



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

**Appeal Reference: EA/2019/0235**

**Heard at Field House, on 28 November 2019**

**Before**  
Judge Stephen Cragg Q.C.

**Tribunal Members**  
Mr Andrew Whetnall  
Mr Gareth Jones

**Between**

**Karl Ammann**

Appellant

And

**The Information Commissioner**

Respondent

The Appellant was represented by Ms Edie Bowles.

The Information Commissioner was not represented.

## DECISION AND REASONS

### THE REQUEST, RESPONSE AND DECISION NOTICE

1. On 27 January 2019, the Appellant made a request for information from the BBC, namely a letter which related to the illegal trade in apes. In the Commissioner's decision notice the request has been redacted to an extent because of confidentiality concerns. As set out in the decision notice the request reads: -

'[Redacted] This letter offered up for illegal sale and export from [Redacted] critically endangered great apes such as gorillas for US\$250,000 each. Will you now disclose or/and hand to international enforcement authorities this key piece of evidence that could greatly assist in the fight against the global illegal ape trade and, if not, why not? Further, as approximately 75% of your income comes from UK TV license payers', given that you spent thousands of pounds on the above investigation, resulting in a wide range of additional facts and evidence pinpointing key players in the illegal wildlife trade, after originally stating that the story would run in November last year, why was it shelved?

Does it amount to covering up criminal and corrupt acts?"

2. The Appellant's skeleton argument for the appeal confirms that the request is for a letter which the Appellant says he saw on another person's laptop.
3. The Appellant made a second request on 6 February 2019 for further information relating to money he said he had paid to facilitate the investigation referred to in the first request. The Commissioner has recorded this request as follows in the decision notice, and records that the Appellant says that he was told that: -

'[Redacted] Interpol officers would stand by and assist in recovering the funds once the evidence of the payment would be provided. This did not happen [Redacted] filmed undercover

evidence to log a case [Redacted] with the police [Redacted]. BBC never provided the corresponding evidence of the negotiations with the dealer and the handing over of the cash which would have allowed for presenting a solid case. [Redacted]

4. The Appellant's skeleton argument for this appeal confirms that the request refers to information relating to the money paid by the Appellant.
5. The BBC responded on 31 January and 7 February 2019 to each request respectively. The BBC explained that it did not believe that the information was caught by FOIA because it was held for the purposes of 'art, journalism or literature'.
6. It is worthwhile explaining the legal provisions relied upon by the BBC at this point.
7. In effect, a combination of section 3 and section 7 FOIA and Part VI of Schedule 1 to FOIA provides that information held by the BBC is only covered by FOIA if it is held for 'purposes other than those of journalism, art or literature'.
8. Thus, materially, in relation to the current appeals, if the BBC can show that it holds the information for the purpose of journalism then the FOIA does not apply to the information and the Appellant will not be entitled to its disclosure.
9. On 20 February 2019 the Appellant contacted the Commissioner to complain about the way the requests for information had been handled. In particular, he challenged the application of the exception claimed in this case on the basis that the BBC was not 'running with this story'. He argued that he was 'not convinced that the journalistic exception applies in the context of the BBC having evidence of criminal and corrupt acts having

and being committed and this evidence not being put into the public domain and not passed on to relevant enforcement authorities.’

10. In the decision notice dated 5 June 2019, the Commissioner calls the Schedule 1 exception that applies to the BBC, ‘the derogation’ and we will follow suit. There is no ‘public interest’ test to be applied if the exception applies.
11. The Commissioner adopted the tests set out in *Sugar v BBC* [2012] UKSC 4; [2012] 1 WLR 439 (which we will explore more fully below) to decide whether the derogation applied to the information. The conclusion reached was as follows: -
  23. In this case, the information requested concerns the correspondence and materials that the BBC may have received in the course of its investigations into potentially illegal trades in protected animal species in Africa and the editorial decisions taken about the selection of information for production.
  24. Both the complainant and the BBC have provided the Commissioner with extensive supporting arguments but the Commissioner will not detail these arguments in this decision notice in case of inadvertent disclosure. For the same reason, the Commissioner redacted parts of the FOIA requests.
  25. In light of submissions made by the BBC in this and previous cases the Commissioner considers that decisions concerning the collection of material and the editorial decisions on whether or not to use the material in a programme falls under .... the collecting or gathering, writing and verifying of materials for publication and editorial judgements.
12. It should be noted that two and a half pages of the ‘supporting arguments’ submitted to the Commissioner by the BBC on 9 May 2009 were redacted, and a covering email said that the contents ‘are marked as confidential and are not to be shared with the requestor or published in the ICO’s Decision Notice’.

## THE APPEAL

13. The Appellant's Notice of Appeal is dated 2 July 2019. The Appellant accepted that when first obtained by the BBC, the requested information had been covered by the derogation. However, by the time the BBC responded to the requests, the Appellant argues that the information had ceased to be held for purposes covered by the derogation, citing comments in the *Sugar* case to the effect that there could come a time when information could cease to be held any longer for journalistic purposes, and was instead held for historical or archival purposes.
14. The Appellant argued that the test to be adopted was whether the BBC had decided that it would either probably or certainly not broadcast a programme for which the requested information might have been relevant. The Appellant noted that that his solicitor had submitted to the Commissioner in an email dated 11 May 2019 that the requested information was no longer held for journalistic purposes, and that the Commissioner had not addressed this in the decision notice. The Appellant suggested that the BBC be joined as a party to the appeal so that this matter could be explored further.
15. The Response by the Commissioner to the appeal stated that in its response to the Commissioner the BBC had not suggested that the requested information had been archived and that the 'Commissioner has not been presented with evidence that the information requested is held only in archives and no longer held for the purposes of journalism, she therefore maintains that she was correct to conclude that the requested information falls within the derogation...'.

## DEALING WITH THE APPEAL

16. The Appellant filed a reply on 22 August 2019, noting that the Commissioner did not seem to have put the point to the BBC about whether the information was still held for journalistic purposes. The Appellant notes also that although the redacted part of the BBC's submissions on 9 May 2019 might address the point, 'if they did one would have expected the Commissioner to consider it in her decision, which she does not do'.
17. The Appellant sought to have the BBC joined as a party to explore the point as to whether the journalistic purpose had expired. The BBC saw the documents in the case, but declined to apply to be joined. The Registrar decided on 27 August 2019 in case management directions that there was no need for the BBC to be joined.
18. The Appellant has also filed a witness statement dated 7 October 2019 in which he claims that, a considerable time prior to his requests, the BBC had decided not to run the story to which the requested information related. There is an email from Ms Martens at the BBC dated 16 July 2018, in which she said that '...we are currently in the mi[d]st of a completely different investigation so other than a Nepal follow-up on information we have already broadcast, we are for now not busy with any active investigation'. After further correspondence Ms Martens stated on 25 November 2018 that 'this investigation was on a back burner as we were working on a different investigation'.
19. The Appellant did not attend at the hearing (as he was abroad) although we were told he could be available on the telephone. On 13 November 2019 the Commissioner said that she did not object to the witness

statement being placed in the hearing bundle, but that that was not to be taken as agreeing or disagreeing with the contents.

20. At the hearing, the Commissioner was unrepresented. No questions have been asked of the Appellant in relation to the witness statement.
21. There was a skeleton argument from the Appellant and we were addressed on the contents by Ms Bowles on behalf of the Appellant.
22. It should also be noted that there is a closed bundle in this case, about which the Appellant is aware. The appropriateness of non-disclosure was decided by the Registrar on 9 August 2019. The Appellant knows that it contains an unredacted copy of the letter at pages 55-62 of the bundle (which is the letter from the BBC to the Commissioner dated 9 May 2019 as referred to above). We agree with the Registrar's reasons that it is appropriate for the unredacted letter to remain in a closed bundle, and that it is necessary for the Tribunal to see the unredacted letter in order to carry out properly our functions in fairly and justly determining the appeal.
23. We will deal with the appeal on the basis of the unredacted material in the bundle. However, to address the appeal more fully, it is necessary for us to produce a closed annexe to this decision, in order to refer to the closed parts of the letter of 9 May 2019.

## DISCUSSION

24. We are grateful for the helpful submissions from Ms Bowles, in difficult circumstances where there is a closed set of materials before the Tribunal. Ms Bowles took us to the relevant parts of the *Sugar* judgment in exploring the circumstances where the derogation applies, and we refer to all the passages she raised below.

25. Thus, Lord Phillips explained the position in relation to Lord Neuberger's comments in the Court of Appeal in the same case: -

66. Lord Neuberger of Abbotsbury MR at para 53 remarked that "today's journalism is tomorrow's archive" and at para 58 "In the case of journalism, above all news journalism, information 'held for purposes ... of journalism' may soon stop being held for that purpose and be held, instead, for historical or archival purposes".

67. .... Information should only be found to be held for purposes of journalism, art or literature if an immediate object of holding the information is to use it for one of those purposes. If that test is satisfied the information will fall outside the definition, even if there is also some other purpose for holding the information and even if that is the predominant purpose. If it is not, the information will fall within the definition and be subject to disclosure in accordance with the provisions of Parts I to V of the Act.

26. Lord Walker, at paragraph 83, said that while the Tribunal should eschew the predominance of purpose as a test, it should 'have some regard to the directness of the purpose.... considering the proximity between the subject-matter of the request and the BBC's journalistic activities and end-product'.

27. Lord Brown at paragraph 106 said that it was a question of judgment on the facts of the case when 'information will cease to be held to any significant degree for the purposes of journalism and become held instead, say, solely for archival purposes...'.

28. Lord Mance commented at paragraph 112 that: -

112. ...We were not given any clear picture when or on what basis archiving might occur. I assume that the reference is to material not envisaged as having any current purpose, but stored for historical purposes or against the possibility of some unforeseen need to revisit, or produce evidence of, past events...



29. The Commissioner's decision notice did not set out any of the detail of the unredacted part of the BBC's letter of 9 May 2019, and we will therefore revisit the letter here.
30. The BBC's case was that the 'immediate purpose of the requested information is clearly editorial'. It was said that 'maintaining editorial independence is a crucial factor' in enabling the BBC to fulfil its core purpose of public service broadcasting. Reference was made to Lord Walker's 'proximity' test set out in paragraph 83 of *Sugar* (see above).
31. Reliance was placed on another paragraph of Lord Walker's judgment which states at paragraph 78: -

78 .... public service broadcasters, no less than the commercial media, should be free to gather, edit and publish news and comment on current affairs without the inhibition of an obligation to make public disclosure of or about their work in progress. They should also be free of inhibition in monitoring and reviewing their output in order to maintain standards and rectify lapses

32. The BBC went on to comment that the description of the activities covered by the word 'journalism' set out by the FTT in the *Sugar* case was adopted by the Supreme Court. Thus, Lord Philips at paragraph 38 summarised the activities as follows: -

38. ....first, the collecting, writing and verifying of material for publication; second, the editing of the material, including its selection and arrangement, the provision of context for it and the determination of when and how it should be broadcast; and third, the maintenance and enhancement of the standards of the output by reviews of its quality, in terms in particular of accuracy, balance and completeness, and the supervision and training of journalists.

33. The BBC stated that the requested information was 'held securely by a BBC journalist and their team working in BBC news investigations'. The BBC said that the requested information 'clearly fell within the definition of journalism' as described by the FTT and endorsed by the Supreme Court, and most notably 'the collecting, writing and verifying of material for publication'.
34. Against this, as we have set out, the Appellant claims that the BBC no longer had any plans to broadcast a programme based on the requested material. He relied upon two emails from the BBC. The first stated that as there were other investigations being undertaken then 'we are for now not busy with any active investigation', and a second email which made the same point by stating that the investigation was on a back burner.
35. The Appellant accepts that the information was held for the purposes of journalism when it was first obtained, but submits that, essentially, the failure to use it meant that it had lost that quality by the time the request was made or responded to.
36. It seems to us that that is not a conclusion we can reach on the information available to us. The BBC said that the information is still 'held securely by a BBC journalist and their team working in BBC news investigations'. The fact that any investigation was then on 'a back burner' does not seem to us to mean that the information could be considered to be held for historical or archival purposes.
37. The Appellant's view is that the emails sent to him are designed to provide him with an excuse for current inaction, whereas he believes the truth is that there is simply no intention to use the requested information. But that

is not what we are told on the face of the emails. An investigation not being active at the moment or being on a back burner (because other investigations have taken priority) could well mean exactly that – namely, that consideration of the investigation will be re-considered when resources are available.

38. We accept that the time for the consideration of the application of the derogation should be the time the BBC responded to the requests. As the Appellant submits this is 31 January 2019 and 7 February 2019. This was a couple of months after the ‘backburner’ email sent on 25 November 2018. We also accept, as the Appellant submits, that the civil burden of proof is on the BBC to show that the derogation applies. But it seems to us that that will be more straightforward once it is accepted, as it is in this case, that the information was initially held for journalistic purposes and the question is now whether its status has subsequently changed.
39. In our view, we should take at face value the BBC’s account that the information was held securely by a BBC journalist and their team working in BBC news investigations. Upon consideration of the emails that have been produced by the Appellant, the contents, in our view, do not gainsay the BBC’s approach. The furthest they go is to say that other investigations have taken priority. That must happen in many cases, and it does not mean that the intention to use the information in a broadcast in the future, subject of course to editorial decision making, has been lost.
40. It does seem to us that the information was still held for ‘determination of when and how it should be broadcast’ (see Lord Philips paragraph 38 above). We do not think the information can be said to be ‘material not envisaged as having any current purpose, but stored for historical purposes or against the possibility of some unforeseen need to revisit, or produce evidence of, past events’ (see Lord Walker at paragraph 112

above).

41. In those circumstances, and on the balance of probabilities, the requested information had not passed into the realm of material held for archival or historical purposes at the time the BBC responded to the requests, and remained held for journalistic purposes at that time.
42. As mentioned above, there is a closed annexe to this decision. The conclusions we reach in that closed annexe reinforce the conclusions we have reached in this open decision.

#### CONCLUSION

43. For these reasons and those set out in the closed annexe, this appeal is dismissed.

**Stephen Cragg QC**

Judge of the First-tier Tribunal

Date: 6 December 2019.

Promulgation Date 10<sup>th</sup> December 2019