

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 26 April 2021

Public Authority: British Broadcasting Corporation (BBC)

Address: Broadcasting House
Portland Place
W1A 1AA

Decision (including any steps ordered)

1. In three requests the complainant has requested information associated with the 1995 BBC Panorama interview with Diana, The Princess of Wales. The BBC refused to comply with the requests as it considered that the requested information was held for the purposes of journalism and was therefore derogated information and outside the scope of the FOIA.
2. The Commissioner's decision is as follows:
 - At the time of the requests, the information the complainant has requested was derogated and did not fall within the scope of the FOIA.
3. The Commissioner does not require the BBC to take any remedial steps.

Request and response

4. On 13 November 2020, 19 November 2020 and 2 December 2020, the complainant wrote to the BBC and requested information in the following terms:

Request 1 – BBC reference RFI20201772

"I have just read that the BBC does in fact have a copy of the letter that Princess Diana gave to the BBC in late 1995.

As I asked for this under RFI20201561 (as well as under RFI20201638) can you please urgently release a copy to me?"

Request 2 – BBC reference RFI20201808

"Copies of the BBC press logs and press office memos or other media strategy/policy documents that relate to Martin Bashir and / or the BBC Panorama interview Diana, Princess of Wales and Marmaduke Hussey's position for the remainder of 1996.

So far I have been given press logs for 1995, and two selective press logs from the 7th and 13th April 1996, but there were other news stories and media queries on these topics aside from those specific dates. In total I would like the relevant press logs for the entirety of 1996."

Request 3 – BBC reference RFI20201880

"A list of all the international broadcasters that were given permission by the BBC to broadcast the interview in 1995/6

How much money the sale or licensing of the interview generated the BBC in 1995/6.

Any relevant document (such as faxes, emails / memos, reports, documents etc) that relate to or discuss the sale or licensing of the BBC Panorama interview with Diana, The Princess of Wales with non-British broadcasters.

Any relevant document (such as faxes, emails / memos, reports, documents etc) that relate to or discuss the possibility of the release of a videotape of the BBC Panorama interview with Diana, The Princess of Wales

Any relevant document (such as faxes, emails / memos, reports, documents etc) from 1995/6 that relate to or discuss the possibility of a repeat broadcast (scheduling) in the UK of the BBC Panorama interview with Diana, The Princess of Wales with non-British broadcasters."

5. In correspondence dated 14 December 2020, the BBC responded to the above three requests. The BBC explained that it did not consider that the requested information was caught by the FOIA because it was held

for the purposes of 'art, journalism or literature' ie the information was derogated.

Scope of the case

6. The complainant contacted the Commissioner on 23 November 2020 to complain about the way her requests for information had been handled.
7. The Commissioner has considered whether the requested information is derogated ie whether it falls outside the scope of the FOIA.

Reason for decision

8. Under section 1(1) of the FOIA, anyone who requests information from a public authority is entitled under subsection (a) to be told if the authority holds the information and, under subsection (b) to have the information communicated to him or her if it is held.
9. The FOIA only applies to the BBC to a limited extent. Schedule 1 of the FOIA defines the BBC as a public authority for the purposes of the FOIA only "*...in respect of information held for purposes other than those of journalism, art or literature.*"
10. 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 the 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.
11. Broadly, BBC information that is covered by the 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.
12. Broadly, BBC information that is not covered by the FOIA includes the following: information about the BBC's on-screen or on-air 'talent' ie 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.

13. The derogation as it applies to the BBC is discussed in more detail in many published decisions made by the Commissioner, such that she 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*¹
14. In this case, the complainant has requested information associated with a particular edition of the BBC's 'Panorama' programme. The requested information includes: a letter that Princess Diana gave to the BBC, press logs and press office memos, other media documents and information about the sale, licencing or broadcasting of the programme.
15. In its submission to the Commissioner dated 16 March 2021 the BBC has explained, for context, that prior to the current requests it had voluntarily disclosed a substantial volume of documents to the complainant relating to the Panorama interview with Diana, Princess of Wales. The BBC said it had made it clear that it considered the information in question was held for the purposes of journalism but that *at that time* (ie prior to the BBC's decision to commission Lord Dyson to investigate the circumstances leading to the BBC obtaining the interview), it was in the broader public interest to disclose certain corporate documents where the BBC could do so consistently with data protection law. With respect to request reference RFI20201808, the BBC says that it had disclosed some of the relevant press logs to the complainant as part of an earlier disclosure. That disclosure was also made voluntarily, before Lord Dyson was asked to investigate.
16. The BBC has confirmed that it considers that it holds the information relevant to requests 1 and 2 with respect to the third limb of the Supreme Court's definition of 'journalism' in the *Sugar* case, namely the maintenance and enhancement of the standards the BBC's output by reviews of its quality.
17. The BBC confirmed that it considers that it holds the information relevant to request 3 with respect to the second limb of the above definition of 'journalism', namely the editing of material. This is because, the BBC says, decisions taken as to whether and to what extent BBC content is re-broadcast, including via licence to international broadcasters, may involve considering the type of editorial matters that

¹ http://www.supremecourt.gov.uk/docs/UKSC_2010_0145_ps_v2.pdf

Lord Dyson's investigation is likely to consider, including the possible factors the decision-makers took into account in 1995 and 1996 to re-use or licence the interview.

18. The BBC explained that the complainant's requests were received in the context of the then-imminent establishment of Lord Dyson's investigation ('the Investigation'). This is an ongoing Investigation the BBC commissioned at arms-length to determine, amongst other matters, the extent to which the steps Martin Bashir took to obtain an interview with the Princess of Wales adhered to BBC editorial standards. The BBC has provided the Commissioner with the Investigation's Terms of Reference.
19. It is the BBC's position that, at the date of the requests, all information it holds that is relevant to these Terms of Reference is held for journalistic purposes. The Investigation was announced on 18 November 2020 but was in serious contemplation on 13 November 2020 when the BBC received the first of the complainant's requests.
20. The BBC has told the Commissioner that the Investigation will investigate the circumstances leading up to and after the interview with the Princess of Wales. Without wanting to pre-judge the precise scope of Lord Dyson's inquiries, the BBC says that this will likely include analysing editorial decisions taken prior to, and post-broadcast.
21. In the BBC's view requests 2 and 3 relate directly to editorial decision making about material available to the BBC post-broadcast which may have impacted on decisions about whether to re-use, re-broadcast or licence output. Additionally the information in request 1 is from the sole contributor to the programme about her involvement in that programme and again, will likely be instructive in Lord Dyson's Investigation.
22. The BBC argues that disclosing information relevant to the Investigation during its course would undermine the independence required to analyse material free from undue influence of internal parties. This requirement for editorial independence is affirmed in Article 3(1) of the BBC's Royal Charter and the BBC says it must be safeguarded during the course of an editorial investigation. The BBC has also told the Commissioner that it has explained that it aims to publish the Investigation's final report.
23. From a legal perspective, the BBC notes, part (ii) of the Investigation's Terms of Reference identify an aim of the Investigation as analysing adherence to the BBC's editorial standards. The BBC confirmed its view that this is clearly a function of the third limb of the *Sugar* definition of 'journalism'; to maintain and enhance the standard of output. It has noted the Commissioner's previous decisions that affirm the approach

that information held for editorial complaints and investigation purposes falls outside the scope of the FOIA.

24. With respect to decisions as to the selection and timing of BBC content for broadcast, including decisions around licencing BBC content, the BBC confirmed that in its view this falls within the second limb of the *Sugar* definition. Similarly, the BBC's view is that information about broadcast costs and decisions taken with respect to such costs falls within that second limb.
25. In correspondence to the Commissioner dated 18 December 2020 the complainant provided arguments to support her view that the information is caught by the FOIA, which the Commissioner will summarise as follows:
 - The information and records are held by the BBC's Written Archives, in the BBC's words, "because of their value as evidence or as a source for historical or other research". As a result, the information is not derogated.
 - The *Sugar* judgment explicitly discussed material held in archives. The view was that material held for the purpose of an archive was not journalistic material and therefore would not fall within the protection of the designation in the Act. The key being whether the information held was part of an active journalistic endeavour, or purpose (broadcast output), and therefore disclosing it would have an effect of interfering in editorial decision making. The judgment made it clear that it would be absurd if every bit of information held by the BBC was exempt, otherwise Parliament would not have included the BBC in the Act at all.
 - The complainant notes paragraph 53 of the *Sugar* judgement: "today's journalism is tomorrow's archive", and paragraph 58: "In the case of journalism, above all news journalism, information 'held for purposes ... of journalism' may soon stop being held for that purpose and be held, instead, for historical or archival purposes". The judgement concluded that the derogation is aimed at "work in progress" and the "BBC's broadcasting output".
 - In the complainant's view disclosing material that is held only in the archives will not be likely to interfere with or inhibit the BBC's broadcasting functions. She has noted that the requested information is approximately 25 years old ie it is approximately 25 years since any journalistic programmes were being made that had any connection to the information.

- At the time of the requests, the dominant purpose for which the BBC held the requested information was for the purpose of historical record, not for the purpose of journalism (art or literature).
 - The information is part of what the BBC terms the 'BBC Written Archives'. The complainant says the Archives are mandated by the BBC's Charter and its Agreement with the Secretary of State, for accountability and historical record. The Archive's website, the complainant says, stresses that the BBC should make these records available to the public. In the complainant's view the BBC's refusal to disclose the material is at odds with its own Charter.
26. The complainant's correspondence to the Commissioner also discusses the BBC's possible reliance on section 40 of the FOIA (personal data) to withhold information, and the public interest in disclosing the information she has requested. However, at issue here is whether or not the requested information is derogated.
27. The Commissioner asked the BBC to address the complainant's specific arguments about the information being held in the BBC's Written Archives and, as such, being held for historical purposes rather than journalistic purposes. The BBC advised that it considers its submission had done so ie it had explained why the requested information is held for the purposes of journalism, but it provided the Commissioner with further reasoning in correspondence dated 13 April 2021.
28. Having referred to the discussion in the *Sugar* decision about information held for archival purposes, the BBC says the starting point is that if material is held solely for archival purposes then it will fall "within the designation", and so will fall within the scope of the Act. The BBC says the information requested in this case is *not* solely held for archival purposes. This is because since the commencement of Lord Dyson's independent Investigation information connected to the 1995 BBC Panorama interview of Princess Dianna is held for journalistic purposes. The information is not held in the Written Archives Centre as the complainant has claimed; it is held by BBC Archives and BBC Litigation. The BBC says that the fact that copies of some of the requested information are held by BBC Archives as part of BBC record management procedures is not determinative of its current use. Rather, questions of access and use are germane to understanding its current purpose.
29. BBC Litigation holds the requested information for the purpose of assisting Lord Dyson's Investigation. The Terms of Reference for the Investigation explain that as part of this work, 'the BBC is handing over

all of its relevant records' to Lord Dyson's Investigation. This is one way in which the BBC's Litigation team is working to assist the independent Investigation.

The Commissioner's conclusion

30. In her correspondence to the Commissioner the complainant has referred to paragraph 106 of the *Sugar* judgement. This discusses the point at which information ceases to be held to any significant degree for the purposes of journalism and becomes held instead, for example, solely for archival purposes. The judgement concluded that necessarily that would depend on the facts of any particular case and involve a question of judgment.
31. In this case, the Commissioner accepts the following. That at the time of the requests the requested information was held by BBC Archives but was also held by BBC Litigation. BBC Litigation held the information to assist Lord Dyson's imminent, independent Investigation into the 1995 Panorama interview. As such the information was held for the purposes of journalism; in respect of maintaining and enhancing the standards of the BBC's output by reviewing the quality of that output, and in respect of the editing of material.
32. Having considered all the circumstances of this case and both parties' submissions, the Commissioner is satisfied that, at the time of the requests, the BBC held the requested information for the purposes of journalism. She has therefore decided that the information was derogated information and was not caught by the FOIA.

Right of appeal

33. 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: www.justice.gov.uk/tribunals/general-regulatory-chamber

34. 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.
35. 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