

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 31 March 2021

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

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

Decision (including any steps ordered)

1. The complainant has requested the number of complaints the BBC received about the daily broadcast of Scotland's First Minister's COVID-19 briefings. The BBC responded to the complainant saying that the requested information was covered by the derogation and hence excluded from the 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 27 January 2021 the complainant wrote to the BBC and requested information in the following terms:

"To ask BBC details of number of complaints they have received, regarding the daily broadcast of Scotland's First Minister's daily Covid

briefings, broken down by weekly complaints into a table from 20th March 2020 to 27th January 2021"

4. On 23 February 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 request.

Scope of the case

6. The complainant contacted the Commissioner on 23 February 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 Commissioner's initial assessment was that the information the complainant had requested was derogated and that, as such, the BBC was not obliged to respond to the request under the FOIA. She directed the complainant to her published decisions which include those about requests for information relating to complaints made to the BBC not being covered by the FOIA. The Commissioner invited the complainant to withdraw his request, but he asked her 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 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."

11. 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.
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
16. 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

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

is held and the production of the BBC's output and/or the BBC's journalistic or creative activities involved in producing such output.

17. 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.
18. The complainant argued that the BBC was using the FOIA to 'hide' the number of complaints it had received about the broadcast and to continue doing this is against the 'public good'. He said that the FOIA is being used in a 'political way' to prevent the information being released, even though disclosure is in the public interest.
19. The complainant also argued that the BBC has previously published the number of complaints it has received about individuals / programmes. This includes an article published by The Herald on 7 March 2021, that says the BBC is examining 244 complaints from viewers who felt it was 'inappropriate' for Nicola Sturgeon to urge Alex Salmond to appear before the Holyrood inquiry during her daily televised update on the coronavirus pandemic. The complainant considers that a 'precedent' has therefore been set about the number of complaints received by the BBC about its broadcasts being published.
20. As explained above, information about complaints that the BBC receives, including the number of complaints, is derogated information. This type of information is associated with the BBC's output because the BBC will use information generated by the number and type of complaints it receives to make editorial decisions about its output; either its broadcast news content or content it publishes on its BBC News website.
21. The complainant's concerns are not unreasonable, but the Commissioner cannot take account of the value that the information may or may not have nor the merits of its disclosure. As the Commissioner explained to the complainant in her initial assessment, 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, if held, the information requested is held for the purposes of journalism, art or literature. The BBC derogation is set out in Schedule 1 of the FOIA. The information the complainant has requested concerns viewer complaints; it is therefore derogated information and is not caught by the FOIA.
22. The Commissioner's decision is, therefore, that the BBC was not obliged to comply with the complainant's information request.

Right of appeal

23. 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

24. 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.
25. 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
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Wilmslow
Cheshire
SK9 5AF**