

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 18 February 2021

**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 relating to complaints received by the BBC about four programmes. 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 2 January 2021, the complainant wrote to the BBC and made four requests for information in the following terms:

Request 1

*"I wish to make an FOI request regarding a complaint or complaints regarding an episode of Frankie Boyle's New World Order on BBC 2 on August 12, 2020. The issue regarded objections to "kill whitey" references. This was not upheld.*

*My request is as follows.*

*1. How many complaints were there on this.*

*2. Copies of all complaints relating to this matter.*

*3. Copies of all responses made to the complaints by the BBC.*

*4. Copies of any papers, minutes, emails and correspondence, including digital communications to and from the BBC not covered by the above in relation to the complaints about this show."*

Request 2

*"I wish to request information under FOI regarding The Trial of Alex Salmond aired on BBC 2 on August 17. According to the fortnightly report this related to two complaints about "bias against Alex Salmond" at Stage 2 and was not upheld*

*My request is as follows.*

- 1. At the time the BBC said they had received 939 Stage 1 complaints from viewers. Why is it that the later fortnightly report only talks about receiving two at Stage 2. What happened to the other complaints?*
- 2. How many complaints were there in total about this programme.*
- 3. Can you furnish copies of all the complaints taken forward in Stage 2 relating to this matter.*
- 4. Can you furnish all responses made to these complaints by the BBC.*
- 5. Copies of any papers, minutes, emails and correspondence, including digital communications to and from the BBC not covered by the above in relation to the complaints about this programme."*

Request 3

*"I wish to request information under FOI regarding The Andrew Marr Show on BBC One on October 4. According to the fortnightly report this related to 144 complaints about "bias both for and against Boris Johnson" at Stage 1.*

*My request is as follows.*

- 1. What was the outcome of the complaints.*
- 2. How many complaints were there in total about this programme.*
- 3. How many complaints were taken to Stage 2.*
- 4. Can you furnish copies of all the complaints taken forward in Stage 2 relating to this matter or*
- 5. Furnish the complaints made at Stage 1.*
- 6. Copies of the responses made to these complaints by the BBC.*
- 7. Copies of any papers, minutes, emails and correspondence, including digital communications to and from the BBC not covered by the above in relation to the complaints about this programme."*

Request 4

*"I wish to request information under FOI regarding Frankie Boyle's New World Order on BBC Two on September 10. According to the fortnightly report this related to 1305 complaints about "offensive humour" at Stage 1.*

*My request is as follows.*

- 1. What was the full reasoned outcome from the BBC of the complaints.*
- 2. How many complaints were there in total about this programme.*

3. *How many complaints were taken to Stage 2.*
  4. *Can you furnish copies of all the complaints taken forward in Stage 2 relating to this matter or*
  5. *Furnish the complaints made at Stage 1*
  6. *Provide a complete synopsis of the complaints made under Stage 1*
  7. *Copies of the responses made to the complaints by the BBC.*
  8. *Copies of any papers, minutes, emails and correspondence, including digital communications to and from the BBC not covered by the above in relation to the complaints about this programme."*
4. On 21 January 2021 the BBC responded to the requests collectively. 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 requests.

### **Scope of the case**

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6. The complainant contacted the Commissioner on 23 January 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.
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. 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.
9. 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."*
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 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.

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 the 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 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.
13. 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.
14. 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 4<sup>1</sup>
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.

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

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 "*unacceptable for a public body committed to transparency*" not to provide the information requested and that "*the lack of transparency over complaints contravenes Article 56(3) of the BBC Charter*".
18. The complainant also argued that the information requested was to show complaints made by the public about its actions are of public interest. The complainant believed that "*details of complaints, in any case, do not relate to material that is directly related to the BBC's creative output, in other words, programme making*".
19. As explained above, information about complaints that the BBC receives, including the number of complaints, is derogated information. This type of information is associated with the BBC's output because the BBC will use information generated by the number and type of complaints it receives to make editorial decisions about its output.
20. The Commissioner is satisfied, based on the very well established precedent set in the numerous other decisions she 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.
21. The Commissioner finding is, therefore, that the BBC was not obliged to comply with the complainant's information requests.

## **Right of appeal**

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22. 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)

23. 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.
24. 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**