

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 16 October 2020

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

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

### Decision (including any steps ordered)

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1. The complainant requested information in relation to viewing figures for Coronavirus briefings. The BBC responded 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

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3. On 20 September 2020, the complainant wrote to the BBC and requested information in the following terms:  
  
*"The viewing figures for the daily Coronavirus briefings from 23 March to the final daily briefing which was held and aired publicly."*
4. On 24 September 2020 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

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6. The complainant contacted the Commissioner on 4 October 2020 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 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

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8. 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."*

9. This means that the BBC has no obligation to comply with parts I to V of the Act where information is held for the purposes of journalism, art or literature. The Commissioner calls this situation "the derogation". In this case the BBC is arguing that the requested information was held for the purpose of journalism.
10. The scope of the derogation was considered by the Court of Appeal in the case *Sugar v British Broadcasting Corporation and another* [2010] EWCA Civ 715, and later, on appeal, by the Supreme Court (*Sugar (Deceased) v British Broadcasting Corporation* [2012] UKSC 4). The leading judgment in the Court of Appeal case was made by Lord Neuberger of Abbotsbury MR who stated that:

*" ..... once it is established that the information sought is held by the BBC for the purposes of journalism, it is effectively exempt from production under FOIA, even if the information is also held by the BBC for other purposes." (paragraph 44), and that "...provided there is a genuine journalistic purpose for which the information is held, it should not be subject to FOIA." (paragraph 46)*

11. The Supreme Court endorsed this approach and concluded that if the information is held for the purpose of journalism, art or literature, it is

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

12. 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. This is the test that the Commissioner will apply.
13. If a sufficiently direct link is established between the purposes for which the BBC holds the information and any of the three derogated purposes – i.e. journalism, art or literature - it is not subject to FOIA.
14. The Supreme Court said that the Information Tribunal's definition of journalism (in *Sugar v Information Commissioner* (EA/2005/0032, 29 August 2006)) as comprising three elements, continues to be authoritative.

*"1. The first is the collecting or gathering, writing and verifying of materials for publication.*

*2. The second is editorial. This involves the exercise of judgement on issues such as:*

*\* the selection, prioritisation and timing of matters for broadcast or publication,*

*\* the analysis of, and review of individual programmes,*

*\* the provision of context and background to such programmes.*

*3. The third element is the maintenance and enhancement of the standards and quality of journalism (particularly with respect to accuracy, balance and completeness). This may involve the training and development of individual journalists, the mentoring of less experienced journalists by more experienced colleagues, professional supervision and guidance, and reviews of the standards and quality of particular areas of programme making."*

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. In this case, the complainant has argued that the BBC *"is choosing when to apply this exemption and when not to"*. As the Commissioner explained to the complainant, the information he has requested concerns the BBC's output and the Commissioner is unable to compel the BBC to provide information outside its obligations under FOIA.
18. The Commissioner's view is that the information requested, relating to viewing figures, is information held for the purpose of journalism, art or literature. This is because this information relates to the analysis of, and review of individual programmes and is directly linked to the BBC's output. This means that the information is derogated and is not caught by the FOIA.
19. The Commissioner has therefore found that the BBC was not obliged to comply with Parts I to V of the FOIA in relation to the complainant's information request.

## Right of appeal

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20. 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](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

21. 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.
22. 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 .....

**Ben Tomes**  
**Team Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**