

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 18 February 2020

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

Address: BC2 A4 Broadcast Centre
White City
201 Wood Lane
London
W12 7TP

Decision (including any steps ordered)

1. The complainant has requested any written representations from the BBC to Facebook objecting to disclosure of confidential user information to Cambridge Analytica. The BBC explained the information was covered by the derogation and excluded from FOIA. The Commissioner's decision is that this information was held by the BBC for the purposes of 'journalism, art or literature' and did not fall inside FOIA. She therefore upholds the BBC's position and requires no remedial steps to be taken in this case.

Request and response

2. The complainant wrote to the BBC on 23 November 2019:
'Details of any formal, written representations made to Facebook in the past three years objecting to, or expressing concern about:
 1. Facebook's disclosure of confidential user information to Cambridge Analytica;
 2. Facebook's policy of hosting paid-for advertising, political or otherwise, where that advertising includes information that Facebook knows, or subsequently learns to be false or misleading.'

3. The BBC responded on 2 December 2019. The BBC explained that it did not believe that the information was caught by FOIA because it was held for the purposes of 'art, journalism or literature'.
4. It explained that Part VI of Schedule 1 to FOIA provides that information held by the BBC and the other public service broadcasters is only covered by FOIA if it is held for 'purposes other than those of journalism, art or literature'. It concluded that the BBC was not required to supply information held for the purposes of creating the BBC's output or information that supports and is closely associated with these creative activities. It therefore would not provide any information in response to the requests for information.

Scope of the case

5. The complainant contacted the Commissioner on 10 January 2019 to complain about the way the request for information had been handled. In particular, he challenged the operation of the derogation in this case.
6. The Commissioner considers the scope of the case is to determine if the requested information is excluded from FOIA because it would be held for the purposes of 'journalism, art or literature'.

Reasons for decision

7. Schedule One, Part VI of FOIA provides that the BBC is a public authority for the purposes of FOIA but 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 means that the BBC has no obligation to comply with parts I to V of the Act where information is held for the purposes of journalism, art or literature. The Commissioner calls this situation "the derogation".

9. The complainant has argued that his request falls outside of journalism, art, or literature as defined in the Supreme Court Judgment of 2012¹. He argued:

'If Lord Walker's interpretation of the BBC's Schedule 1 derogation from the FOIA is taken to its logical conclusion, together with the 4:1 majority verdict, it is hard to see that any BBC information at all would be covered by the FOIA. That is of course absurd, unreasonable and manifestly contrary to the public interest. In that context the Supreme Court's broad interpretation of the derogation, such as to deny my FOIA request, is unsustainable.

A narrower interpretation of the derogation, however, which treated information that is not directly for the purposes of art, journalism or literature, is logical, reasonable and sustainable.

Under that interpretation, my FOIA request falls clearly outside the BBC's FOIA derogation. The information I seek is that which is not directly for the purposes of art, journalism or literature; it is simply to find out what representations have been made by the BBC to Facebook, seeking to express its view to Facebook about Facebook's illicit data sharing with Cambridge Analytica, and to clarify the implications of Facebook's paid-for political advertising policy. Facebook's illicit data sharing with Cambridge Analytica and its paid-for advertising policy are in conflict with the BBC's core principles. It is self-evidently in the public interest that representations by the BBC to Facebook concerning these matters, solely for the purposes of general clarification, not directly for the production of any published article or broadcast programme, are accessible to BBC licence payers and the wider public...

*The question of whether the BBC is entitled to rely on the FOIA derogation in the case of my complaint is a legal one. It cannot be definitely answered by a lay person. And this question turns on whether the case law already cited by the ICO, *Sugar (Deceased) v British Broadcasting Corporation* and another [2012] UKSC 4, constrains the ICO to adopt a broad interpretation of Part VI of Schedule 1 of the FOIA, meaning practically anything the BBC does is caught, or whether, in circumstances such as mine, the ICO can adopt a narrow interpretation.'*

¹ The judgment can be found here (please be aware that the dissenting judgment comes first and is not the law) <https://www.supremecourt.uk/cases/docs/uksc-2010-0145-judgment.pdf>

The official summary of the same can be found here:

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

10. The Commissioner's view is that having applied the approach to the derogation set out by the Supreme Court and the Court of Appeal, which is binding, the Commissioner is satisfied that the requested information falls under the definition of journalism and is therefore derogated. The Commissioner sees no basis for deviating from the approach as the complainant argues; the information clearly falls within the derogation. The derogation is engaged as soon as the information is held by the BBC to any extent for journalistic purposes.
11. In conclusion, and for all of the reasons above, the Commissioner finds that the information falls within the derogation and that the BBC is not obliged to comply with Parts I to IV of the FOIA in respect of the complainant's information request.

Right of appeal

12. 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: 0870 739 5836

Email: grc@justice.gov.uk

Website: <http://www.justice.gov.uk/tribunals/general-regulatory-chamber>

13. 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.
14. 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
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SK9 5AF