

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 15 February 2024

**Public Authority:** British Broadcasting Corporation (BBC)

**Address:** BBC Broadcasting House  
Portland Place  
London  
W1A 1AA

#### **Decision (including any steps ordered)**

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1. The complainant requested information from the BBC about communications between BBCNI and the Department of Health relating to what material BBCNI broadcasts or publishes. 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 is not covered by FOIA. He therefore upholds the BBC's position. However, the Commissioner finds that the BBC breached section 10(1) of FOIA as it failed to confirm whether or not the requested information was held for the purposes of FOIA within the statutory 20 working days.
3. The Commissioner requires no steps to be taken in this case.

#### **Request and response**

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4. On 18 October 2023, the complainant wrote to the public authority and requested information in the following terms:

- "1. Please outline/ provide the contents of all meetings, formal and informal between Adam Smyth and any other senior BBCNI staff with any and all DOH staff, whereby the BBCNI have been asked to modify , limit, alter, censor, or plan in any way, their rules/norms for publishing/ including/ not including stories, based on what DOH staff have asked, requested, ordered or demanded, either by conversation , email, meeting, letter, text, whats app etc.  
This is to include what the BBCNI have been told is 'ok' to broadcast or publish or discuss, and what it is no 'ok' to. and what mode of broadcasting is chosen eg newsdesk, online, radio etc.
2. please list all staff from DOH who were/ are involved in any form of discussions with BBCNI on any and all of these matters over the past 3 years
3. Please also include all BBCNI staff who were involved in same discussions over the past 3 years.
4. Please outline any and all involvement and communications between BBCNI and the Dept health in any restrictions AT ALL regarding what BBCNI put out to the public as far as health stories go, and kind of health stories/ health care, services, complaints, court cases- everything.
5. How many communications have taken place official and unofficial, formal and informal, declared, and undeclared, minuted and unminuted, between any and all DOH staff, DOH press office staff, any and all BBCNI staff , in the last 3 years and what stipulations orders requests have DOH made to BBCNI regarding what is and is not published and what was BBCNI's response."
5. On 9 January 2024 the BBC responded to the request. The BBC explained that it believed that the information would be held for the purposes of "art, journalism or literature" and would therefore not be caught by FOIA. As a result, the BBC did not consider it was obliged to provide the information.

## Reasons for decision

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6. The following analysis covers whether the information requested is excluded from FOIA because it was held for the purposes of "journalism, art or literature".
7. 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.”

8. 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.
9. 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.
10. 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.
11. 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.
12. 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
13. 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.

14. 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.

### **The complainant's view**

15. The complainant expressed their dissatisfaction with the BBC's response in a complaint to the Commissioner, stating:

"I wish for you to investigate this breach of data provision from a public body."

### **The Commissioner's view**

16. Information about communications between BBCNI and DOH relating to what material BBCNI broadcasts or publishes would be derogated information. This is because there is a clear relationship between the type of information requested and the BBC's output. Specifically in this case it would relate to the BBC's coverage of health matters in Northern Ireland.
17. The Commissioner is satisfied 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 is not obliged to provide it.

### **Procedural matters**

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18. 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.
19. In the case of the BBC, even if information is derogated, it must still inform the requester of that fact within 20 working days. This was confirmed in *Sugar v BBC & Another* [2009] UKHL 9.
20. In this case the BBC breached section 10(1) of FOIA because it failed to confirm whether or not the requested information was held for the purposes of FOIA within 20 working days.

## Right of appeal

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21. 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](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

22. 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.
23. 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**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**