

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 12 August 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 requested the total sums of money paid by the BBC to Facebook since the BBC started its Facebook page. 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 26 January 2021, the complainant wrote to the BBC and requested information in the following terms:

*"The total sum paid by the BBC to Facebook in the year 2020; and
The totals for all previous years from the point the BBC started its
Facebook page."*

4. On 23 February 2021, the BBC responded to the request. It 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”. The BBC would not provide any information in response to the request.

5. On 26 February 2021, the complainant contacted the Commissioner to complain about the way the request for information had been handled.
6. On 15 March 2021, the Commissioner invited the complainant to withdraw his case; as it was her opinion that the requested information was held for the purpose of journalism and that the BBC was correct in its refusal to disclose the information.
7. However, the complainant declined to withdraw the case and wrote to the Commissioner on 1 April 2021 to dispute the derogation. He argued that the Commissioner had incorrectly interpreted ‘journalistic output’ to include BBC payments to Facebook for its Facebook pages.
8. On 15 April 2021, the Commissioner invited the BBC to provide more detailed arguments about why it believed that the information requested falls within the derogation. On 2 August 2021, the BBC responded to two further questions asked by the Commissioner for clarification and completeness of its response.

Scope of the case

9. The complainant contacted the Commissioner on 26 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.
10. 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 his request, but he preferred to progress to a formal decision notice.
11. 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

12. 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.

13. 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."

14. 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.
15. 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.
16. 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.
17. 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.
18. 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

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.

19. 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.

The complainant's view

20. The complainant argued that payments made by the BBC to Facebook for a social media platform used to host the BBC's journalistic content, do not fall within the meaning of 'output' and is not information that is held partly for the purposes of journalism. He said that that the information is 'different in kind' to the internal BBC report about Middle East news coverage that was considered by the Supreme Court in *Sugar v BBC* (2012).
21. The complainant argued that the BBC does not pay Facebook for content, nor has the BBC commissioned Facebook to make content for it. He said that payments made by the BBC to Facebook for its online presence are not payments for Facebook to write and verify materials for production, exercise judgment on the selection of materials for publication, analyse and review individual programmes, provide context and background to programmes, or for the maintenance and enhancement of standards and quality.
22. The complainant argued that it is clear from the BBC's submission to the Commissioner that its total Facebook expenditure comprises several elements, and while he acknowledged 'some elements may be held for the purposes of journalism or marketing, the total includes costs unrelated to either of those two elements'. He also said that disclosing the total sum would not reveal the proportion of the expenditure allocated to editorial decision-making or to marketing, or for other purposes.

The BBC's view

23. The BBC explained that, it does not pay (Facebook) for its Facebook pages. It said that Facebook states on its website "*no, we do don't charge you to use Facebook. Instead, we charge advertisers to show ads on the Facebook family of apps and technologies*". The BBC also said that it has many Facebook pages and so interpreted the timeframe within the request to mean the date at which the BBC began a commercial and contractual relationship with Facebook.
24. The BBC carried out searches and liaised with its Finance, Procurement, Marketing, Media Strategy and Editorial Policy (News) divisions. It confirmed that information within the scope of the request is held and used by these divisions. It initially said that this 'includes' all payments

made by the Marketing, Media Strategy and News Teams (who use the information). The BBC later confirmed that this is all of the withheld information and does not hold further information within the scope of the request.

25. The BBC explained that the withheld information has two purposes; News Commissioning and Marketing. It has applied the journalism derogation to all of the information because it is held for the purpose of News commissioning. It has also applied section 43(2) of the FOIA (commercial interests) to withhold all of the information for the latter purpose.
26. In regard to the journalism derogation, the BBC said that the total spend on Facebook is held for the purposes of news commissioning (journalism). It said that the BBC's News team have a direct relationship with Facebook and fund advertising content on Facebook for editorial purposes (these are the payments that form the withheld information). This involves the BBC selecting and promoting content that is likely to appeal to new audiences, the BBC analysing audience engagement (with the content) to gain insight into what content appeals to the particular audience targeted, and this paid marketing performance being taken into account by the BBC when making editorial decisions about output published on Facebook.
27. The BBC said that this activity also helps it to meet its Royal Charter Obligations:

'... provide high quality output in many different genres and across a range of services and platforms ... and should take creative risks, even if not all succeed, in order to develop fresh approaches and innovative content', and

'to reflect, represent and serve the diverse communities of all the United Kingdom's nations and regions ... the BBC should reflect the diversity of the United Kingdom both in its output and services. In doing so, the BBC should accurately and authentically represent and portray the lives of the people of the United Kingdom today ... It should ensure that it provides output and services that meet the needs of the United Kingdom's nations, regions and communities ...'².
28. The BBC also argued that if it were to disclose the withheld information, that this would disclose sums it specifically spent on journalistic output, which, is likely to expose the BBC to unfair criticism in respect to the way it allocates funds for certain content and resources.
29. The BBC referred to the second limb of the definition of journalism in the analysis in *Sugar v BBC* (2012), e.g., 'if financial information is directly

² [Cm 9365 Broadcasting Royal Charter \(bbc.co.uk\)](http://www.bbc.co.uk/1/av/2012/08/20120820_sugar_v_bbc)

related to the making of a particular programme, or group of programmes, it is likely to be held for purposes of journalism'. It also referred to the quote from Irwin J in *BBC v The Information Commissioner* (2009), in which he held that information about costs referable to the broadcast of a programme, about its annual budget for a programme and the price paid for its rights to cover certain events (e.g., the Olympics), was held at an operational level in order to assist in the making of editorial and creative choices and so was held partly (and, if relevant predominately) for purposes of journalism. -

30. The BBC said that the requested information falls within the definition of the second limb in *Sugar v BBC* (2012) because it includes financial information that assists its News teams to better understand its diverse range of audiences and make editorial decisions (editorial matters) about the creation of news content (journalistic output) that is better targeted to their needs and demographics. The BBC said that this demonstrates a direct link between its holding of the information and the achievement of its journalistic purposes.

Commissioner's view

31. The Commissioner acknowledges that all the withheld information constitutes payments made by the BBC relating to advertising content on Facebook and are not payment for a social media platform to publish journalistic output, nor are they payments to Facebook for content, or to make content.
32. Whilst the Commissioner acknowledges that the withheld information in this case differs to that considered in *Sugar v BBC* (2012), she is reminded that the Supreme Court's second limb of the definition of 'journalism' included any financial information directly related to the making of programmes (or content) likely being held for the purposes of journalism.
33. The Commissioner also notes the First Tier Tribunal's decision in *BBC v Information Commissioner EA/2009/0015*³. The appeal involved a nine part request for information to the BBC relating to its spending on radio stations and radio budgets, including spend on production and external promotions. It was the Tribunal's decision that, information relating to spend on production costs and budgets was held for the purposes of journalism, whilst information relating to spend on external promotion was not and fell within the scope of the Act.
34. The Commissioner also notes that in *FS50779799*⁴, which involved a request for information relating to costs to broadcast football, decisions taken on costs can relate to editorial decisions about the content the

³ [IN THE UPPER TRIBUNAL \(tribunals.gov.uk\)](http://tribunals.gov.uk)

⁴ [Freedom of Information Act 2000 \(Section 50\) \(ico.org.uk\)](http://ico.org.uk)

BBC wishes to offer and that this in turn relates to the overall editorial decision making process and resource allocation.

35. The Commissioner notes that, the withheld information in this case, is financial information that relates to advertising content, that is selected and promoted to attract new audiences, the audience engagement (of that content) is then analysed and informs / is taken into consideration when making editorial decisions and exercising judgement about selecting content to publish on Facebook. She also acknowledges that the information also relates to external promotion of the BBC's News output (marketing) and therefore has a dual purpose.
36. It is clear to the Commissioner that the withheld information is associated with advertising content and analysis that is used at an operational level, and facilitates activities that form part of the production process for News output (or content) that the BBC chooses to publish on Facebook. This also assists the BBC in achieving its Royal Charter objectives, e.g., producing content that meets the needs of their audience. She also notes that the complainant himself acknowledged (when he believed that further information within scope was also held) that 'some elements may be held for the purposes of journalism or marketing'.
37. The Commissioner also notes that, the BBC has confirmed that it does not hold any further information relevant to the scope of the request, and she therefore accepts that disclosure of the withheld information would reveal the BBC's total Facebook spend on activities related to its News (journalistic) output, and without further information about each individual payment this could result in the BBC receiving unfair criticism.
38. 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, decisions about whether information is held for the purposes of journalism, art or literature are based on the very well established precedent set in the numerous other decisions she has made in cases involving the BBC.
39. It is the Commissioner's view that, the withheld information is associated with content and analysis that is used by the BBC when making editorial decisions about News content (output) it publishes on Facebook. The information is therefore held for editorial management purposes associated with its journalistic output and activities involved in the production of this content.
40. In conclusion, and for all of the reasons above, the Commissioner has found that the withheld information is held for the purposes of

journalism, and that the BBC was not obliged to comply with Parts I to V of FOIA.

41. Because of this, it is not necessary for the Commissioner to go on to consider the BBC's application of section 43(2) of the FOIA to the withheld information.

Right of appeal

42. 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

43. 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.
44. 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**