

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 2 August 2021

Public Authority: British Broadcasting Corporation
Address: Broadcasting House
Portland Place
London
W1A 1AA

Decision (including any steps ordered)

1. The complainant has requested information about audience research contained in an annual report. The British Broadcasting Corporation ("the BBC") initially refused to provide any information, but subsequently indicated where some of the information could be found and also denied holding some of the requested information. The remaining information would, the BBC said, be subject to the derogation.
2. The Commissioner's decision is that any information the BBC held within the scope of elements [1] and [8] of the request would be held for the purposes of journalism, art or literature and would therefore fall outside of the FOIA.
3. The Commissioner does not require any further steps to be taken.

Request and response

4. On 17 June 2020, the complainant wrote to the BBC and requested information in the following terms:

"I refer to page 19 of the BBC Group Annual Report and Accounts 2018/2019 giving the results for several survey questions showing that 52% of people asked think that the BBC provides impartial news and that 44% turn to the BBC if they want impartial news. The source for both is given as IPSOS MORI.

"Please can you provide information and all relevant documents relating to the following for both the 52% and 44% results:

- 1. A copy of and details of the brief and instructions that were given to IPSOS MORI or any relevant meeting notes when they were commissioned to carry out the survey that led to the above two results and any underlying contracts;*
 - 2. How the audience sample was chosen and what were the criteria to include or exclude survey participants in each case;*
 - 3. A list of the coding options used and raw data received back from the survey participants in each case;*
 - 4. Details as to how the survey answers were coded in each case or otherwise how the raw data was extrapolated to create the percentage results shown in the annual report;*
 - 5. Whether reports by the organisation News-watch on the subject of the BBC's impartiality obligations played any part in the production of the conduct of the IPSOS MORI survey and the content of the BBC Annual Report and, if so, what?*
 - 6. A copy of the original report and any interim reports by IPSOS MORI to the BBC; and*
 - 7. How the BBC altered or changed the presentation of the results mentioned above.*
 - 8. Please also provide copies of all complaints to the BBC about impartiality from 2015 to date and the BBC responses to the same.*
5. The BBC responded on 25 June 2020. It stated that all the requested information would be held for the purposes of either journalism, art or literature and therefore outside the scope of the FOIA. It did not offer an internal review.

Scope of the case

6. The solicitors acting on behalf of the complainant contacted the Commissioner on 11 December 2020 to complain about the way the request for information had been handled. The complainant considered that the derogation had been applied in an over-broad fashion and that at least some of the information was likely to be archived.
7. The Commissioner wrote to the BBC on 29 June 2021 to put some of the complainant's arguments across and to ask it to justify its use of the derogation in relation to the specific information requested.
8. The BBC responded on 19 July 2021. It maintained its stance that any information it held in respect of elements [1], [7] and [8] would be derogated and thus fall outside the scope of the FOIA. It stated that it

held no information within the scope of elements [5] and [6]. Finally, in respect of elements [2], [3] and [4], it noted that the information was already in the public domain as Ipsos Mori had published it in order to meet the requirements of the British Polling Council.

9. The Commissioner wrote to the complainant on 20 July 2021, setting out her view that the information in question would be derogated, noting that he had now been given access to some of the information he was interested in. Given the strong precedents in respect of the derogation she invited him to withdraw his complaint. The complainant did not wish to do so and exercised his right to seek a formal decision from the Commissioner. Further representations were also submitted on his behalf and these are considered below.
10. The Commissioner considers that, for the same reasons as given below, even if the BBC did hold information within the scope of either element [5] and [6], it would also be covered by the derogation. She has therefore not considered whether the BBC holds any information within the scope of these elements.
11. She also considers that, because both the raw data from Ipsos Mori (the results) and the BBC's annual report (the presentation) are in the public domain, the complainant effectively already has an answer to question [7]. The Commissioner has therefore not considered this element further either.
12. The House of Lords in *Sugar v BBC* [2009] UKHL 9 confirmed that the Commissioner has the jurisdiction to issue a decision notice to confirm whether or not the information is caught by the derogation. The Commissioner's analysis will now focus on the derogation in respect of elements [1] and [8] of the request.

Reasons for decision

13. Schedule One, Part VI of the FOIA provides that the BBC is a public authority for the purposes of the Act, but 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 means that the BBC has no obligation to comply with part I to V of the FOIA where information is held for 'purposes of journalism, art or literature'. The Commissioner calls this situation 'the derogation'.

15. 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)

16. 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.
17. 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.
18. 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.
19. The Supreme Court affirmed that the original Information Tribunal's definition of journalism (in *Sugar v Information Commissioner* (EA/2005/0032, 29 August 2006)) should be adopted when considering whether material is (or is not) held by the BBC for the purposes of journalism. This definition describes three stages to the journalistic process:

"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."

20. However, the Supreme Court said this definition should be extended to include the act of broadcasting or publishing the relevant material. This extended definition should be adopted when applying the 'direct link test'. However, material falling within any of the three stages will be material held for the purposes of journalism.
21. The Supreme Court also 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.

The complainant's position

22. The complainant contended that the BBC's definition of "journalism" was over-broad and did not meet the test set out by the Supreme Court.
23. In particular, he drew attention to the remarks, cited with approval by the Supreme Court, of Lord Neuberger in his Court of Appeal judgement *Sugar v BBC* [2010] EWCA Civ 715 when referring to peripheral information, such as that relating to advertising revenue or finance, not being held for a journalistic purpose – even if it might have a slight, indirect effect on the BBC's output:

"On that basis, literally every piece of information held by the BBC could be said to be held for the purposes of journalism. In my view, save on particular facts, such information, although it may well affect journalism-related issues and decisions, would not normally be 'held for the purposes...of journalism.' The question whether information is held for the purposes of journalism should thus be considered in a relatively narrow rather than a relatively wide way."

24. The complainant noted that the BBC had a charter obligation to provide "due impartiality" in providing its content. He argued that the information would have been created as a result of the BBC measuring its compliance with that obligation. Specifically, he stated that this related to the:

"'Machinery' and 'methodology' used by the BBC in measuring its compliance."

25. Furthermore, the complainant argued, the derogation did not cover information relating to the BBC's "constitutional, governance or compliance issues...such as those contained in the annual report."
26. Finally, even if he were prepared to accept (and the complainant was adamant that he did not) that the information might originally have been held for a journalistic purpose, given its age, the information was likely to be contained in "historical or archival purposes."
27. In his later submissions, the complainant appeared to move away from his initial stance that the information within the scope of element [1] was held either for corporate or archival purposes. Instead, he now argued that the information must be "principally commercial" and therefore not within any of the journalistic criteria.
28. In relation to element [8], the complainant argued that there was no direct link between the information and journalistic purpose.

The BBC position

29. The BBC maintained its initial stance that the information within the scope of elements [1], [7] and [8] would be derogated.
30. The BBC explained to the Commissioner that the information within the scope of element [1] was held by the Audience Research Team. It noted that:

"This team is responsible for commissioning the annual Ipsos Mori survey and, more broadly, facilitating ways that the BBC can better understand its audience."

31. Specifically in relation to element [1], the BBC noted that:

"Information about the underlying scoping of the survey and the terms provided to Ipsos Mori by the BBC – beyond that which is already publicly available – would disclose internal considerations about how the BBC perceives of its content and how it seeks to engage audiences..."

"...The survey results are analysed by the BBC News Board, BBC Board and Executive Committee which in 2018 included the Head of News and Editorial Policy & Standards. The survey also feeds into annual performance reviews of BBC output to understand how the BBC is meeting its public service mission under its Royal Charter to 'inform educate and entertain' audiences.

"In addition, the results are used by the Editorial Standards and Policy in training sessions with BBC staff to help explain how perceptions of impartiality relate to the BBC's editorial landscape...as a way of reinforcing how audiences will regard BBC coverage."

32. In relation to element [8], the BBC drew the Commissioner's attention to numerous decision notices in which she had ruled that information relating to complaints about output would be editorial information and thus exempt from disclosure.

The Commissioner's view

33. In the Commissioner's view, any information that the BBC held within the scope of elements [1] and [8] of the request would be subject to the derogation.
34. Taking element [8] first, the Commissioner has repeatedly ruled that information relating to complaints about the BBC's output is information relating to the maintenance of editorial standards
35. Of particular relevance to this case, the Commissioner notes that the complainant did not seek copies of any complaints – he sought copies of complaints about impartiality. Nothing in the context of the request or in any of the complainant's correspondence indicates that he is seeking information about impartiality complaints relating to anything other than the BBC's output.
36. This is not the sort of peripheral financial information that Lord Neuberger referred to: there is a clear and direct link between the complaints the BBC receives, its editorial processes of review based on the grounds of those complaints and its subsequent output – the information therefore falls squarely within the third element of the "journalism" test set out in Sugar because it relates to the maintenance of editorial standards.
37. In respect of element [1], whilst the Commissioner accepts that some of this information may also be held for other purposes, it is also held for the purposes of journalism.

38. If the BBC commissions a survey, asking people whether they consider its output is impartial, it has not done so because it wishes to improve its recruitment or procurement processes. It has done so because it wishes to measure the quality of its output and how that might be affected over time or in reference to events.
39. The complainant's request referred very specifically to Ipsos Mori's findings that 52% of people consider that the BBC delivers impartial news and that 44% turn to the BBC if they want impartial news.
40. Presumably, if those percentages had been low, or if they had shown considerable deterioration over the past 12 months, the BBC would wish to take action to improve the quality of its output. The 2019 annual report figures would still have been relevant at the time of the request as they would show how the respective percentages had altered over a 12 month period.
41. The Commissioner therefore accepts that like with the Balen Report (which was the subject of the original *Sugar* litigation) the BBC's audience research and the correspondence that preceded it is information it holds for the purpose of monitoring and influencing its output. It is therefore also covered by the third limb of the journalism exception as set out in *Sugar*.
42. The Commissioner therefore concludes that, such information as the BBC holds in respect of the request, is held for the purposes of journalism and therefore lies outside the scope of the FOIA.

Right of appeal

43. 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

44. 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.
45. 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

Roger Cawthorne
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