



**First-tier Tribunal
(General Regulatory Chamber)
Information Rights**

Appeal Reference: EA/2017/0013

**Heard at Fleetbank House
On 22nd June 2017**

Before
Miss Fiona Henderson
JUDGE
Mr Paul Taylor
Mr Nigel Watson
TRIBUNAL MEMBER

Between

Fr. Francis Lynch
and

Appellant

The Information Commissioner

Respondent

Subject: s7 and Part VI Schedule 1 FOIA

Case Law: *Sugar (Deceased) (Represented by Fiona Paveley) v BBC [2012] UKSC 4*

DECISION AND REASONS

1. This is an appeal against the Commissioner's decision notice FS50650473 dated 12th January 2017. The appeal is refused for the reasons set out below.

Status of the BBC as a Public Authority

2. Section 3(1) FOIA defines a "public authority" as any body listed in Schedule 1 of FOIA subject to section 7 which provides:

(1) Where a public authority is listed in Schedule 1 only in relation to information of a specified description, nothing in Parts I to V of this Act applies to any other information held by the authority.

Part VI of Schedule 1 FOIA designates the BBC as a public authority only:

... in respect of information held for purposes other than those of journalism, art or literature.

It is not disputed that the effect of this is that information held by the BBC is not disclosable under FOIA if it is held for the purposes of journalism, art or literature.

We refer to this as the derogation from FOIA.

The Information Request

3. The Appellant requested the following information from the BBC by way of letter dated 12th September 2016:

“There is a program most days on Radio 4 called Thought for today (or some such title); it is usually vaguely of a spiritual or moral nature and often given by someone representing a church or community or with a position in the church.

Could you tell me how many of these talks have been given by Catholics (ie Roman Catholics) in roughly the past two years, from the beginning of August 2014 to the end of July 2016. I am referring to those who are publically mentioned on the radio as being Catholic or representing a Catholic body.

If it isn't too much trouble, I'd be grateful to know whether you have similar figures for other religious groups”.

4. The BBC refused the request by letter dated 5th October 2016 stating that *“The BBC is 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.”*

Since the BBC were relying upon the derogation no internal review was available.

5. The Appellant complained to the Commissioner arguing that he should have disclosure because:

- i. The information would have been available if he had listened to the programme noting the information down.
- ii. It would not impinge on the BBC's editorial freedom as it was information freely broadcast.

iii. Although the organisation is journalistic the information could only be considered journalistic at a stretch.

He concluded by asking if the Commissioner could ask the BBC to provide the information outside of FOIA.

6. The Commissioner issued a decision notice dated 12th January 2017 which held that the information was covered by the derogation, being held by the BBC for the purposes of “journalism, art or literature”, and thus excluded from FOIA. She required no remedial steps to be taken in this case.

The Appeal

7. The Appellant appealed to the Tribunal, his grounds of appeal echoed the issues raised before the Commissioner.
8. The case was listed as an oral hearing at which the Appellant attended to represent himself, the Commissioner relied upon the written representations in the case papers and chose not to be represented at the hearing. The BBC had not been joined to the appeal.
9. The Tribunal has had regard to the bundle of papers encompassing some 29 pages. At the start of the hearing it was apparent that the Appellant had not received a copy of the papers. It was not clear whether there had been an error in the administration of the appeal or if the bundle had gone astray due to postal difficulties. The Tribunal was satisfied that the Appellant had already received the majority of the documentation (which amounted to correspondence between him, the BBC and the Commissioner as well as the Decision Notice). The only document that would have been new to him was the Commissioner’s response to the Notice of Appeal. This expanded the arguments raised in the correspondence and decision notice but did not raise any new issues.
10. The Tribunal provided the Appellant with a copy of the bundle and adjourned to enable him to read this document, only resuming when he had confirmed that he had had sufficient time. We are satisfied therefore that whilst it was regrettable that he had not

had the bundle prior to the appeal, having regard to the overriding objective as set out in rule 2, there was no injustice and it was appropriate to hear the case without the need for further adjournment.

Scope

11. The Appellant had asked the Commissioner if she could ask the BBC to provide the information outside of FOIA. This is outside the jurisdiction of both the Commissioner and the Tribunal whose roles are to ensure that FOIA is applied correctly.
12. The Appellant relied upon the fact that the information would have been available to a dedicated listener and having already been broadcast would not impinge on the BBC's editorial freedom as it was information freely broadcast. These arguments amount to "public interest" arguments and are not material to the question before the Tribunal, namely whether the information falls within the derogation, as such they are not within the remit of this appeal.

Analysis of Grounds of Appeal

13. The Commissioner's case is that on a proper application of *Sugar (Deceased) (Represented by Fiona Paveley) v BBC [2012] UKSC 4* ("Sugar") the requested information was held for the purposes of journalism within the meaning of Schedule 1 Part VI FOIA. We are bound by the decision in that case and apply it in our consideration of this appeal.
14. From *Sugar*, we are satisfied that the definition of "*journalism, art or literature*" covers the BBC's output. The first question for the Tribunal is whether the information is held in some (more than minimal respect) for the purposes of the BBC's output.
15. We are satisfied that it is. A radio programme falls clearly within the creative output of the BBC. The terms of the question relate directly to the content of a programme in that it requires the contributor to have been "*publically mentioned on the radio as being Catholic or representing a Catholic body*". It relates to the subject matter, approach and angle of individual programmes and the long-term overview of a series.

The religious identity of the contributor provides context and background to the programme and series¹.

16. The second question for the Tribunal (from Sugar) is whether there is a sufficiently direct link between the information being held and that output.

17. The Court in Sugar approved the analysis of “journalism” as including:

...108 *“The exercise of judgment 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.*

109...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”.

18. Fr. Lynch did not accept the link between the information being held and the journalistic purposes. He argued that:

- i. the programmes were stored as a historical record because the BBC were too embarrassed to destroy them having been criticised in the past for the loss of original material. Additionally, his view was that the BBC were arguing that it was held speculatively in case of future need. He considered this to be a circular argument in that asking for the information under FOIA would justify their need to refer to it and thus their need to hold it which in turn would mean that it was not disclosable under FOIA.

19. In this regard he was reflecting Lord Mance (at paragraph 112 of Sugar) who considered that material would fall outside of the derogation if it was:

¹ Cf paragraph 17 below.

“not envisaged for any current purpose, but stored for historical purposes or against the possibility of some unforeseen need to revisit or produce evidence of past events”. A library maintained for current reference would in contrast contain material held for the purposes of journalism art or literature”.

20. In rejecting Fr Lynch’s arguments we take into consideration the date of the information requested and its proximity to the date of the request. It related to programmes broadcast in the previous 2 years the most recent of which was within 2 months of the date of the request. As such as we are satisfied that the material was not historic but current. There had been insufficient passage of time for it to have lost relevance to current programming. When assessing the quality, balance or content of future programmes it is reasonable to assume that regard will be had to the quality, balance and content of programmes in the recent past.
21. We also reject Fr. Lynch’s arguments relating to the need to hold the information for FOIA requests. In light of the derogation it is apparent that the purpose of holding the information is not to respond to FOIA requests. We are satisfied that it is foreseeable that the BBC need the ability to respond to any repercussions from the programming e.g. allegations of bias or complaints relating inaccuracy. Retention of the programmes is necessary to defend editorial choice and again the Tribunal relies upon how recent the information was in reaching this conclusion.
22. Fr Lynch disputes that the information could be used for the maintenance and enhancement of the standards and quality of journalism. He argues that you cannot maintain what you do not have, and in his view the programme is unbalanced and biased and consequently there are no standards or quality to maintain. His contention is based upon his belief that Roman Catholics are under represented on Thought for the Day (bearing in mind the proportion of the population who identify as Roman Catholic and his perception of the number who feature on the programme).
23. The Tribunal expresses no opinion upon the quality or standard of the BBC’s programming but is satisfied that Fr Lynch’s argument is flawed. To ensure balance and standards of future programmes, the BBC need the ability to review recent past

programming. Additionally, the information can be expected to be available within the BBC as a resource for training, reference and reuse in relation to the production of other output.

Conclusion

24. For the reasons set out above we refuse the appeal and do not require any steps to be taken. This decision is unanimous.

Signed Fiona Henderson

Date Promulgated: 1st August 2017

Judge of the First-tier Tribunal
Date: 31st July 2017