

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 5 March 2021

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

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

Decision (including any steps ordered)

1. The complainant requested from the BBC the number of reports on the news and/or digital platforms covering the Infected Blood Inquiry. 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

3. On 30 November 2020 the complainant wrote to the BBC and requested information in the following terms:
"I am requesting under the Freedom of Information Act the number of reports on the News &/or on digital platforms covering the Infected Blood Inquiry between the 20/07/2017 - 31/10/20."
4. On 21 December 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

6. The complainant contacted the Commissioner on 9 February 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

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 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 said that the Infected Blood Inquiry was set up to explore 'what has been described as the worst treatment disaster in NHS History'. That the people affected have waited nearly 40 years for the enquiry with nearly 3,500 people having died as a result of this 'disaster'.
18. The complainant also said that the BBC are the journalistic pool reporters on the Inquiry. After speaking with the Inquiry's media team, his understanding is that other journalists would source their information on what is happening with the Inquiry through the BBC pool reporters, which, has been 'woefully' lacking. He said that there were 6 - 8 reports covered by the BBC, but none nationally. During the same period the Grenfell Fire Inquiry had in excess of 50 reports solely carried out by the BBC and at least more than 50 percent of these were covered nationally.
19. The complainant argued that it is in public interest that the information is made available because it could be 'highly valuable' to the inquiry

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

currently taking place. That the information would also enable the public to assess whether there is a bias within the BBC surrounding the infected blood 'scandal', which, would bring the relationship between the BBC and the Government into question.

20. The complainant also argued that he fails to see how releasing the information compromises the BBC's freedom of expression and rights under Article 10 of the European Convention on Human Rights, given that it (the BBC) is the pool reporter and all journalists have access to the information it holds on the Infected Blood Inquiry.
21. As explained above, information about the number of reports on the news and digital platforms about the Infected Blood Inquiry, is derogated information. This type of information is associated with the BBC's output because it will use information about the number of reports in the news covering the Inquiry to make production and editorial decisions about its output.
22. The Commissioner is sympathetic towards the individuals that have been affected by the contaminated blood treatment matter. She is however 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.
23. The Commissioner's finding is, therefore, that the BBC was not obliged to comply with the complainant's information requests.

Right of appeal

24. 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

25. 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.
26. 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

Pamela Clements
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