

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 24 January 2023

**Public Authority:** British Broadcasting Corporation (BBC)  
**Address:** 2252 White City  
201 Wood Lane  
London  
W12 7T

### Decision (including any steps ordered)

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1. The complainant made a request for how often per day tik tok is mentioned over the last several years.
2. The BBC confirmed that it does not hold the requested information.
3. The Commissioner's decision is that if the information were held by the BBC it would be held for the purposes of 'journalism, art or literature' and would not therefore fall inside FOIA. He therefore requires no remedial steps to be taken in this case.

### Request and response

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4. On 19 January 2022 the complainant made a request for the following information:

"I would really like to know how often per day tik tok is mentioned over the last several years? FOI?"

5. The BBC responded on 19 December 2022 and confirmed that it does not hold the requested information under section 1(1) FOIA.

6. The complainant requested an internal review:

"You, I assume, have the radio broadcasts recorded, this is how they are able to play parts from previous shows. This was demonstrated this very day, a clip of a previous show was played during a live show today, and there was humorous interaction between the very nice covering presenter today and the missed absent presenter and a joke about jurassic park. You have the shows it is assumed in digital format.

In the letter it states you, the BBC, does not hold this information, I would suggest that you do have the information but it is not in an easily accessible format. There are plenty of programs that can be used, if you don't have them already, that can pick through with speed, voice or digital recordings for words beats etc. Would you please put through the request on this basis. And could this also be done with references to other commercial brands.

Would it be a thing that should be happening at any rate? How can you not be keeping tabs on the amount of commercial references being made? This should be a thing that the BBC keeps tabs on and is clear that they do so. Passing reference once in a while is one thing, but unless you know how often and what is said and in what context how can you comfortably assess whether it is indeed occasional or passing as opposed to repeated and/or what could look like endorsement.”

7. On 4 January 2023 the BBC provided the internal review:

“The FOI Act provides the public a general right of access to recorded information held by the BBC. However, the BBC is not obliged to create new information in order to respond to a request if it is not already held in recorded form at the time of the request.

I have liaised with the relevant departments within the BBC and confirm that it does not hold the information requested.

Further, given that the BBC does not keep any records regarding the number of times Tik Tok or any other social media platforms are mentioned across its many television and radio programmes, I do not consider that the BBC holds the ‘building blocks’ that would allow it to provide you with the information requested by means of, for example, compiling existing raw data.

In your request for internal review, you suggest that the BBC does hold the information, but that it is “not easily accessible”, and suggest that the information requested could be compiled through a manual review of recorded programmes. First, I reiterate the above position that the BBC is only required to respond to FOI requests that are for recorded information that it already holds at the time of the request, and that is not required to create new recorded information in response to a request. Second, I note the exemption set out in section 12 of the FOI Act, pursuant to which the BBC is not required to comply with requests for information if it estimates that the cost of complying with the request would exceed the ‘appropriate limit’ of £450, equivalent of 25 hours’ work at £18/hour.

Your request is for the number of times that Tik Tok is mentioned per day “over the last several years”. A narrow interpretation of this request

is that it is for the average number of times that Tik Tok is mentioned across all BBC radio programmes for the last three years. Responding to this request would require the BBC to manually review three years of radio broadcasts across all its radio stations to tally the complete number of references to Tik Tok in order to then calculate the daily average. This would manifestly exceed 25 hours and as such the section 12 exemption would apply.

As such, I consider that the original response was correct and I uphold it accordingly."

## **Scope of the case**

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8. The complainant contacted the Commissioner on 4 January 2023 to complain about the way his request for information had been handled.
9. Although the BBC has confirmed that the requested information is not held under section 1(1)(a) FOIA and if it were to be considered to be held it would exceed the cost limit under section 12 FOIA to locate, retrieve and extract the information, the Commissioner has considered in the first instance whether the requested information is excluded from FOIA because it would be held for the purposes of 'journalism, art or literature'.

## **Reasons for decision**

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10. Schedule One, Part VI of FOIA provides that the BBC is a public authority for the purposes of FOIA 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."
11. This means that the BBC has no obligation to comply with part I to V of the Act where information is held for 'purposes of journalism, art or literature'. The Commissioner calls this situation 'the derogation'.
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.
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 in *Sugar (Deceased) v British Broadcasting Corporation* and another [2012] UKSC 4<sup>1</sup> 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 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.

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

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'.
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.
20. 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.
21. In determining whether the information is held for the purposes of journalism, the Commissioner has considered the following factors:
- The purpose(s) for which the information was held at the time of the request;
  - The relationship between the purposes for which the information was held and the BBC's output on news and current affairs, including sport, and/or its journalistic activities relating to such output.
22. The Commissioner considers that the requested information if held, relates to the act of broadcasting or publishing the relevant material.
23. The Commissioner is therefore satisfied that the information requested is derogated. Therefore, the Commissioner has found that the request is for information (if it were held) that would be held for the purposes of journalism, art or literature and that the BBC was not obliged to comply with Parts I to V of FOIA.

## Right of appeal

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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](mailto:grc@Justice.gov.uk)  
Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://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**.....

**Gemma Garvey**  
**Senior Case Officer**

**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**