



**First-tier Tribunal  
(General Regulatory Chamber)  
Information Rights  
Decision notice FS50795337**

**Appeal Reference: EA/2018/0296**

**Considered on the papers  
On 15 July 2019**

**Before**

**JUDGE CHRIS HUGHES**

**TRIBUNAL MEMBERS**

**GARETH JONES & JOHN RANDALL**

**Between**

**GEORGE GREENWOOD**

Appellant

**and**

**INFORMATION COMMISSIONER**

First Respondent

**THE BRITISH BROADCASTING CORPORATION**

Second Respondent

**Cases:**

**Sugar v British Broadcasting Corporation [2010] EWCA Civ 715**

**Sugar (Deceased) (Represented by Fiona Paveley) (Appellant) v British  
Broadcasting Corporation and another (Respondents) [2012] UKSC 4**

## DECISION AND REASONS

### DECISION

1. The appeal is dismissed

### REASONS

#### The request for information

2. The Appellant in these proceedings wrote to the Second Respondent (the British Broadcasting Corporation, "BBC") on 1 October 2018 seeking the disclosure of information:-

*"I am sending this request under the Freedom of Information Act. 1) Please state the number of internal complaints made by BBC staff against the Victoria Derbyshire programme in each of the following calendar years:*

*a) 2015*

*b) 2016*

*c) 2017*

*d) 2018*

*2) Please provide a breakdown of the categories of complaint made in each year*

*3) Please provide a breakdown of the outcomes of the complaints made in each year.*

*4) Please provide a copy of the anonymised free text of all complaints, setting out the reasons for each complaint."*

3. On 16 October 2018 the BBC refused the request explaining that the information requested was excluded from the operation of the Freedom of Information Act 2000 because it was held for the purposes of "journalism, art or literature". The letter explained that this exclusion was to protect freedom of expression and the rights of the media under Article 10 of the European Convention on Human Rights.

4. On 18 October the Appellant complained to the First Respondent ("the ICO") arguing:-

*"this information is expressly not held for the purposes of journalism, It is information about internal HR management within the BBC, and nothing to do with its editorial process Moreover, it is information that is unlikely to be even held by the programme itself, instead being held by the BBC HR and associated complaints departments, which are expressly not part of the BBC's editorial process."*

5. The ICO investigated the complaint seeking the views of the BBC on the Appellant's arguments that the information was within the scope of FOIA. The BBC explained (bundle page 66):-

*“information about the internal number of complaints, a breakdown of the category and outcomes of the complaints regarding the Victoria Derbyshire programme is held by the BBC Audiences, who handle complaints from its audiences, and editorial staff within the Victoria Derbyshire team.*

*Information about complaints may also be held [by] BBC Legal or Editorial Policy, who may provide advice about how to respond to complaints.*

....

*The information is held to maintain the quality and standards of journalism and creative output across the BBC.*

...

*Information concerning editorial complaints is intrinsically inked to the BBC’s output. Complaints are about, and are intended to influence, the BBC’s content.”*

6. On 13 December the ICO issued a decision notice this analysed the legal issues (see below) and after reviewing the BBC’s account of where the complaints were reviewed concluded that the complaints were intrinsically linked to the BBC’s output and this was used in decision-making about future programming. The ICO concluded that the BBC was not required by FOIA to comply with the Appellant’s request.
7. In his grounds of appeal the Appellant challenged this conclusion:-

*“I do not think this decision is correct. Neither the Commissioner, nor the BBC, has considered that beyond internal complaints about editorial output, which I accept was within scope of my request and could be classed as derogated material where appropriate, that this request would also have within scope conduct complaints, such as complaints concerning bullying, harassment and sharp practice by editors and other members of staff at the programme.*

*It would not be likely, or indeed appropriate, for these cases to be handled by an editorial complaints team, and would have to be dealt with by HR. Information held for the purposes of HR would not fall within the derogation, as they are about staff conduct, not the journalistic output of the BBC, and anonymised and/or statistical information held by BBC HR of this nature should be released under FOIA.”*

8. In responding to the appeal the ICO noted that the request made did not categorise the types of complaint sought. Having considered the Appellant’s grounds of appeal she accepted that the scope of the request was wide enough to include any internal complaint that had no connection with the derogation from disclosure.
9. The BBC was joined to the proceedings and directed to file a “closed bundle” of material falling within the scope of the request and provided to the tribunal a sample of complaints made against the Victoria Derbyshire programme. In its reply to the appeal confirmed that it understood the request to relate to editorial complaints since the request was made with respect to complaints against a programme and not against individual managers working on the

programme. The BBC in responding to the request had had no reason to consider the wider interpretation upon which the Appellant now sought to rely. In its response the BBC noted that BBC Audience Services had received approximately 900,000 complaints over the four year period and that all complaints received prior to 1 March 2017 were anonymised and therefore it was not possible to determine whether they were from BBC staff.

### The statutory framework

10. The Freedom of Information Act 2000 is “an Act to make provision for the disclosure of information held by public authorities”. Given the scale and complexity of public authorities and the diverse information they hold the extent of the disclosure required by the Act is circumscribed in certain circumstances. With respect to the BBC it is brought within the ambit of FOIA in a way which limits the right to some information held by it. Section 7 provides:-

*“ Public authorities to which Act has limited application.*

*(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.”*

11. Schedule 1 Part VI lists the BBC as being subject to FOIA:-

*“The British Broadcasting Corporation, in respect of information held for the purposes other than those of journalism, art or literature”*

12. Section 8 provides:-

*“in this Act any reference to a “request for information” is a reference to such a request which-*

*...*

*(c) describes the information requested”*

### The caselaw

13. The meaning of these provisions and their implications for how decisions of the BBC may be challenged has been the subject of consideration in the higher courts including the Court of Appeal and the Judicial Committee of the House of Lords in proceedings brought by Mr Sugar who sought to have a report prepared for the BBC which it had commissioned in response to complaints about its coverage of the Middle East and in particular its coverage of Israel/Palestine. The Judicial Committee in 2009 considered procedural issues and concluded that the Information commissioner (and therefore the tribunal) had jurisdiction to determine where or not information fell within the category of journalism, art or literature. Lord Neuberger, then Master of the Rolls, giving the leading decision of the Court of Appeal in *Sugar v British*

*Broadcasting Corporation [2010] EWCA Civ 715* endorsed the reasoning of the Information Tribunal (the predecessor of this tribunal) which in its decision had formulated a description of the purposes of journalism:-

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

*108. 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.*

*109. 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 colleague, professional supervision and guidance, and reviews of the standards and quality of particular areas of programme making....."*

14. The Supreme Court then considered how the statutory framework was to be applied where information was held partly for journalism art or literature and partly for another purpose.

...

*116. Self-critical review and analysis of output is a necessary part of safeguarding and enhancing quality. The necessary frankness of such internal analysis would be damaged if it were to be written in an anodyne fashion, as would be likely to be the case if it were potentially disclosable to a rival broadcaster."*

15. Lord Phillips clarified the relationship between the three terms used in the statute:-

*"38. Before I turn to "purposes", let me reflect on the meaning, in the context of the Act, of the words "journalism", "art" and "literature". I suggest that the key to it lies in the omnibus word "output". Article 5 of the BBC's Royal Charter (Cm 6925), presented to Parliament in October 2006, provides, at para (1), that the BBC's main activities should be the promotion of its six Public Purposes, specified in article 4, "through the provision of output which consists of information, education and entertainment" supplied by means of television, radio, online and similar services; and the Charter provides, at article 5(2), that the BBC may carry out other activities, subordinate to its main activities, provided that they promote the Public Purposes. In his letter to Mr Sugar dated 24 October 2005 the Commissioner, echoing the word in the Charter, wrote that he interpreted the three words in the designation broadly so as to include all types of the BBC's "output". In this respect I discern no dissent from his view in any of the three subsequent decisions in these proceedings; and in my opinion he was right. I would be surprised if any later set of facts was to yield a conclusion that something which the BBC put out, or considered putting out, to the public or to a section of the public did not fall within the rubric either of journalism or of art or of literature. So, although one might have an interesting debate whether nowadays the word "journalism" encompasses more than news and current affairs, the debate is*

*likely in this context to be sterile. For any output which did not obviously qualify as journalism would be likely to qualify either as literature or – in particular, in that its meaning has a striking elasticity – as art.”*

16. By a majority the Supreme Court upheld the decision of the Court of Appeal where Lord Neuberger stated:-

*“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 the Act, even if the information is also held by the BBC for other purposes.”*

17. Lord Mance explained the reasoning of the Court

*“111. In the present case, the special consideration to which the legislator gave effect was the freedom of the BBC as a public service broadcaster in relation to its journalistic, artistic and literary output. Information held for any such purposes of journalism, art or literature was absolutely exempt from disclosure. The legislator was not content with the more qualified protection from disclosure, often depending on a balancing exercise or evaluation, which would anyway have been available under section 2, read with sections 28, 29, 36, 41 and 43. To read into the words “information held for purposes other than those of journalism, art or literature” a need to evaluate whether such purposes were dominant seems to me unjustified. I share Lord Walker’s view (para 79) that the real emphasis of the words is on what is not disclosable, so that the exemption applies, without more, if the information is held for any journalistic, artistic or literary purpose. That conclusion is to my mind also fortified by consideration of the exemption relating to certain functions of the Bank of England.”*

### Consideration

18. The starting point is the request for information. The request is for information about complaints by BBC staff “against the Victoria Derbyshire programme”. This is the definition of the information requested which is needed to be a valid request for information within s8 FOIA. The programme is part of the BBC news and current affairs output. The programme is journalism, part of the output of the BBC. The request is clear in that it seeks information about complaints against a programme. A programme is a broadcast – electromagnetic output. As such the request was clear and the BBC response was based on a reasonable interpretation of that request. In his email to the ICO of 18 October (paragraph 4 above) he asserted that this information “is expressly not held for the purpose of journalism, it is information about internal HR management”. The ICO does not appear to have explored this with the Appellant further and the BBC did not see this correspondence until after the appeal to the tribunal. In any event, even at this stage, it is by no means clear why a **complaint** by a member of staff about a **programme** should be a HR issue (it could be a complaint about political bias in the programme); and even if it is a HR issue (for example the member of

staff claiming that she was shown on tv being humiliated) it could still fall within the category of information which is not disclosed under FOIA.

19. The grounds of appeal are clearer in substantially changing the request. The Appellant argues that:-

*“this request would also have within scope conduct complaints, such as complaints concerning bullying, harassment and sharp practice by editors and other members of staff at the programme”*

20. These may well be issues about which a member of staff could complain however some will not fall within the natural meaning of the request – an electromagnetic transmission cannot bully except by such means as unfair questioning of an individual who is interviewed by the programme and whose interview is broadcast, such could give rise to a complaint, but it would fall squarely within the scope of the natural meaning of the request.
21. The Appellant seeks to reinterpret the request so as to go beyond what the BBC properly interpreted it as meaning. The use of language is crucial to the understanding of a request for information. In his request the Appellant sought for information about “internal complaints by BBC staff against the Victoria Derbyshire programme”. In his grounds of appeal he argues that this encompasses HR issues. However there is a very simple distinction in usage in all large organisations – where employees are dissatisfied by the actions of their managers or other work colleagues they raise the issue following a Grievance Procedure under which the employer looks at the issue of how the individual has been treated that is the route by which HR issues are dealt with.
22. A brief examination of the publicly facing BBC website shows that it possesses a Grievance Policy, which is incorporated into contracts of employment of its staff and an Anti-Bullying and Harassment Policy to address issues in the working environment of the BBC. Similarly the BBC has a complaints website which can be used to complain about the contents of programmes. By analogy an employer of a supermarket chain will have access to a grievance procedure, however if the employee is dissatisfied with something she bought, ie with the supermarket’s products, she will make a complaint.
23. Having interpreted the meaning of the request the BBC responded explaining why the information sought was not disclosable under FOIA. In subsequent correspondence with the ICO and in his appeal to the tribunal the Appellant has attempted to widen the scope of his request. He cannot widen the scope of his request beyond the normal meaning of the words in their context.
24. The tribunal is therefore satisfied that the request originally made was for material which is not disclosable under FOIA. The original decision of the ICO is correct in law and this appeal is dismissed.

25. If the Appellant wishes to seek information related in some way to the production of this programme which is *held for purposes other than those of journalism, art or literature* he should make a further request for information so that the BBC can consider it and apply the various provisions of FOIA to the new request.

Signed Chris Hughes

Judge of the First-tier Tribunal

Date: 31 July 2019

Promulgated: 31 July 2019