

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 19 October 2023

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

Address: BBC Broadcasting House
Portland Place
London
W1A 1AA

Decision (including any steps ordered)

1. The complainant requested information from the BBC about diversity commitments. The BBC responded that the requested information was covered by the derogation and hence excluded from FOIA.
2. The Commissioner's decision is that this information, if held at all, is held by the BBC for the purposes of journalism, art or literature and so was not covered by FOIA. He therefore upholds the BBC's position and requires no steps to be taken in this case.
3. However, the Commissioner finds that the BBC has breached section 10(1) of FOIA in that it failed to provide a valid response to the request within the statutory time frame of 20 working days.

Request and response

4. On 4 July 2023 the complainant wrote to the BBC and requested information in the following terms:

"1a) Does the BBC have standard contractual terms for independent production companies relating to commitment to diversity?"

- 1b) If so, please supply a copy
- 2a) Does the BBC require independent production companies to provide data on the ethnic diversity of their workforce?
- 2b) Does the BBC have a standard form for companies to use to report such data?
- 2c) If so, please supply a copy
- 2d) Has the BBC undertaken any analysis or summary of such data it has received?
- 2e) If so, please supply a copy
- 3a) Does the BBC require suppliers to provide evidence they have a diversity and inclusion Policy?
- b) Does the BBC possess a standard statement for suppliers of how to provide such evidence?
- c) If so, please supply a copy
- 4. Regarding the £100million fund for diverse programming, please state
 - a) how much of this was spent in the year April 2021-March 2022?
 - b) how much of this was spent in the year April 2022-March 2023?
 - c) the titles of the programmes commissioned so far as part of this scheme
- 5. Regarding the 100 diverse role models initiative,
 - a) Please provide copies of all relevant material which has been published on the BBC intranet
 - b) Please list the membership of the panel tasked with identifying 100 diverse role models
 - c) Please list the dates on which this panel has met."
- 5. On 20 September 2023 the BBC responded explaining that parts 1a to 4c of the request were subject to the derogation from FOIA. The BBC explained that it did not believe that the information was caught by FOIA because it was held for the purposes of "art, journalism or literature". It therefore would not provide any information in response to the requests. The BBC also explained that it did not hold information within parts 5a to 5c of the request.

Scope of the case

- 6. The complainant contacted the Commissioner on 21 September 2023 to complain about the way their request for information had been handled. On clarification, the complainant set out that their complaint was about parts 1a to 4c of their request for information. In particular, they 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 FOIA because it was

held for the purposes of "journalism, art or literature". Finally, the Commissioner will consider if the BBC has complied with its obligations under section 10(1) of FOIA.

Reasons for decision

8. Under section 1(1) of 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. FOIA only applies to the BBC to a limited extent. Schedule One, Part VI of FOIA provides that the BBC is a public authority for the purposes of 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 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 FOIA. Releasing information about its output, or related to its output, could therefore commercially disadvantage the BBC. However the test to be applied is whether the information relates to the BBC's output. The BBC is not required to demonstrate that it would be commercially disadvantaged if it were to disclose the information.
12. Broadly, BBC information that is covered by 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 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 he 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 argued that the "information I seek is not held for programme-making purposes, but it is instead held for management, administration and HR purposes".
18. As explained above, information about editorial decision making including information it may hold from independent programme makers, if held at all, is derogated information. Any information the BBC held would relate to the process for selecting independent companies to produce output for the BBC and the purpose of monitoring the production of that output. This information would likely be related to the BBC's output if held at all.
19. Whilst the information may also be held for "management, administration and HR purposes" as well, if it is held for a derogated purpose, it is outside the scope of FOIA.
20. The Commissioner is satisfied, based on the very well established precedent set in the numerous other decisions he has made in cases involving the BBC, that, if held at all, the information requested by the

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

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 provide the information.
22. Section 10(1) of FOIA states that a public authority must respond to a request promptly and "not later than the twentieth working day following the date of receipt".
23. From the evidence provided to the Commissioner in this case, the BBC has breached section 10(1) by failing to respond to the request within 20 working days.

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: 0203 936 8963

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

Roger Cawthorne
Team Manager
Information Commissioner's Office
Wycliffe House
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