

Freedom of Information Internal Review decision

Internal Reviewer	Lawyer – Legal Workplace and Information Rights
Reference	RFI20211635 / IR2021089
Date	22 December 2021

Requested information

On 1 November 2021, you requested that the BBC provide the following information under the Freedom of Information Act 2000 ('the Act'):

"I am submitting a request under the FOI Act, in relation to your work with the charity Stonewall.

I would be most grateful if you could please release the information as follows:

- Your most recent application to Stonewall's Workplace Equality Index;*
- Any feedback given to you from Stonewall following the evaluation of your most recent WEI application.*

I apologise for the length of this email. However, I wish to set out fully why I feel that this information is in the public interest and should be released.

Furthermore, while I am sure you know that the identity and, or, the motive of the applicant is irrelevant under FOI, it still feels necessary to state that my motivation for requesting the release of this information has nothing to do with any particular policy debate.

This FOI is fundamentally about the general principle of transparency by public bodies and questions which have been raised about the BBC's editorial independence.

I know this is not the first request you have had for this information. But I feel the situation has moved on since you last responded to an FOI on this topic.

The last FOI response you gave that I could see (April 2021) noted one factor in favour of disclosure: "that there is a public interest in understanding the BBC's progress concerning LGBTQ+ inclusivity."

You then used the commercial exemption. As you will also know, the commercial test is very much context-dependent. Over time, the balance between the public interest and any given commercial interest may shift.

Last time, you noted one factor in favour of disclosure (as above). I would add that in my view there are more general arguments in favour of disclosure in the public interest by the BBC about your work with Stonewall. They could be said to include a public interest in:

- transparency;*
- accountability;*

- promoting public understanding;
- safeguarding confidence in the BBC's impartiality;
- good decision making by public bodies;
- upholding standards of integrity;
- ensuring justice and fair treatment;
- securing the best use of public resources;
- responding to plausible accusations of wrongdoing;
- correcting information in the public domain, if it is wrong.

I also think it would be in the BBC's commercial interests to respond due to:

- Public interest in the issue
- Presenting a 'full picture'
- Questions about a plausible suspicion of wrongdoing (in the most general sense, as per the Nolan podcasts).

In April you argued that the public interest in maintaining the exemption outweighs the public interest in disclosing. But, in light of the Nolan podcast series, there is further public interest in full transparency, particularly about the BBC's editorial independence.

In April you claimed publication would damage the BBC's commercial interests. I would argue disclosure would be in the BBC's commercial interests, because responding to this FOI request in full may indicate whether or not there is any substance in an allegation of wrongdoing. These allegations were made in a BBC podcast. As ICO note, the content of the information is important in making this assessment.

It may refute the suspicion, in which case there may be some public interest in disclosing the information in order to clear up misconceptions; or, it may indicate that the suspicion is justified (a so-called 'smoking gun').

In which case, there is an even stronger public interest in disclosure.

As ICO say, even if wrongdoing is not an issue, there is a public interest in fully understanding the reasons for public authorities' decisions, to remove any suspicion of manipulating the facts, or 'spin'.

If information that is already in the public domain (rather than the requested information) is misleading or misrepresents the true position, or does not reveal the full picture, this may increase the public interest in disclosure.

Information has been partly disclosed, so it could be leading to misrepresentation or a misleading picture being presented to the public.

For example - I note that the BBC has declined to comment on membership of Stonewall's schemes. A spokesperson said: "We are not a member of Stonewall, we do not take legal advice from Stonewall and we do not subscribe to Stonewall's campaigning. The charity simply provides advice that we are able to consider. As a broadcaster, we have our own values and editorial standards."

Perhaps releasing the documents requested, as all the devolved administrations and countless other public bodies have done, could present the 'full picture', and clearly refute any allegations of editorial bias?

In April, the BBC also stated that "the public interest is not served by public bodies being less willing to engage in programmes which help them improve LGBTQ+ inclusivity, a likely consequence of the BBC disclosing the information requested."

However, it seems odd to draw a correlation between these two outcomes. Obviously, I have no idea what is in the documents, hence this request. But it seems hard to believe that releasing this information would be so damaging as to make public bodies "less willing to engage in programmes which help them improve LGBTQ+ equality" when they already have a legal obligation to do so under the Public Sector Equality Duty.

On commercial interests, as you know, it is not sufficient for you to simply argue that because information is commercially sensitive, its disclosure would, or would be likely to, prejudice commercial interests. You must be able to demonstrate a causal relationship between the disclosure of the information in question and the prejudice you envisage.

Over the course of 2020-21, many public bodies have released their full WEI applications and full feedback given by Stonewall. Organisations including: the University of Edinburgh, the Scottish Government, the Welsh Government, and the IOPC, to name just a few.

Press interest in these releases was high and widely reported, often in a very negative light. Indeed, Stonewall has stated that "The weekend of 22/23 May [2021] saw a coordinated attack on our Diversity Champions programme launched across some parts of the media."

But they continued: "the Diversity Champions programme now counts more than 900 leading employers as members... The number of organisations who are part of the programme has grown by 30 in total in the year to 1 June 2021." (<https://www.stonewall.org.uk/about-us/news/stonewall-statement-diversity-champions-programme>).

I would argue that this clearly demonstrates that transparency by public bodies has not impacted on Stonewall's commercial interests, or organisation's willingness to work with them on LGBT+ inclusion.

It is great news that Stonewall's membership has grown. It is also great news that many public bodies were transparent and accountable about their work, spending and decision making processes.

So I would contend that there is not a causal relationship between transparency by public bodies, like the BBC, and fewer organisations wishing to support LGBT+ rights. Both are clearly outcomes in the public interest, and one does not appear to have affected the other.

You also noted in April that "We also consider that disclosure of some of the requested information would be contrary to legitimate expectations of confidentiality." However, as the ICO website notes, public authorities cannot contract out of their statutory obligations under FOIA, and suppliers of good or services should be aware of this.

With any necessary redactions needed, I would therefore be most grateful if you could please release the information as follows:

- Your most recent application to Stonewall's Workplace Equality Index;

- Any feedback given to you from Stonewall following the evaluation of your most recent WEI application.”

On 3 December 2021, you sought internal review on the basis that a response to your request was overdue. You said:

“I am writing to request an internal review of British Broadcasting Corporation's handling of my FOI request 'FOI Updates'.

Your response to these requests is long overdue.

In the interim, you have cut ties with Stonewall. You stated: “After careful consideration, we believe it is time to step back from the Diversity Champions Programme and will also no longer participate in Stonewall’s Workplace Equality Index.”

However, that of course does not exonerate you from FOIs regarding your past relationship with Stonewall, which has come under scrutiny.

If your relationship could have, in your own words, "led some to question whether the BBC can be impartial when reporting on public policy debates where Stonewall is taking an active role" further information and transparency is patently in the public interest.

It is vital to understand if the BBC's application to the WEI etc. did indeed indicate that Stonewall's relationship with you posed a conflict or risk of perceived bias, or in any way influenced editorial policy.

Throughout 2021, many public bodies have released info on their WEI applications and feedback.

In July 2021 Stonewall released a statement stating that "the number of organisations who are part of the [Diversity Champions] programme has grown by 30 in total in the year to 1 June 2021". The growth in numbers is despite numerous public bodies publishing their WEI applications and feedback, including full disclosure from the Scottish Government and the Welsh Government, which sadly garnered very negative press.

However, this clearly indicates that there is no threat to Stonewall's commercial interest from transparency by public bodies.

As you have now left the scheme, which was widely reported in the media, and surely more prejudicial to "Stonewall's commercial interests" than transparency about your historic work with them could now be considered to be, I would suggest that it is clearly in the public interest for you to respond to this FOI.

In light of these developments, I wonder if you feel the commercial interest exemption has now changed, and you would be able to release:

- Submissions made to, and feedback received from, the Stonewall Workplace Equality Index in the three most recent years you took part the scheme.

Submissions and feedback should be provided for the year the index was published, even if the feedback was provided the previous year.”

The issues for review

This internal review will consider whether the BBC complied with its obligation under section 10(1) of the FOI Act to respond to a valid request “promptly and in any event not later than the twentieth working day following the date of receipt” – that is, by 29 November 2021.

Decision

The BBC failed to comply with its obligations under the FOI Act, in particular under s10(1), in respect of this request. I apologise for the delay in providing a substantive response to your request, and note that this will be done so as soon as possible.

Other matters

I note that you have expanded the scope of your original request in seeking an internal review. Please note that your expanded scope, which covers the three most recent years, will now be considered as part of this request.

Appeal Rights

If you are not satisfied with the outcome of your internal review, you can appeal to the Information Commissioner. The contact details are: Information Commissioner’s Office, Wycliffe House, Water Lane, Wilmslow, Cheshire SK9 5AF; Telephone 01625 545 700 or <https://ico.org.uk/>