

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 14 June 2024

Public Authority: British Broadcasting Corporation (BBC)
Address: BBC Broadcasting House
Portland Place
London
W1A 1AA

Decision (including any steps ordered)

1. The complainant requested information from the BBC about editorial decisions involving Julian Assange. The BBC had yet to respond at the date of this notice.
2. The Commissioner finds that as the BBC failed to respond to the request, it breached section 10(1) of FOIA. However he is also satisfied that this information, if held at all, would be held by the BBC for the purposes of journalism, art or literature and so would not be covered by FOIA.
3. The Commissioner does not require further steps to be taken.

Request and response

4. On 28 February 2024, the complainant wrote to the public authority and requested information in the following terms:

“This is to confirm my formal request to receive copies of all BBC internal meeting minutes over the past 1, 784 days, taken from today's date, where the person of JULIAN ASSANGE was discussed in relation to BBC policy and in relation to the decision making process that led to the decision or decisions to either ignore Mr. Assange's both physical and psychological torture in Belmarsh prison or to seriously curtail any newsworthy items in relation to Mr. Assange's

plight and the reasoning defined in those BBC meetings as to why Mr. Assange's particular situation should be ignored or sidestepped?

My specific request wishes to ascertain, define and accurately confirm whether or not decisions were made by senior staff at the BBC to take a specific stance in relation to Mr. Assange and if that stance had any external influence from sources to be defined in my FOI request

I wish to know definitively if the BBC recognises that Mr. Assange has and is continuing to be tortured in Belmarsh Prison, UK, and if so having that knowledge, what decision making process was adopted and what influences affected any decision(s) as a result"

5. The BBC had failed to issue a response at the date of this notice.

Scope of the Case

6. The complainant originally complained to the Commissioner because the BBC had failed to respond to the request. In line with his usual practice, the Commissioner notified the BBC of the complaint and attempted to resolve the matter informally. These efforts were unsuccessful.
7. The complainant asked the Commissioner to issue a decision notice compelling the BBC to respond to their request.
8. Even if information is derogated, the BBC must still inform the requester of that fact within 20 working days. This was confirmed in *Sugar v BBC & Another* [2009] UKHL 9.
9. Given the clear precedents that exist on such matters, whilst the Commissioner has considered the timeliness of the BBC's response, he has also considered whether the BBC would be obliged to provide the requested information.

Reasons for decision

10. A public authority is required to respond to a request for information within 20 working days. It must usually inform the requester if it holds the requested information and, if it does, either provide copies or issue a refusal notice. In the BBC's case, this means informing the requester whether it holds any information that is not subject to derogation.
11. In this case the BBC breached section 10 of FOIA because it has failed to confirm whether or not the requested information was held for the purposes of FOIA.

12. The following analysis covers whether the information requested would be excluded from FOIA because it would be held for the purposes of "journalism, art or literature".
13. 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."
14. 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.
15. Although it is publicly funded through the licence fee, the BBC competes with other commercial broadcasters who are not subject to FOIA. Releasing information about its output, or related to its output, could therefore commercially disadvantage the BBC. However, for the derogation to apply, the BBC does not need to demonstrate that it would suffer commercial harm if the information were to be disclosed. It only has to demonstrate that the information is held for a derogated purpose.
16. 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.
17. 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.
18. 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

19. 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 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. As explained above, information about internal BBC decisions on coverage of Julian Assange’s story, if held at all, would be derogated information. This type of information would be associated with the BBC’s output because it involves the decision on whether to broadcast or publish specific information. It also relates to the editorial process of selecting which materials are broadcasted or published. This is clearly linked to editorial decision making and is within the Supreme Court’s definition of what ‘journalism’ is.
22. 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 complainant would be held for the purposes of journalism, art or literature. It is therefore not covered by FOIA and the BBC would not be obliged to provide it.
23. Whilst the Commissioner notes that the BBC has not responded to the request, given that the complainant will not ultimately be entitled to receive the information they have requested, he considers that it would serve no useful purpose to compel the BBC to provide a response.

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

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.

Roger Cawthorne
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