

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 6 July 2023

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 from the BBC about a Panorama programme. The BBC responded that the requested information was covered by the derogation and hence excluded from FOIA.
2. The Commissioner's decision is that this information, if held at all, is held by the BBC for the purposes of journalism, art or literature and so was not covered by FOIA. He therefore upholds the BBC's position and requires no steps to be taken in this case.

Request and response

3. On 26 May 2023 the complainant wrote to the BBC and requested information in the following terms:

""It is my understanding that there was a virtual staff meeting between BBC staffers and the team behind "Panorama: Private ADHD Clinics Exposed". I believe that it was Friday 19th May.

Please may I request:

- The date, time, meeting title, and number of attendees of that meeting.
- A copy of the messages sent during that meeting (including texts and questions) put in that meeting.

If it doesn't consequently take the question over FOI budget please may I also ask:

- If not included in the above any additional questions posed.

If it doesn't consequently take the question over FOI budget please may I also ask:

- For the editor Karen Wightman, producer Hannah O'Grady and journalist Rory Carson of the show "Panorama : Private ADHD Clinics Exposed" please may I request any personal notes they took from the meeting, and/or any emails in which they discussed the meeting or the meeting was discussed.

If it doesn't consequently take the question over FOI budget please may I also ask:

- For the editor Karen Wightman, producer Hannah O'Grady and journalist Rory Carson of the show "Panorama : Private ADHD Clinics Exposed" please may I request any briefing documents, emails or other materials they have related to this meeting.

If it doesn't consequently take the question over FOI budget please may I also ask:

- Any notes in preparation, during, or after taken by BBC employees who attended the meeting.

If it doesn't consequently take the question over FOI budget please may I also ask:

- If available please may I have a transcript of the meeting."

4. On 12 June 2023 the BBC responded to the request. The BBC explained that it did not believe that the information was caught by 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 12 June 2023 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 scope of this case and the following analysis is to determine whether the information requested is excluded from FOIA because it was held for the purposes of "journalism, art or literature".

Reasons for decision

8. Under section 1(1) of 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. 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 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 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 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 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 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 he 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. The complainant argued that it "is about an internal staff meeting as a consequence of an episode of Panorama they put out. It is not about the show itself. It does not relate to the generation of their output (to which I believe the exemption applies. In their website they state 'this means that the Act does not apply to material held for the purposes of creating the BBC's output'. This was about an internal meeting about Neurodiversity and the impact their show had on ADHD staffers. Whilst related to the show it is not something that was for the purposes of creating the BBC's output. The meeting was not held for a purpose other than that of journalism, art or literature. It was held to discuss the impact of the show on BBC staffers."
18. As explained above, information about the Panorama programme and any meetings about it, if held at all, is derogated information. This type of information would be associated with the BBC's output because analysis and review of information relates to editorial decisions about

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

programming, and enhancement of the standards and quality of journalism (particularly with respect to accuracy, balance and completeness). This would likely be related to the BBC's output if held at all.

19. The Commissioner is satisfied, based on the very well established precedent set in the numerous other decisions he 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.
20. The Commissioner finding is, therefore, that the BBC was not obliged to comply with the complainant's information requests.

Right of appeal

21. 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

22. 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.
23. 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

Michael Lea
Team Manager
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Wycliffe House
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SK9 5AF