

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 10 September 2021

Public Authority: British Broadcasting Corporation ('the BBC')
Address: Broadcasting House
Portland Place
London
W1A 1AA

Decision (including any steps ordered)

1. The complainant has requested information regarding seat forecasts made prior to the results being declared for historical General Elections. 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 so was not covered by the FOIA. She therefore upholds the BBC's position and requires no remedial steps to be taken in this case.

Request and response

3. On 5 June 2021 the complainant wrote to the BBC and requested information in the following terms:

"I'd like to make a freedom of information (FOI) request for information regarding the February 1974, October 1974 and 1979 General Election broadcasts please.

Its regarding the seat forecasts made prior to any results being declared(what the authors of the forecasts Dr Clive Payne and Professor Philip Brown called 'prior forecasts'). According to these gentlemen they generated such seat forecasts from their computer program which the BBC did not broadcast at all 3 of these elections and I was wondering if somewhere in the archive information held by the BBC the forecast seat figures for each party which they were produced were available (for each of these elections) and if so could I have them please. In case you ask

I've checked with these academics if they retained such records but they haven't. (NOTE For October 1974 and 1979 the on air forecasts were produced by other sources so these aren't the ones I'm looking for, just the Payne/Brown ones produced by their program)."

4. On 29 June 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 "journalism, art 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 1 August 2021 to complain about the way their request for information had been handled. In particular, they challenged the operation of the derogation in this case.
7. The Commissioner's initial assessment was that the information the complainant had requested was derogated and the BBC was not obliged to respond to the request under the FOIA. She directed the complainant to her published decisions, which includes those about complaints to the BBC relating to requests for information not covered by the FOIA. The Commissioner invited the complainant to withdraw their request, but they preferred to progress to a formal decision notice.
8. 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

9. 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.
10. 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."

11. This is known as the "derogation". This means that information which 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.
12. 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.
13. 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.
14. 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.
15. 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.
16. The Supreme Court concluded that if the information is held for the purpose of journalism, art or literature, it is caught by the derogation

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

even if that is not the predominant purpose for holding the information in question.

17. 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.
18. 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.
19. The complainant argued that they are unsure why the BBC can't disclose the seat forecasts which were not broadcast for these early general elections, when information about other seat forecasts for later elections is already in the public domain. The complainant used the example of the 1997 forecast which was not broadcast but was then published 2 years later in a publicly available journal.
20. The complainant also argued that the disclosure of the requested information would help to complete a full set of data and would be of great interest to those studying elections.
21. The complainant further argued that the information is harmless and disclosure would, therefore, not compromise the BBC.
22. As explained above, information about broadcasting and editorial decisions, even if the decision is not to broadcast, is derogated information. The data requested included information that would have been used to consider broadcasting and is associated with editorial decisions. It is, therefore, directly related to the BBC's output.
23. 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 by the complainant would be held for the purposes of journalism, art or literature.
24. The Commissioner's finding is, therefore, that the BBC was not obliged to comply with the complainant's information request.

Right of appeal

25. 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

26. 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.

27. 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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