

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 3 September 2021

Public Authority: British Broadcasting Corporation ("the BBC")

Address: BBC Broadcasting House
Portland Place
London
W1A 1AA

Decision (including any steps ordered)

1. The complainant requested information relating to commissioning polls by the BBC and polling companies used. The BBC responded that the requested information was covered by the derogation and hence excluded from the FOIA.
2. The Commissioner's decision is that most of the information was held by the BBC for the purposes of journalism, art or literature and so was not covered by the FOIA. Following the Commissioner's investigation, the BBC disclosed information requested in part 3 of the request. She upholds the BBC's position on the rest of the request and requires no remedial steps to be taken in this case.

Request and response

3. On 23 April 2021, the complainant wrote to the BBC and requested information in the following terms:

"(1) What was the payment made to Lucid Polls for the poll commissioned for the BBC Spotlight programme of the week beginning 19th April.?"

"(2) How much money has the BBC NI paid out in commissioning polls in the last 24 months.?"

(3) How many other polling companies have been used for polling by the BBC in the last 5 years?

(4) Who in BBCNI made the decision to use Lucid Poll company for the recent Spotlight programme?"

4. On 25 May 2021 the BBC responded to the request. The BBC explained that it did not believe that the information was caught by the 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 requests.

Scope of the case

6. The complainant contacted the Commissioner on 2 June 2021 to complain about the way her request for information had been handled. In particular, she 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. 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.
9. The FOIA only applies to the BBC to a limited extent. Schedule One, Part VI of the FOIA provides that the BBC is a public authority for the purposes of the 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."
10. 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.

11. 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.
12. 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.
13. 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.
14. 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
15. 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.
16. 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.
17. As explained above, information about complaints that the BBC receives, including commission polls, is derogated information. This type of information is associated with the BBC's output because the BBC will use

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

information generated by polls commissioned to make editorial decisions about its output.

18. The Commissioner asked the BBC to reconsider its initial response and in particular part three of the request.
19. The BBC sought clarification from the complainant regarding the scope of the third part of her request, and in light of the clarification provided, made a disclosure of information relating to the third part of her request.
20. The Commissioner is satisfied, based on the very well established precedent set in the numerous other decisions she has made in cases involving the BBC, that, if held at all, the information requested in parts one, two and four of the request would be held for the purposes of journalism, art or literature.
21. The Commissioner's finding is, therefore, that the BBC was not obliged to comply with most of the complainant's information request.

Right of appeal

22. 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

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

23. 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.
24. 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