

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 21 April 2021

Public Authority: British Broadcasting Corporation (BBC)

Address: Broadcast Centre
White City
Wood Lane
London W12 7TP

Decision (including any steps ordered)

1. The complainant has requested information the BBC holds that sets out when staff can volunteer information in response to an FOI request in cases where the request is for information that is derogated from the FOIA. The BBC has advised that it does not hold information within the scope of the request.
2. The Commissioner's decision is as follows:
 - On the balance of probabilities, the BBC does not hold information within the scope of the complainant's request and has complied with section 1(1)(a) of the FOIA.
3. The Commissioner does not require the BBC to take any remedial steps.

Request and response

4. How the FOIA derogation is applied to the BBC has been discussed many times in published decisions that the Commissioner has made in cases

involving the BBC, for example in her decision IC-90030-D3L5¹. As such, the Commissioner does not intend to discuss the derogation in detail here.

5. On 28 April 2020 the complainant wrote to the BBC and requested information in the following terms:

"There have been circumstances when a FOI request has been denied, due to exemption 32 "journalism literature and art", but the data has been provided on a voluntary basis, despite the potential exemption... An example of the exact language used by the BBC is given below:

"However, in this instance, we have opted to provide you with information relevant to your request voluntarily, despite the Act not obliging us to do so."

Please provide data regarding the advice, recommendations and policy guiding BBC FOI staff to "volunteer" information, despite section 32 prohibition."

6. The BBC responded on 27 May 2020. It advised that section 32 of the FOIA relates to the exemption from disclosure under the Act of court records and so was not relevant in this case which, the BBC said, concerned information it holds for the purposes of journalism, art or literature. The BBC advised that such information is derogated ie is not covered by the FOIA. It provided further explanation on the FOIA derogation and referred back to its response to an earlier request that the complainant had submitted to it, in which the BBC had also discussed the derogation.
7. The BBC provided an internal review on 17 June 2020. It clarified and confirmed that it does not hold recorded information falling within the scope of the request, such as guidelines or policies. The BBC explained that its staff made such decisions on a case-by-case basis, taking into account the particular factual circumstances that are relevant to that request, and having regard to the overarching duty to provide advice and assistance to requesters.

¹ <https://ico.org.uk/media/action-weve-taken/decision-notices/2021/2619614/ic-90030-d3l5.pdf>

Scope of the case

8. The complainant contacted the Commissioner on 19 June 2020 to complain about the way their request for information had been handled.
9. The Commissioner's investigation has focussed on whether, on the balance of probabilities, the BBC holds information within the scope of the complainant's request and has complied with section 1(1) of the FOIA.

Reasons for decision

10. 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 them if it is held and is not exempt information.
11. In correspondence to the Commissioner, the complainant has explained that, in their view, the BBC seems arbitrarily to provide information that falls within the 'journalism, art and literature' derogation and that their request simply "interrogates the remit of such arbitration".
12. In its submission to the Commissioner, the BBC has confirmed that it does not hold recorded information relevant to the scope of the request. The BBC has noted that the request is for any recorded information, such as policies or guidelines, that set out when the BBC can volunteer information in response to a FOI request, even if such information falls outside of the scope of the FOI Act because it is held for the purposes of journalism, art or literature.
13. The BBC says its Information Rights team in its Legal Division is the relevant business area for this request, as that team centrally handles all FOI requests, internal reviews and appeals. The Information Rights team confirmed that it does not have any policies or guidelines which set out when information may be volunteered in response to a FOI request. Its consideration of FOI requests is always on a case-by-case basis. The BBC says that in making decisions on FOI requests and internal reviews, the Information Rights team considers the particular factual circumstances of the request. It is also guided by the Commissioner's published guidelines on the application of various exemptions, published decision notices, relevant case law, and the principle of providing advice and assistance to requesters in accordance with section 16 of the FOIA. The BBC has noted that its initial response to the current request set out some examples of when this may occur,

for example, where the information is already available in the public domain.

14. The BBC has explained that, contrary to the complainant's understanding, its position is not that the requested information about 'guidelines' or 'policies' on the voluntary disclosure of information held for the purposes of journalism, art or literature is itself held for derogated journalistic purposes. Instead, its position is that it does not hold this information as such guidelines or policies do not exist. The BBC concludes its submission by reiterating the explanation it provided in its internal review decision.
15. The Commissioner is satisfied that the appropriate team in the BBC has considered whether any information relevant to the complainant's request is held. She accepts the BBC's explanation on why, on occasion, it voluntarily discloses information that is not covered by the FOIA - namely that it considers requests on a case-by-case basis and considers the circumstances of each request. As such, no formal disclosure policy or guidance exists. The Commissioner has decided that, on the balance of probabilities, the BBC does not hold information falling within scope of the complainant's request and has complied with section 1(1)(a) of the FOIA.

Other matters

16. In his correspondence to the Commissioner, the complainant has also argued that the BBC should be transparent. Under the FOIA derogation, the BBC is not legally obliged to respond under the Act to requests for information that it holds for the purposes 'journalism, art and literature'. That is, the BBC is not obliged to confirm or deny it holds such information or to release any that it holds that is not exempt from disclosure under an FOIA exemption. That the BBC nonetheless voluntarily does so in certain circumstances appears to the Commissioner to be a demonstration of a degree of transparency.
17. However, in this case the request is for particular policies and guidance. As discussed above, the BBC has handled the request under the FOIA, and the Commissioner has found that it does not hold that information and has complied with section 1(1)(a).

Right of appeal

18. 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

19. 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.
20. 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
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF