant has requested the number of BBC TV and radio appearances of Alistair Campbell between 1 Jan 2018 and March 2021. The 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 within the scope of FOIA. She therefore upholds the BBC's position and does not require any remedial steps to be taken in this case.

Request and response

3. On 3 April 2021, the complainant wrote to the BBC and requested information in the following terms:

"I have written previously for this information, however, you replied saying that the information I requested was not in the public interest. The original request is below, but to ascertain how many times Alistair Campbell (former aid to Tony Blair) has been on BBC TV or radio programs in 2018 and 2019. The reason for asking was because I feel that his views are pushing a specific agenda.

However, I note that recently, your own current affairs programs were reporting on how many times Nigel Farage had appeared on specific programs and a number of 43 times was mention [sic] for one program as proof that reporting had been balanced. If the number of times Mr. Farage was on your programs is being reported, then I assume that this was deemed to be in the public interest.

I therefore request the information about how many times Alistair Campbell was featured on BBC TV or radio programs from 1st Jan 2018 to March 2021. This will be consistent with your reporting on other persons of interest."

4. On 30 April 2021 the BBC responded to the request. The BBC explained that it did not believe that the information was caught by FOIA because it was held for the purposes of 'art, journalism or literature'.
5. It therefore would not provide any information in response to the request.

Scope of the case

6. The complainant contacted the Commissioner on 21 May 2021 to complain about the way his request for information had been handled. In particular, he challenged the operation of the derogation in this case.
7. The scope of this case and the following analysis is to determine whether the information requested is excluded from the FOIA because it was held for the purposes of "journalism, art or literature".

Reasons for decision

8. 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 means that the BBC has no obligation to comply with parts I to V of the FOIA where information is held for 'purposes of journalism, art or literature'. The Commissioner calls this situation 'the derogation'. In this case the BBC is arguing that the requested information was held for the purpose of journalism.
10. The House of Lords in *Sugar v BBC* [2009] UKHL 9 confirmed that the Commissioner has the jurisdiction to issue a decision notice to confirm

whether or not the information is caught by the derogation. The Commissioner's analysis will now focus on the derogation.

11. The scope of the derogation was considered by the Court of Appeal in the case *Sugar v British Broadcasting Corporation and another* [2010] EWCA Civ 715, and later, on appeal, by the Supreme Court (*Sugar (Deceased) v British Broadcasting Corporation* [2012] UKSC 4). The leading judgment in the Court of Appeal case was made by Lord Neuberger of Abbotsbury MR who stated that:

" once it is established that the information sought is held by the BBC for the purposes of journalism, it is effectively exempt from production under FOIA, even if the information is also held by the BBC for other purposes." (paragraph 44), and that "...provided there is a genuine journalistic purpose for which the information is held, it should not be subject to FOIA." (paragraph 46)

12. The Supreme Court endorsed this approach and concluded that if the information is held for the purpose of journalism, art or literature, it is caught by the derogation even if that is not the predominant purpose for holding the information in question.
13. In order to establish whether the information is held for a derogated purpose, the Supreme Court indicated that there should be a sufficiently direct link between at least one of the purposes for which the BBC holds the information (ignoring any negligible purposes) and the fulfilment of one of the derogated purposes. This is the test that the Commissioner will apply.
14. The Supreme Court also 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.
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.
16. The complainant has argued that the information requested was to show that some individuals receive more broadcast time on the BBC than other individuals, and that this indicates a lack of balance at the BBC.

17. The Commissioner's view is that the information requested, relating to the number of BBC TV and radio appearances of a named individual, is information held for the purpose of "journalism, art or literature". This is because this information relates to the selection of material for broadcast and is directly linked to the BBC's output.
18. 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

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

Susan Duffy
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF