

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 8 August 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 about the 'Today' programme on BBC Radio 4. The BBC's position is that the information is covered by the derogation and so is excluded from FOIA.
2. The Commissioner's decision is that any relevant information held by the BBC would be held for the purposes of journalism, art or literature and so isn't covered by FOIA.
3. It's not necessary for the BBC to take any steps.

Request and response

4. On 15 May 2024, the complainant wrote to the BBC and requested information in the following terms:

"BBC Radio 4 – The Today Programme

Please let me know the total number of interviews conducted during the "prime-time" slot [c. 08.10 – c.08.25] following on from the 08.00 news bulletin for this year – from January 1 2024 to May 14 2024

Of the total number of interviews please let me know

How many were conducted with a minister/government representative

How many were conducted with another representative of the conservative party

How many were conducted with an opposition / shadow representative

How many were conducted with another member of the labour party

How many were conducted with a representative of one of the other political parties

How many were conducted with someone not overtly affiliated to any political party.

Please also let me know whether this information is routinely recorded

Finally could you please let me know which person or persons are responsible for inviting the interviewee”

5. On 30 May 2024 the BBC responded to the request. The BBC explained that the information would be held for the purposes of “art, journalism or literature” and therefore wouldn’t be caught by FOIA. As a result, the BBC didn’t consider it was obliged to provide the information.

Reasons for decision

6. The following analysis first covers whether most of the information requested is excluded from FOIA because it was held for the purposes of “journalism, art or literature”. The Commissioner will consider the complainant’s concern about BBC’s internal review process under ‘Other Matters.’
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 – isn’t covered by FOIA. If information falls within the derogation, then that’s the end of the matter; there’s no public interest test or similar provision to consider the merits of disclosure.

9. Although it's publicly funded through the licence fee, the BBC competes with other commercial broadcasters who aren't 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 doesn't 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's 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 isn't 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 doesn't 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.
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.

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

The complainant's view

15. The complainant has presented the following arguments:

- The information requested in the first question was created for the public and has been in the public domain throughout the year because all of the interviews were publicly broadcast to approximately seven million listeners. Any individuals listening each day to all of the interviews could have collated the information had they thought to do so, on an ongoing basis. It therefore makes no sense to suggest that the information in the interviews is derogated. The question is one of statistical computation not journalistic research; the underlying information is and should be a matter of public record. The BBC is not being asked to give the reasons or the documentation of the reasons for its choices of interviewees.
- The second question is similarly not for derogated information. It's a question about management and administrative procedure at the BBC and how it maintains and monitors an appropriate political balance.
- The third question is similarly a production and management question about which team role(s) are responsible for suggesting and inviting the interviewees.

16. The complainant's request concerns the BBC's 'Today' programme and interviews carried out at a particular time slot in that programme. It's not relevant that it might have been possible for an individual to compile some of the information themselves, if they'd thought to do so. The request concerns the BBC's 'output' and editorial decisions it made about that output, and as such any relevant information the BBC may hold is derogated.

17. The Commissioner is satisfied, based on the very well-established precedent set in the numerous other decisions he's made in cases involving the BBC, that the information requested by the complainant would be held for the purposes of journalism, art or literature. It's therefore not covered by FOIA, and the BBC isn't obliged to provide it.

Other matters

18. In their complaint to the Commissioner, the complainant stated the following:

"I am additionally concerned that the BBC should not even wish assist in this instance; that the starting point appears to be a reflex attempt to refuse to cooperate with the act when an open spirit of enquiry and wish to be seen to be accountable for political balance on Radio 4's flagship programme must be in the public interest irrespective of the corporation's obligation to do so under the act. It seems an unnecessary obfuscation, especially regarding the seeking of information about the political balance in programming during the weeks immediately prior to the announcement of a General Election. In this respect I therefore also wish to raise the additional complaint that the corporation offers no internal review or appeal procedure to establish whether their FOI office's determination that a request falls within the derogation is correctly applied."

19. Internal reviews aren't a legal requirement of FOIA, they're a matter of good practice. However, in this case the requested information isn't caught by FOIA and therefore the BBC was under no obligation to offer an internal review, even as a matter of good practice. As was correct to do, the BBC directed the complainant to the Commissioner if they weren't satisfied with its response.

Right of appeal

20. 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

21. 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.
22. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Cressida Woodall
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
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SK9 5AF