

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 8 December 2023

Public Authority: The British Broadcasting Corporation ('the BBC')

Address: 2252 White City
201 Wood Lane
London
W12 7TS

Decision (including any steps ordered)

1. The complainant has requested information about the BBC's use of the national anthem. The BBC provided information in response to the request but also explained that the information was covered by the derogation and excluded from FOIA.
2. The Commissioner's decision is that this information is held by the BBC for the purposes of 'journalism, art or literature' and therefore falls outside of FOIA.
3. He doesn't require the BBC to take any steps.

Request and response

4. On 15 August 2023, the complainant wrote to the BBC and requested:

"I am writing for information about the BBC's policy on playing the national anthem on the radio for royal birthdays.

Please treat this as an FOI request. If any of the information sought is already available on the internet, please provide links – I have not been able to find any.

Please provide the following information:

1. Please confirm if there is a policy to play on BBC Radio (Radio 4, or any other station) at any time, any part of the national anthem on the real birthday of the reigning monarch, i.e. the anniversary of the actual date of birth, not the "official" birthday in June.

If so, please provide a copy of the policy, and/or any other written material relating to this issue including emails, memos, notes of meetings, etc.

2. Please confirm if a decision has already been taken to play on BBC Radio (Radio 4, or any other station) any part of the national anthem at any time on the next real birthday of the current reigning monarch, i.e. on 14 November 2023.

If so, please provide a copy of the policy, and/or any other written material relating to this issue including emails, memos, notes of meeting etc.

3. Please confirm if there is a policy to play on BBC Radio (Radio 4, or any other station), at any time, any part of the national anthem or any other birthday of a member of the royal family, including on the monarch's "official birthday" in June.

If so, please provide a copy of the policy, and/or any other written material relating to this issue including emails, memos, notes of meetings etc.

4. Please provide a copy of the review of BBC policy on the playing of the national anthem for members of the royal family, reported on the BBC news website in 1998
<http://news.bbc.co.uk/1/hi/uk/84146.stm>

5. Please confirm if there has been any kind of review of the policy on playing on the BBC any part of the national anthem at any time on the birthday of any member of the royal family, since the review

referred to immediately above reported on the BBC news website in 1998: <http://news.bbc.co.uk/1/hi/uk/84146.stm>

If there has been any such further review since 1998, please provide a copy of the review, and/or any other written material relating to it since it was conducted, including emails, memos, notes of meetings etc.”

5. The BBC responded on 12 September 2023. It explained that it didn't believe the requested information was caught by FOIA because it was held for the purposes of 'art, journalism or literature'.
6. Nonetheless, the BBC voluntarily disclosed information in response to the request. It explained to the complainant:

“There is no official BBC policy however the practice, which was in place during the reign of the late Queen, will be continued. That is, Radio 2 and Radio 4 will be the only Radio Networks that will play the National Anthem on both the official and actual birthday of the reigning monarch. The National Anthem is broadcast on Radio 2 at 08:00 and on Radio 4 at 06:59.”
7. The BBC also gave the dates for the official birthday of HM The King, and the actual birthdays of HM The King, HM Queen Camilla and HRH Prince William.
8. The BBC refused to conduct an internal review, because it maintained that the information requested (and disclosed) isn't covered by FOIA.
9. The complainant disputes the BBC's position that the information sits outside of FOIA. They also dispute the accuracy of the information that was volunteered to them by the BBC in response to the request.

Reasons for decision

10. 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's held.
11. 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.”

12. 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’s the end of the matter; there is no public interest test or similar provision to consider the merits of disclosure.
13. 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.
14. 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.
15. 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.
16. 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 4.¹
17. 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.

¹ [Microsoft Word - Sugar v BBC.doc \(supremecourt.uk\)](#)

18. 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.
19. The Commissioner has considered the information being requested here. The decision to play the national anthem on the radio directly relates to the BBC's output; it's a content decision about what to broadcast.
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 the information requested by the complainant would be held for the purposes of journalism, art or literature.
21. Even though it wasn't obligated to, the BBC disclosed information to the complainant in response to the request and the complainant is concerned:

"I am concerned that the information "volunteered" to me in the FOI response I received on 12 September 2023, and which is the subject of my current complaint/appeal to the ICO, was wrong."
22. Even if the information was covered by FOIA, neither the Commissioner nor FOIA concerns the accuracy of information. The Commissioner can't verify the accuracy the information volunteered to the complainant. He also can't comment on whether the BBC **should** hold such a policy.

Right of appeal

23. 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

24. 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.
25. 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

Alice Gradwell
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF