

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 28 August 2014

**Public Authority:** British Broadcasting Corporation  
**Address:** 2252 White City  
201 Wood Lane  
London W12 7TS

#### Decision (including any steps ordered)

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1. The complainant has requested information about records concerning a court order. The British Broadcasting Corporation ('the BBC') said that it did not hold this information.
2. The Commissioner's decision is that, on the balance of probabilities, the BBC does not hold the information that has been requested and does not require the BBC to take any further steps.
3. Moreover, if the BBC *had* held the information, the Commissioner considers it would have been for the purposes of "art, journalism or literature" and therefore not caught by the FOIA.

#### Request and response

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4. On 12 May 2014, the complainant wrote to the BBC and requested information in the following terms:

*"Please provide your record of any order by a court ordering the BBC to release either to Merseyside Police or the Crown Prosecution Service or any other investigators the un-broadcast BBC footage from the making of the Newsnight documentary 'A Family Affair' (broadcast 20th November 2000).*

*If no such record or court order is available, please provide the BBC's own record of editorial or management discussions leading to the handing over of the un-broadcast footage to Merseyside Police by the programme's producer on or before 21st December 2000 as set down in a subsequent lawyer's civil claim statement on behalf of an individual falsely accused as a result of the broadcast:"*

5. The BBC responded on 15 May. It said that it did not believe that the information was caught by the FOIA because it was held for the purposes of "art, journalism or literature" and was therefore derogated.
6. The complainant was not satisfied with this response. Following intervention from the Commissioner, the BBC wrote to the complainant on 26 June. It now said that it had carried out a search for the requested information and could confirm that it did not hold it.

### **Scope of the case**

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7. The complainant contacted the Commissioner on 19 May to complain about the way their request for information had been handled. After liaising with the complainant, the Commissioner focussed his investigation on whether or not the BBC held the information.

### **Reasons for decision**

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8. Section 1 of the FOIA says that an individual who asks for information is entitled to be informed whether the information is held and, if the information is held, to have that information communicated to them.
9. In its submission, the BBC told the Commissioner that it had carried out a search of its Archives and within the BBC's legal department, and had not uncovered the requested information. In addition, the programme's producer referred to in the information request no longer works at the BBC. Emails or other documents from 2000 or 2001 were therefore unlikely to be still held on that user's system. Taking account of the fact that the events covered by the information request happened 14 years ago, the BBC has concluded that it does not hold the information requested.

10. The Commissioner has considered the steps the BBC undertook to search for the information that has been requested and is prepared to accept that the BBC does not hold it.
11. In its submission the BBC has also provided arguments to support its position that, had it been held, the requested information would have been held for the purposes of "art, journalism or literature" and would therefore not have been caught by the FOIA.
12. The BBC says that the un-broadcast footage, and therefore any court order or internal editorial discussions about whether to release the footage to the Merseyside Police, would only exist because this particular edition of 'Newsnight' was created. Had it been held, the information would be held in connection with this documentary and not for any purposes connected to the running and management of the BBC.
13. The BBC put forward the argument that the requested information could be used in a follow up documentary by the BBC, about the same subject matter or related or similar matters. Editorial discussions about whether to release un-broadcast footage to the police in these instances may involve referring to any discussions covered by the information request. In this situation, programme makers would be using the information requested to inform editorial decisions about the BBC's output. The BBC maintains that there is therefore a close relationship between the requested information and its creative output, and that the information would therefore be derogated if it existed.
14. The BBC is a public authority for the purposes of the FOIA – "in respect of information held for purposes other than those of journalism, art or literature [ie its output]." This is known as the Schedule 1 derogation. Given that he accepts that the information is not held, the Commissioner has not considered the BBC's derogation arguments in great depth. He does however acknowledge them and considers that if the BBC had held this information it would have been covered by the derogation and would therefore be exempt from the Act.

## Right of appeal

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15. 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: 0300 1234504

Fax: 0116 249 4253

Email: [grc@hmcts.gsi.gov.uk](mailto:grc@hmcts.gsi.gov.uk)

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

16. 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.
17. 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 .....**

**Pamela Clements**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**