

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 19 May 2023

Public Authority: British Broadcasting Corporation ("the BBC")
Address: 2252 White City
201 Wood Lane
London
W12 7TS

Decision (including any steps ordered)

1. The complainant has requested information on the carbon footprint associated with BBC1's 2023 series of "Race against the World". The BBC explained the information was covered by the derogation and excluded from FOIA.
2. 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. He therefore upholds the BBC's position and requires no remedial steps to be taken in this case.

Request and response

3. The complainant wrote to the BBC on 23 March 2023 and requested information as follows:

"What is the Carbon Footprint (tonnes of CO2) for BBC1's "Race Across the World " current series of 9 programmes travelling across the entirety of Canada - a distance of 16,000 kilometres according to the Radio Times .

This data is produced / held under the ALBERT scheme."

4. The BBC responded on 13 April 2023. It stated that the information requested is excluded from FOIA because it is held for the purposes of 'journalism, art or literature.' It provided an appendix to its reply

explaining 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 request for information.

5. On the 13 April 2023, the complainant requested an internal review.

6. On the 14 April 2023, the BBC responded as follows:

"As stated in our response to your Freedom of Information request, the BBC does not offer an internal review when the information requested is not covered by the Act."

Scope of the case

7. The complainant contacted the Commissioner on 2 May 2023 to complain about the way his request for information had been handled. In particular, he challenged the operation of the derogation in this case.

8. For reasons that will be explained below, the Commissioner considers that, although some of the information would ordinarily fall within the scope of the EIR, it nevertheless falls to be dealt with under FOIA in this case. The Commissioner therefore must first decide what the correct access regime for dealing with the request is and secondly, if the correct access regime is FOIA, whether the information is held for the purposes of journalism, art or literature.

Reasons for decision

What is the correct access regime?

9. The Commissioner considers that the request seeks environmental information, as a carbon footprint will be information on factors (carbon emissions) which affect the elements of the environment. It therefore falls within the definition at regulation 2(1)(b) of the EIR and thus, if the BBC is a public authority for the purposes of the EIR, it will be obliged to respond under that legislation.

Is the BBC a public authority for the purposes of the EIR?

10. The EIR definition of what constitutes a public authority is broader than that of FOIA and focusses more on the functions the particular organisation performs.
11. Regulation 2(2) of the EIR sets out the definition thus:
 - (a) government departments;
 - (b) any other public authority as defined in section 3(1) of FOIA, disregarding for this purpose the exceptions in paragraph 6 of Schedule 1 to FOIA, but excluding—
 - (i) any body or office-holder listed in Schedule 1 to FOIA only in relation to information of a specified description; or
 - (ii) any person designated by Order under section 5 of FOIA;
 - (c) any other body or other person, that carries out functions of public administration; or
 - (d) any other body or other person, that is under the control of a person falling within sub-paragraphs (a), (b) or (c) and—
 - (i) has public responsibilities relation to the environment;
 - (ii) exercises functions of a public nature relating to the environment; or
 - (iii) provides public services relating to the environment.
12. Clearly, the BBC is not a government department, and Regulation 2(2)(a) does not apply.
13. Regulation 2(2)(b) provides that those bodies listed in Schedule 1 of FOIA are also public authorities for the purposes of the EIR. However, this does not apply to a body listed in Schedule 1 only for specified purposes. The BBC is listed in Schedule 1 only in relation to information held for purposes other than art, literature or journalism. Therefore it does not fit within the definition of Regulation 2(2)(b).
14. The BBC is an independent organisation and it is not under the control of another public authority. Therefore the BBC cannot fall within the definition of Regulation 2(2)(d) of the EIR.

Regulation 2(2)(c) – carrying out functions of public administration

15. The Commissioner turns next to the question whether the BBC can be said to be carrying out functions of public administration
16. In *Fish Legal & Another v Information Commissioner & Others* [CJ-279/12] (“Fish Legal CJEU”), the Grand Chamber of the Court of Justice of the European Union set out that this category of public authorities will cover:

“legal persons governed by public law or by private law, which are entrusted, under the legal regime which is applicable to them, with the performance of services of public interest, inter alia in the environmental field, and which are, for this purpose, vested with special powers beyond those which result from the normal rules applicable in relations between persons governed by private law.”¹

17. In *Cross v Information Commissioner* [2016] AACR 39 and subsequently in *Information Commissioner v Poplar Housing and Community Regeneration Association* [2020] UKUT 182 (AAC), the Upper Tribunal further interpreted the judgement in *Fish Legal CJEU* as laying out a dual functional test which requires two distinct conditions to be met in order for an organisation to qualify as a public authority under Regulation 2(2)(c):

(a) Firstly, the organisation must have been entrusted, under the legal regime applicable to the organisation, with the performance of services of public interest relating to the environment (in practice this means a specific piece of law must delegate functions to the organisation).

(b) Secondly, the organisation must have been vested with “special powers” for the purpose of performing those services.

The “Entrustment” condition

18. In considering the question of entrustment, the Commissioner has first considered whether the functions the BBC performs “have a sufficient connection with what entities that are organically part of the administration or the executive of the state do”.

¹ Whilst the *Fish Legal CJEU* ruling was issued prior to the UK leaving the European Union, the Commissioner considers that it stands as retained case law (and is therefore binding) unless and until such times as the UK’s senior courts decide otherwise.

19. The BBC is established under a Royal Charter² (Royal Charter for the continuance of the British Broadcasting Corporation) and has a mission which, in very broad terms, includes the provision of high quality, objective journalism which is accessible to all sectors of society, in the public interest.
20. Whilst the Commissioner considers that the BBC has been entrusted, in law, with carrying out services of public interest, he is not persuaded that these services and duties are sufficiently related to the environment.
21. The BBC may report on environmental issues and it may produce documentaries on environmental issues, but that does not mean it has any "duties" in respect of the environment – any more than it could be argued that the BBC has "duties" in respect of any of the hundreds of other subjects that it produces programmes on or reports on in news stories.
22. As the Commissioner is not satisfied that the BBC has been entrusted with environmental functions, the Commissioner does not need to consider whether it also has special powers. The BBC does not meet the first part of the Fish Legal CJEU test and thus does not carry out functions of public administration for the purposes of regulation 2(2)(c) of the EIR.
23. Consequently, the Commissioner does not consider that the BBC is a public authority for the purposes of the EIR and therefore the BBC is not obliged to comply with the EIR.
24. The Commissioner turns next to consider whether the BBC was required to disclose the information under FOIA.

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25. Section 39 of FOIA normally provides an exemption from disclosure (under FOIA) of environmental information. This is because such information can be usually accessed via the EIR.
26. However in the present case, section 39 does not apply to the request because the information it seeks, whilst environmental, would not be accessible via the EIR – because the BBC is not a public authority for the purposes of that legislation.

² http://downloads.bbc.co.uk/bbctrust/assets/files/pdf/about/how_we_govern/2016/charter.pdf

27. It thus follows that the information falls to be treated under FOIA.
28. 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.”
29. This means that the BBC has no obligation to disclose any information that is held for ‘purposes of journalism, art or literature’. The Commissioner calls this situation ‘the derogation’.
30. The scope of the derogation was considered by the Court of Appeal in the case of *Sugar v British Broadcasting Corporation and another* [2010] EWCA Civ 715. The leading judgment in the Court of Appeal case was made by Lord Neuberger of Abbotsbury MR who stated that:

“ once it is established that the information sought is held by the BBC for the purposes of journalism, it is effectively exempt from production under FOIA, even if the information is also held by the BBC for other purposes.” (paragraph 44), and that “....provided there is a genuine journalistic purpose for which the information is held, it should not be subject to FOIA.” (paragraph 46)
31. The Supreme Court endorsed this approach on appeal in *Sugar (Deceased) v British Broadcasting Corporation and another* [2012] UKSC 4³ and concluded that if the information is held for the purpose of journalism, art or literature, it is caught by the derogation, even if that is not the predominant purpose for holding the information in question.
32. In order to establish whether the information is held for a derogated purpose, the Supreme Court indicated that there should be a sufficiently direct link between at least one of the purposes for which the BBC holds the information (ignoring any negligible purposes) and the fulfilment of one of the derogated purposes. This is the test that the Commissioner will apply.

³ <https://www.supremecourt.uk/cases/docs/uksc-2010-0145-judgment.pdf>

33. If a sufficiently direct link is established between the purposes for which the BBC holds the information and any of the three derogated purposes – i.e. journalism, art or literature - it is not subject to FOIA.
34. The Supreme Court said that the Information Tribunal's definition (in *Sugar v Information Commissioner (EA/2005/0032)*, 29 August 2006) of journalism as comprising three elements, continues to be authoritative

"1. The first is the collecting or gathering, writing and verifying of materials for publication.

2. The second is editorial. This involves the exercise of judgement on issues such as:

- * the selection, prioritisation and timing of matters for broadcast or publication,
- * the analysis of, and review of individual programmes,
- * the provision of context and background to such programmes.

3. The third element is the maintenance and enhancement of the standards and quality of journalism (particularly with respect to accuracy, balance and completeness). This may involve the training and development of individual journalists, the mentoring of less experienced journalists by more experienced colleagues, professional supervision and guidance, and reviews of the standards and quality of particular areas of programme making."

However, the Supreme Court said this definition should be extended to include the act of broadcasting or publishing the relevant material. This extended definition should be adopted when applying the 'direct link test'.

35. The Supreme Court also 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 and/or the BBC's journalistic or creative activities involved in producing such output.
36. 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.
37. The complainant has argued that, "the BBC is cutting jobs at a local level but continues to overspend in other areas", however, the

derogation contains no public interest test. Information is either covered by the derogation, or it is not.

38. The Commissioner considers the information that has been requested in this case relates to a specific programme. The carbon footprint will have been determined by a series of editorial decisions about where the programme would be based and what matters were to be filmed. Those decisions would, in turn, have determined how many staff and what equipment the BBC would have needed for the programme. All of these are editorial decisions because they relate to how the BBC decides on the output it wishes to produce and how it goes about creating that output.
39. The Commissioner is satisfied, based on the very well established precedent set in the numerous other decisions that, if held at all, the information requested by the complainant would be held for the purposes of journalism, art or literature. Therefore, the BBC was not obliged to comply with the request.

Right of appeal

40. 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

41. 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.
42. 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
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