



**IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
(INFORMATION RIGHTS)**

Appeal No: EA/2015/0212

ON APPEAL FROM:

**The Information Commissioner's Decision Notice No: FS50586208
Dated: 25 August 2015**

Appellant: Gerard Gallacher

Respondent: The Information Commissioner

Heard at: Edinburgh

Date of Hearing: 7 January 2016

Before

Chris Hughes

Judge

and

Dave Sivers and Paul Taylor

Tribunal Members

Date of Decision: 16 February 2016

Attendances:

For the Appellant: in person

For the Respondent: did not appear

Subject matter:

Freedom of Information Act 2000

Cases:

BBC v Sugar (No 2) [2012] UKSC 4; [2012] 1 WLR

BBC v The Information Commissioner [2009] EWHC 2348(Admin), [2010] EMLR 121.

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal upholds the decision notice dated 25 August 2015 and dismisses the appeal.

REASONS FOR DECISION

Introduction

1. On 12 May 2015 the BBC programme, “File on Four” broadcast an edition entitled “Who killed Emma” which concerned a 10 year old unsolved murder. This broadcast, which described its contents as the result of a BBC investigation, was similar in substantive content to a series of articles which had been published in the Sunday Mail on 5,12 and 19 April 2015.
2. The Appellant in these proceedings considered that the BBC, in its description of the broadcast, may have misled the public and broadcast as its own investigation what was in fact a work of plagiarism. In order to elucidate this issue he wrote to the BBC on 27 May 2015:-

‘On Tuesday 12th May 2015, Radio 4’s File on Four broadcast a program titled “Who Killed Emma”, which related to the murder in 2005 of a Glasgow woman, Emma Caldwell. Can you please provide the following information?

1 The date that this program was contracted by the BBC

2 The date the program was allocated a 12th May broadcast slot

3 The date that the presenter, Eamon OConnor, was contracted to present the broadcast.’
3. By a letter dated 15 June 2015 the BBC refused the request for information on the grounds that the BBC was not subject to the Freedom of Information Act in respect of information held for the purposes of “journalism, art or literature”. On 18 June the Appellant complained to the Respondent who investigated and in his decision upheld the stance of the BBC. The Appellant remained dissatisfied and has appealed to this Tribunal to determine the question.
4. In the letter setting out his grounds of appeal the Appellant set out the background of the murder investigation and the Sunday Mail publication. He stated that bundle page 12,13):-

“...the manner of presentation, content and tone could have left no-one in any doubt that “File on Four” were claiming that their program was revealing something not previously known, and was innovative, original investigative journalism.

...

The BBC is a publicly funded Corporation and it has built its journalistic reputation for broadcasting articles which are truthful reliable and trustworthy.”

He referred to the reasoning of the Respondent and continued:-

“Surely, however a Corporation cannot be allowed to utilise this clause in order to disguise potential deception?

...

The public who fund the Corporation, have to be reassured that when they watch, or listen, to documentary programs broadcast by the BBC, and which claim to be original and revelatory, they do so in the knowledge, and belief, that these claims are true, and reliable.”

5. The Respondent resisted the appeal relying on his decision notice and setting out the reasoning of the Supreme Court which, in *BBC v Sugar (No 2) [2012] UKSC 4; [2012] 1 WLR* considered the position of the BBC under FOIA.
6. In the hearing the Appellant emphasised the public interest in getting answers to his questions and the importance of maintaining the standards of the BBC. He felt that the BBC had to be answerable for the content of their broadcasts and he did not consider that lazy journalism could be covered. He could not see the logic for blanket protection for the BBC’s production of “journalism, art or literature.”

Legal analysis

7. Section 7 of FOIA makes provision for the limited application of the Act to certain public authorities:-

“(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.”

In Schedule 1 the BBC is listed:-

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

8. The question for the Tribunal is whether the specific information requested, which are three key dates in the preparation of a programme for broadcast, are held for purposes “other than those of journalism, art or literature”.
9. The purpose of this exemption from FOIA is to protect the independence of the BBC and to prevent it from being placed at a disadvantage compared with other broadcasters. In *Sugar* (paragraph 39) Lord Wilson stated:-

“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.”

10. Lord Wilson went on to give qualified approval to a tripartite classification of journalism adopted by the original Tribunal in *Sugar* and explored its application with respect to financial information:-

“The Tribunal contrasted the three suggested types of journalistic activity with the direction of policy, strategy and resources which provides the framework within which a public service broadcaster conducts its operations.

*... It is important to note, however, that not all financial information will be held by the BBC for purposes other than those of journalism. 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. On the same day, namely 2 October 2009, as that on which he handed down his judgment in the present proceedings, Irwin J handed down his judgment in *BBC v The Information Commissioner* [2009] EWHC 2348(Admin), [2010] EMLR 121. He held that information about (among other things) costs referable to its broadcast of “EastEnders”, about its annual budget for “Newsnight” and about the price paid for its right to cover the winter Olympics in Turin in 2005/06, was held at an operational level in order to assist in*

the making of editorial and creative choices and so was held partly (and, if relevant, predominantly) for purposes of journalism.

11. In this case the information held related directly to the making of the programme – the dates contracts were entered into and the date the slot for the programme was determined. These are clear editorial decisions going to the arrangements for the production of what must, whatever its merits or de-merits, be considered to fall within the exemption even if, as the Appellant contends, some of the programme consisted of false assertions as to the provenance of the information contained within the programme, if it is not journalism it is entertainment or art.

12. The majority of the Supreme Court (Lords Mance, Phillips, Walker and Brown) held (paragraph 109) that:-

“once it is established that the BBC held the Report for purposes of journalism, art or literature, the Report was exempt from disclosure, and would have been even had these not been the predominant purposes for which it was held.”

13. The reason for this was set out in the judgement of Lord Mance:-

“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.

14. The Tribunal is satisfied that the information requested by the Appellant was operational information closely tied to editorial decisions about a broadcast which had occurred only a few weeks before the request. The information was therefore held for the purposes of that broadcast output and the Respondent’s decision was correct in law. The appeal is dismissed.

15. Our decision is unanimous.

Judge Hughes

[Signed on original]

Date: 16 February 2016