



**Joined Appeal Numbers: EA/2010/0107
EA/2011/0139**

**IN THE MATTER OF AN APPEAL TO THE FIRST-TIER TRIBUNAL
(INFORMATION RIGHTS) UNDER SECTION 57 OF THE FREEDOM OF
INFORMATION ACT 2000**

Dated: 1 May 2012

BETWEEN:

Appellant: Julian Todd
Respondent: The Information Commissioner
Second Respondent: British Broadcasting Corporation

Decision by: Robin Callender Smith
(Tribunal Judge)

RULING

On consideration to strike out the Appellant's grounds of appeal pursuant to rule 8(3)(c) of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (The Tribunal Rules).

DECISION

The Decision Notices FS50284450 of the Information Commissioner dated 18 May 2010 and FS50350144 dated 16 June 2011 are upheld and the appeals are struck out because there is no realistic prospect of success in either of them when viewed separately or in respect of both of them when viewed together as joined appeals.

REASON FOR DECISION

Background

1. The BBC developed and makes available a service which is part of the BBC News website 'Democracy Live' (DL). This service aims to enhance the accessibility and understanding of the proceedings of political institutions by bringing together the provision of live and on-demand, searchable audio-visual coverage which is supplemented by the BBC's digital on-screen graphics and captions.
2. The focus of Democracy Live is the UK's national political institutions. These include the Main Chambers of the House of Commons, House of Lords, Westminster Hall and the Westminster Select Committees, the Scottish Parliament, the Northern Ireland Assembly, the Welsh Assembly and the European Parliament). This service is supplemented by the BBC's own political news coverage, including extracts of the footage supplemented with news reporting, commentary and guidance.
3. The rationale for this output is that it contributes to the fulfilment of the BBC's public purposes, in particular the purpose of sustaining citizenship and civil society by building greater understanding, among the BBC's audience, of the parliamentary process and political institutions governing the UK. This was recognised in the Service Licence for BBC Online, which was granted by the BBC Trust in May 2010.
4. When the BBC officially launched the site on 2 November 2009, the Launch Editor for Democracy Live published a blog post on the site (<http://www.bbc.co.uk/blogs/aboutthebbc/2009/11/democracy-live.shtml>), announcing its launch and summarising the output that would be available and the site's capabilities.

5. That blog included the following remarks:

'DL', as it has become known in the BBC, is the result of about 18 months of development work. It brings together, for the first time in the BBC, live and on-demand video coverage of proceedings in our national political institutions and the European Parliament.

Democracy Live builds on previously available content in the form of video streams, guides and biographies.

But the real magic lies in the site's search function, which is unlike anything the BBC has done before.

By its very nature, the business of politics can be lengthy. Can you/would you watch an entire six-hour long debate from the House of Commons? Possibly. But you'd need to be a battle-hardened political observer or someone with a very keen interest in the subject to do so.

Democracy Live gives you the ability to search for a specific word or words spoken in the proceedings and the results will give you links to the points in the video where they were spoken. The ability to home in on the passages which are of direct interest and relevance to you is at the heart of Democracy Live's purpose.

Our search is powered by a speech-to-text system built by two companies called Blinkx and Autonomy which create transcriptions of the words spoken in the video.

The Appeals

6. On 6 November 2009 the Appellant made a request under the Freedom of Information Act 2000 (FOIA) for

copies of all progress reports produced by the Democracy Live team (including any that were filed by the contractors Autonomy and Blinkx) during the 18 months they were building this project.

7. This request was made a few days after the official launch of the service. The BBC responded to the request on 4 December 2009, indicating that the requested information was held for the purposes of journalism, art or literature and was therefore outside the scope of FOIA, and declined to communicate the information to the Appellant.

8. The Appellant appealed against the BBC's refusal to the Information Commissioner, who issued a Decision Notice (Reference FS50284450) dated 18 May 2010 upholding the BBC's right to refuse to disclose the requested information to the Appellant on the grounds that the information was held for the purposes of journalism, art or literature.
9. The Appellant appealed the Information Commissioner's decision to the Tribunal by Notice and Grounds of Appeal dated 05 June 2010: EA/2010/0107.
10. The Appellant submitted that the requested information had "nothing to do with journalism" because:

A similar project, theyworkforyou.com, that additionally uses the official transcripts, was built and supported by a team of volunteers (including myself) none of whom are considered by anyone as journalists";

The purpose of both projects, DL and TWFY, is to be entirely unselective of the information, to produce a complete searchable archive of the source data in a more accessible form. If users believed there was any deliberately missing content due to editorial selection, they would lose confidence in them.

11. The Information Commissioner responded to the Appellant's Grounds of Appeal on 7 July 2010. He considered that his conclusion that the requested information was held for the purposes of journalism, art or literature was

correct for the reasons set out in the Decision Notice [and that] the meaning of 'journalism' is wider than simply the sort of 'editorial selection' suggested by the Appellant.

12. The Information Commissioner relied upon the BBC's submission to him that

the core purpose of the progress reports, both technical and editorial were to manage and oversee the development of Democracy Live as a new editorial proposition within the BBC's news output ... The BBC believes that it is clear that editorial and technical progress reports relating to the development of a website used to deliver content to our audience [are held] 'to a significant extent' for the purposes of journalism.

13. The BBC was joined to the appeal as an Additional Party by a Direction of 13 July 2010. The following day, the Appellant served a Reply to the Information Commissioner's Response to his Grounds of Appeal. He argued that not all of the BBC's web content constituted journalism, art or literature, and that because the Democracy Live service was published, information relating to it could not be protected from disclosure under FOIA on the grounds that it was held for the purposes of journalism, art or literature.
14. The BBC served its response to the Appellant's Grounds of Appeal on 10 August 2010. It maintained that both the BBC and Information Commissioner were correct to find that the requested information was held for the purposes of 'journalism, art or literature'. It accepted that the requested information did not itself constitute journalism, but submitted that this did not prevent the requested information from *being held* [my emphasis] for the purposes of journalism. The matters submitted by the Appellant had no bearing on that issue.
15. The BBC submitted that the requested information related to the BBC's output and to the activities previously identified by the Tribunal as constituting journalism. It was therefore *held* [my emphasis] at the time of the request for the purposes of journalism, art or literature, and was therefore outside the scope of FOIA.
16. On 13 August 2010, the Appellant made a further request under FOIA. This requested was based on a number of assumptions - the accuracy of which was not accepted by the BBC – and sought a range of information relating to the commissioning of the software which enables the Democracy Live service.
17. The BBC responded to that FOIA request on 13 September 2010, again indicating that the requested information was held for the purposes of journalism, art or literature and was therefore outside the scope of FOIA.

18. The Appellant appealed against that refusal to the Information Commissioner, who issued a Decision Notice (Reference FS50350144) dated 16 June 2011 upholding the BBC's right to refuse to disclose the requested information to the Appellant on the basis that it was held for the purposes of journalism, art or literature.
19. The Appellant appealed against the Information Commissioner's decision by Notice and Grounds of Appeal dated 26 June 2011: EA/2011/0139. He argued that any editorial decisions relating to the BBC's Democracy Live service were fully disclosed by the output and that the designation afforded to the BBC and other public service broadcasters in respect of information held for the purposes of journalism, art or literature should not be interpreted as extending to published journalistic information.
20. The Information Commissioner served his response to the appeal on 8 August 2011, maintaining that his conclusion that the requested information was held for the purposes of journalism, art or literature was "correct for the reasons set out in the Decision Notice". The IC argued, in essence, that the Appellant's arguments were irrelevant to the proper determination of whether the requested information was protected from disclosure under FOIA on the basis that it was held for the purposes of journalism, art or literature. The BBC was joined to this appeal by Direction of 26 August 2011.
21. The Appellant's two appeals were consolidated by Direction of 26 August 2011.
22. The consolidated appeals were stayed on 29 September 2011 pending the handing down of the Supreme Court's decision in the case of *Sugar (deceased) v BBC*.

Striking Out: the Appellant's representations

23. The Appellant maintained that his requests related to information in respect of an item of utility software – supplied by Autonomy/Blinkx – that enabled the raw video streams from several Parliamentary debating chambers to be made text-searchable. In his view the technique was flawed, had poor reliability and there was no evidence that its output had ever been put to review within any of the BBC's processes of quality control or public accountability that normally applied to its journalism.
24. Apart from one single press release in 2009 on the day the service was launched, there was no sign that anyone in the BBC had expressed the slightest concern for the accuracy or usability of the service. In the Appellant's view, it seemed to be a machine that operated wholly outside all the BBC's journalistic activities. There was, for instance, no member of staff with a remit to answer questions about any inadequacies or advise on its practical use for the purposes it had been installed.
25. Just because the BBC had bought a piece of utility software and ran it did not, by definition, make it journalism, art or literature, he argued. If the BBC deployed some virus checking software to scan the e-mails its staff sent out then, if the Appellant continued to receive virus in e-mails from the BBC that infected his computer, he would not expect to be met with a refusal to tell him more about that because of the derogation that was the subject of these appeals.
26. He points to the fact that both the IC and BBC's submissions made separate reference to the Supreme Court's judgement in respect of the phrase "journalism, art or literature" giving it a reading that – as an aggregation – covered the whole of the BBC's output without needing to determine into what category the output might fall.
27. He also believed that computer-generated material that used software from external suppliers running against external non-BBC content – whose

output was not reviewed by any human (journalist or otherwise) like the Autonomy/Blinkx video search engine – fell wholly outside the category of anything that could qualify as "journalism art or literature".

The Law

28. Rule 8(3)(c) of The Tribunal Procedure (First-Tier Tribunal) (General Regulatory Chamber) Rules 2009 provides

The Tribunal may strike out the whole or a part of the proceedings if - the Tribunal considers there is no reasonable prospect of the appellant's case, or part of it, succeeding.

29. Rule 8(4) further provides that

The Tribunal may not strike out the whole or a part of the proceedings under paragraph (2) or (3)(b) or (c) without first giving the appellant an opportunity to make representations in relation to the proposed striking out.

30. The BBC is listed at Schedule 1 FOIA as being a public authority

in respect of information held for purposes other than those of journalism, art or literature [which I will refer to as the 'designation'].

31. Section 7(1) FOIA provides that

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.

32. As such, a requester's entitlements under section 1 FOIA, to be informed whether information of the description specified in the request is held and, if so, to have that information communicated, did not apply in respect of information held for the purposes of journalism, art or literature.

33. The Supreme Court decided that in *Sugar (deceased) v BBC* [2012] UKSC 4, a case which related to the proper interpretation of the derogation afforded to the BBC, and other public service broadcasters, in respect of information held for the purposes of journalism, art or literature.

Conclusion

34. The *Sugar* case concerned a request for the so-called ‘Balen report’, an internal review of the BBC’s Middle Eastern coverage, which was not itself journalism nor intended to form part of the BBC’s output. The Justices in the Supreme Court unanimously found that the report was held for the purposes of journalism, art or literature.
35. The majority (4 out of 5) upheld the judgment of the Court of Appeal ([2010] EWCA Civ 715 that where information is held to “any significant extent” for the purposes of journalism, art or literature it falls outside the scope of FOIA in accordance with s.7(1) and Schedule 1 FOIA.
36. Lord Justice Walker (who dissented only in respect of the *extent* [my italics] to which information must be held of the purposes of journalism, art or literature before it falls outside the scope of FOIA, but not in respect of the outcome of the appeal) stated, at paragraph 38, that

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, 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.

37. That view was reflected in his reasoning when he said [79] what could not be disclosed under FOIA is

material held for the purposes of the BBC’s broadcasting output.

38. In determining the purpose for which information was held at the relevant time, two of the Justices espoused the practice of considering the

“directness” or “proximity” of the relevant information and the BBC’s activities and output (see Lord Walker [83] and Lord Brown at [106]).

39. In that case Lord Wilson also approved, subject to the inclusion of the actual exercise of broadcasting or publishing, the Tribunal’s analysis [107-109] of their decision in Appeal No. EA/2005/0032 of 29 August 2006) of the activities encompassed in the practice 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.

40. Lord Wilson also made an obiter remark [42] that

If financial information is directly related to the making of a particular programme, or group of programmes, it is likely to be held for purposes of journalism

endorsing the decision of Irwin J in *BBC v Information Commissioner* [2009] EWHC 2348 (Admin) that the annual budget for *Newsnight*, the cost of episodes of *EastEnders* and the price paid for the right to cover the winter Olympics in Turin in 2005/06, all constituted information held for the purposes of journalism, art or literature and were thus outside the scope of FOIA.

41. In striking out these appeals –in case the Appellant was unaware – I was the Tribunal Judge in *BBC v Information Commissioner* whose judgement was successfully appealed to Irwin J.

42. The issues relating to how slender can be the connection between the information requested and what constitutes information held for the purposes of journalism, art or literature – so that the request(s) fall within the derogation – are well-known to me and have been clearly articulated by the Supreme Court in its most recent judgement.

43. I have no hesitation determining to the required standard, the balance of probabilities, that these appeals have no prospect of success.

44. This is because of the explicit and careful consideration the issues latent and overt within them have already received at the most senior judicial level in the United Kingdom.

45. For all these reasons my ruling is that these appeals are struck out.

Robin Callender Smith
Tribunal Judge

1 May 2012