

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 8 February 2021

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

Decision (including any steps ordered)

1. The complainant requested copies of internal correspondence relating to Ofcom's Notice to Broadcasters of 23 March 2020. The British Broadcasting Corporation ("the BBC") explained that the information was covered by the derogation and excluded from FOIA.
2. The Commissioner's decision is that this information was held by the BBC for the purposes of 'journalism, art or literature' and did not fall inside the FOIA.
3. The Commissioner does not require any further steps.

Background

4. On 23 March 2020, Ofcom published a Notice to Broadcasters setting out how it intended to modify its usual regulatory approach to take account of the exceptional circumstances of the pandemic. Of particular relevance to the present case was Ofcom's announcement that:

"We recognise that licensees will want to broadcast content relating to the Coronavirus and that dissemination of accurate and up-to-date information to audiences will be essential during the current situation. However, we remind all broadcasters of the significant potential harm that can be caused by material relating to the Coronavirus. This could include:

- *Health claims related to the virus which may be harmful.*
- *Medical advice which may be harmful.*
- *Accuracy or material misleadingness in programmes in relation to the virus or public policy regarding it.*

"We will be prioritising our enforcement of broadcast standards in relation to the above issues. In these cases, it may be necessary for Ofcom to act quickly to determine the outcome in a proportionate and transparent manner, and broadcasters should be prepared to engage with Ofcom on short timescales.

"Ofcom will consider any breach arising from harmful Coronavirus-related programming to be potentially serious and will consider taking appropriate regulatory action, which could include the imposition of a statutory sanction." ¹

Request and response

5. On 13 November 2020 the complainant sent the following information request to the BBC:

"FOI request - communication with OFCOM and with particular emphasis on their "Note to Broadcasters" dated 23rd March 2020 and the section "Broadcast content relating to coronavirus" that contained veiled and implied threats of punishment and revocation of broadcast licences of any broadcaster that did not follow the approved official Government narrative guidance and advice on the 'coronavirus pandemic'.

"Please supply the following information including relevant e-mails, memorandums, telephone call logs, meetings held in person or on video conferencing, investigations of complaints, both internally at the BBC and externally with OFCOM:

1 - what actions the BBC agreed they would take to follow the OFCOM threats and edict Note to Broadcasters dated 23rd March 2020?

¹ https://www.ofcom.org.uk/_data/assets/pdf_file/0025/193075/Note-to-broadcasters-Coronavirus.pdf

2 - did the BBC discuss and implement deplatforming and refusing airtime to scientists, doctors etc that held opposing views to the official Government narrative?

3 - did the BBC discuss and implement the policy of the interviews being hostile towards scientists, doctors etc that held opposing views to the official Government narrative ?

4 - has OFCOM supplied further guidance to the BBC in addition to the public "Note to Broadcasters" dated 23rd March 2020?

5 - has OFCOM made any contact with the BBC with complaints that certain shows (TV, radio and online), and presenters had deviated from the official narrative and guidance?

6 - if question 4 is 'yes', what was the outcome?"

6. On 11 December 2020, the BBC responded to the request. The BBC explained that it did not consider that the information was caught by the FOIA because it was held for the purposes of 'art, journalism or literature'.

Scope of the case

7. The complainant contacted the Commissioner on 29 December 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, arguing that:

"the matters raised are political and relate to the BBC kowtowing to ministerial diktat and is not related to journalism, art nor literature but to the BBC following a political agenda forced onto them by the Government to promote and broadcast fake news."
8. The Commissioner wrote to the complainant on 25 January 2021 to offer her preliminary view of the complaint. She explained that, due to the wording of the request, any relevant information was likely to be held by the BBC for the purposes of journalism and therefore would be likely to be covered by the derogation. The complainant did not accept the Commissioner's view and asked for a decision notice.
9. Given the considerable case law in relation to the operation of the BBC's derogation and the wording of the request, the Commissioner considered that she could reach a decision without requiring further submissions from the BBC. The BBC was asked whether it wished to add

to its previous response but did not respond. The Commissioner has therefore not viewed the disputed information.

10. 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.

Reasons for decision

11. 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."

12. 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'.

13. 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)

14. 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.
15. 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.

16. 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.

17. 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."

18. 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.

19. 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 view

20. In rejecting the Commissioner's preliminary view, the complainant noted that her assessment of the editorial function of journalism:

"assumes that the BBC has a choice, has full journalistic control, has full editorial control over what to broadcast and therefore can decide what they wish to report, broadcast etc or not.

"In this case the only choice the BBC has is how to word or present their reports so that it supports the mandated, official narrative that meets OFCOM's Notice to Broadcasters dated 23rd March 2020 and any instructions in this matter from Ministers.

"They have NO choice in presenting or reporting a differing view. [original emphasis]

"My FOI request and appeal is to find out how much pressure has been put onto the BBC (and other MSM broadcasters) from OFCOM, how Ministers have interfered with the BBC's impartiality turning it into a propaganda mouthpiece of that can only broadcast, can only broadcast officially mandated 'facts' and narrative."

The Commissioner's view

21. The Commissioner's view is that the requested information would be held by the BBC for the purposes of journalism and would therefore be covered by the derogation.
22. If the BBC had held editorial meetings or exchanged correspondence as a result of the Notice to Broadcasters (and the Commissioner offers no opinion as to the extent to which any correspondence exists) such correspondence would relate to the steps the BBC might need to take to ensure that its output complied with the Notice. This would clearly relate to editorial judgments and thus the information would be held for the purposes of journalism.
23. The BBC may hold the information for other purposes as well, but this is irrelevant. The information would be held for the purposes of journalism.
24. The Commissioner is therefore satisfied that there is a direct link between the information the complainant has requested and the BBC's output. Such information as exists would therefore be covered by the

derogation and thus the BBC was not required to comply with any obligations under Parts I to V of the FOIA.

Right of appeal

25. 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

26. 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.
27. 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

Phillip Angell
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF