



**First-tier Tribunal
(General Regulatory Chamber)
Information Rights
Decision notice FS50779799**

Appeal Reference: EA/2018/0294

**Considered on the papers
On 5 September 2019**

Before

JUDGE CHRIS HUGHES

TRIBUNAL MEMBERS

HENRY FITZHUGH & NIGEL WATSON

Between

KENNETH NICHOLSON

Appellant

and

INFORMATION COMMISSIONER

First Respondent

Cases

Sugar (deceased) v BBC and another [2012] UKSC 4

DECISION AND REASONS

1. On 13 August 2018 the Appellant asked the BBC for information:-

'Could you provide information on how much it costs the BBC to broadcast football (i.e. the budget), noting that 2018 presumably is higher because of the World Cup, and also the cost of broadcasting other sports.'

2. The BBC replied on 20 August stating that it did not consider that the information was susceptible to disclosure under FOIA because the information was held for the purposes of "journalism, art, or literature" and the BBC was within the scope of FOIA only in respect of information held for purposes other than those of journalism, art or literature. It explained *"This means the Act does not apply to information held for the purposes of creating the BBC's output (TV, radio, online etc) or information that supports and is closely associated with these creative activities."*
3. The Appellant complained to the Respondent (the IC) who responded in 12 September 2018 explaining the IC's preliminary view that the information was not within scope of FOIA. She set out the reasoning of the Supreme Court in *Sugar* and continued:-

"your request for the broadcast football costs is well within the expected remit of the BBC for the purposes of creating content and producing output. This in turn closely relates to the editorial decision making process and resource allocation.... The particular information sought is used by the BBC as part of the process in allocating a fixed resource to produce its complement of broadcasted output.....the creative output of the BBC in relation to producing a programme is directly influenced by the allocation of funds which are, in turn, determined by editorial decisions. ... It is the commissioner's view that information about broadcast football costs has a relationship to its creative output. The Commissioner is satisfied that such decisions form part of the editorial process.

4. The Appellant did not accept this preliminary view and wrote to the IC on 13 September denying that his request fell within the exemption arguing *"the request relates to an overall spend on a wide area of broadcasting, it has nothing to do with notes relating to the production of or the production costs for an individual programme or a small group of programmes, nor is it about an individual. Nor does it relate to the output of the BBC but rather an internal budget of the BBC...."*
5. The IC made inquiries of the BBC. In particular she asked "where the requested information is held". The BBC confirmed that (bundle page 130):-

"17. Information about the cost of broadcasting football and other sports is held by individual programmes and teams within the BBC's sport division. This information is held by those in editorial roles and those with budgetary responsibility.

18. Information relating to the cost of broadcasting sport is an editorial matter. This is because decisions on a given piece of journalistic output will involve editorial judgment about the content and costs involved.

.... The requested information includes financial information that is directly related to the BBC's journalistic output. Broadcasting costs of particular sports has flow-on

implications for other decisions relating to a given piece of journalistic output, such as to determine the creation of content, prioritisation and timing of matters for when sport is broadcast, its promotion, or whether to include other content or commentators in connection with a given matter."

6. The IC issued her decision notice upholding the BBC's position. She set out the reasoning of the Supreme Court which had endorsed a definition of journalism as comprising three elements (decision notice paragraph 18):-

"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). ..."

7. She continued:-

"19 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."

8. Noting the Appellant's view that the request did not relate to the output of the BBC but to an internal budget she set the BBC's explanation:-

"24.....The BBC explained that televising large public events all involve the same sort of editorial decisions on logistical scenarios, resource allocation, creative output and the costs involved. Furthermore, the expenditure involved in the coverage of such events will be used to inform editorial and budgetary decisions for future events.

24. Any decision taken on costs has a direct impact on the creative scope for the programme and for other programmes because more money spent on one area or one programme means less available for another. The Commissioner recognises that these decisions relate to editorial decisions (the second element - see paragraph 18 above) about the content that the BBC wants to offer its customers and this in turn relates to the overall editorial decision making process and resource allocation. It is therefore intimately linked to the BBC's output and it is clear that the Commissioner has no jurisdiction in this matter."

9. She therefore concluded that the requested information fell within the derogation and upheld the BBC's position.

10. In his grounds of appeal the Appellant argued that

- the requested information related to an overall budget and was not specifically to do with journalism, art, or literature, and that it was inconceivable the BBC does not know how much it spends on broadcasting football in total, since it would mean the BBC has little or no knowledge of its finances or control over them
- the IC had not behaved impartially
- some information had already been disclosed by the BBC on its website.

11. In resisting the appeal the IC relied on her decision notice. She emphasised that the information requested was used by the BBC as part of the process of allocating resources to produce programmes. There was a sufficiently close link between the information and the process of production of output “ *the information is held by those in editorial roles and those with budgetary responsibility. It is an editorial matter as decisions on a given piece of journalistic output will involve editorial judgement about the content and costs involved.*” The IC rejected the claim of bias in her initial response to the Appellant, she had explained, based on her experience of considering cases relating to the BBC, why it was highly likely that the BBC’s position would be upheld. The information in the public domain had not been released as a result of FOIA and was therefore irrelevant.

12. In his response the Appellant re-emphasised points he had already made.

Consideration

13. The Appellant’s request for information is “*Could you provide information on how much it costs the BBC to broadcast football...*” The IC in investigating this matter specifically asked where the information was held. In reply the BBC confirmed that the information is held on a disaggregated basis:- “*Information about the cost of broadcasting football and other sports is held by individual programmes and teams within the BBC’s sport division. This information is held by those in editorial roles and those with budgetary responsibility.*” While the Appellant has argued that he is seeking an “overall budgetary figure” and that such a figure is not connected with editorial matters, however the information before the tribunal is that information about the cost is not gathered in this way but held within programmes and teams. While the Appellant has pointed to a BBC website giving certain information about costs involved with football there is no indication of how that figure is arrived at, what is included or excluded. There is no evidence before the tribunal that there exists a piece of recorded information which sets out the “overall budgetary figure”. FOIA does not require public authorities to generate new information – to perform calculations to respond to questions put to them.

14. The problem that the Appellant faces is that to comply with his request the BBC would be required to aggregate information held in a variety of places,

those places being intimately tied into the editorial process. On the evidence before the tribunal it is clear that such information is held for the purposes of journalism etc and therefore the appeal must fail.

Signed Hughes

Judge of the First-tier Tribunal

Promulgation Date: 26 September 2019