



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

**Appeal Reference:EA/2018/0032**

**Decided without a hearing  
On 6 August 2018**

**Before  
JUDGE CARTER  
GARETH JONES  
DAVE SIVERS**

**Between**

**YAFET ZEREOU**

Appellant

**and**

**THE INFORMATION COMMISSIONER**

Respondent

**and**

**THE BRITISH BROADCASTING ASSOCIATION**

Second Respondent

**DECISION AND REASONS**

1. This is an appeal by Yafet Zereou (“the Appellant”) under s.57 of the Freedom of Information Act 2000 (“FOIA”) against the Information Commissioner’s (“the Commissioner”) Decision Notice dated 20 February 2018 with reference number FS 50718238 (“the DN”). This appeal is not upheld for the following reasons.

**Background**

2. On 17 November 2017 the Appellant wrote to the British Broadcasting Corporation (“BBC”), the Second Respondent, in the following terms:

*“I write to you to make a freedom of information request with regards to the BBC’s Tigrinya service*

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*I would like to know the following about the service:*

- 1) *How many staff does the service have? Of these, how many are Eritreans and how many are Ethiopians?*
  - 2) *During the recruitment process how did the BBC check the Tigrinya language proficiency (both oral and written) of the candidates and who had the last word in the selection?*
  - 3) *During the setting up of the service, was the BBC aware of the differences in culture and language between the Tigrinya speakers in Eritrea and Ethiopia? If so, what steps were taken and are being taken to ensure a fair representation of both Eritrean and Ethiopian issues?*
  - 4) *How does the BBC regulate the quality of the Tigrinya service? When a complaint is made who translates articles written in Tigrinya into English? Who checks the accuracy of the translation?”*
3. The BBC initially refused the whole request on the basis that the information was held for the purposes of ‘journalism, art or literature’, and therefore fell outside the scope of the FOIA regime by virtue of Part VI of Schedule 1 FOIA (derogations in relation to certain public authorities).
  4. The Appellant complained to the Commissioner on 2 January 2018, stating that he considered the information related to the BBC’s administration, rather than its journalistic output. During the course of the Commissioner’s investigation, the BBC changed its position. On 9 February 2018 it wrote to the Appellant, providing answers to parts (2) and (3) of the request. The BBC continued to refuse to disclose the information requested at part (1), and explained that it considered this information was exempt from disclosure pursuant to s.40(2) FOIA. The BBC maintained its position that part (4) of the request was not subject to FOIA, further to the derogation.

5. In the DN, the Commissioner set out her decision that the BBC had correctly applied s.40(2) FOIA to part (1) of the request, and that it had correctly applied the derogation to part (4).

### **The Legal Framework**

6. Public authorities are under a general duty, under section 1 FOIA, to disclose information they hold where it is requested unless subject to an exemption. In this case, the relevant exemption is section 40 FOIA in respect of personal data. This provides (insofar as relevant):

*40.— Personal information.*

*(1) Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.*

*(2) Any information to which a request for information relates is also exempt information if—*

*(a) it constitutes personal data which do not fall within subsection (1), and*

*(b) either the first or the second condition below is satisfied.*

*(3) The first condition is—*

*(a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of “data” in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene—*

*(i) any of the data protection principles,*

*.....*

*(7) In this section—*

*“the data protection principles” means the principles set out in Part I of Schedule 1 to the Data Protection Act 1998, as read subject to Part II of that Schedule and section 27(1) of that Act;”.*

7. Section 1(1) DPA defines ‘personal data’ as follows:

*“personal data” means data which relate to a living individual who can be identified—*

*(a) from those data, or*

*(b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,*

*and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual”*

8. Section 2 DPA defines 'sensitive personal data' insofar as relevant as follows:

*2. Sensitive personal data.*

*In this Act “sensitive personal data” means personal data consisting of information as to—*

*(a) the racial or ethnic origin of the data subject,”*

9. Of relevance in the present appeal, the first data protection principle (Paragraph 1, Schedule 1 DPA) provides as follows:

*“1.*

*Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless—*

*(a) at least one of the conditions in Schedule 2 is met, and*

*(b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met ...”*

10. The Commissioner drew the Tribunal's attention to the case of Boam (EA/2015/0294), in which the First-tier Tribunal considered the application of s.40 FOIA to various information relating to an Ofsted report, in circumstances in which the requested information did not itself name individuals. In determining whether it nonetheless constituted personal data, from which individuals were identifiable, the Tribunal summarised the approach to be applied as follows:

*“[17] The first question requires us to consider whether references to individuals or groups of people are such as could lead to the identification of an individual or of a number of individuals forming the group, where the information applies to all its members. If such data is processed in anonymised form, it ceases to be personal data - see Common Services Agency v Scottish Information Commissioner [2008] 1 W.L.R. 1550 at §27 per Lord Hope, giving effect to Recital 26 of EC Directive 95/46/EC –*

*“Whereas the principles of protection must apply to any information concerning an identified or identifiable person; whereas, to determine whether a person is identifiable, account should be taken of all the*

*means likely reasonably to be used either by the controller or by any other person to identify the said person; whereas the principles of protection shall not apply to data rendered anonymous in such a way that the data subject is no longer identifiable ...”*

[18] *The test for determining whether data have been sufficiently anonymised so that they cease to be personal data is, therefore rigorous. Cranston J., giving judgment in R (Department of Health) v Information Commission [2011] EWHC 1430, stated that the chances of identification must be “extremely remote.” The ICO’s Code of Practice, “Anonymization: managing data protection risk” puts that principle into effect and draws attention to the fact that data common to every member of a group are the personal data of every member, an observation relevant to this appeal. Plainly, the Tribunal must have careful regard to the acute deductive powers of those familiar with the school and understandably curious as to the individuals referred to. In the section “The reasons for this decision”, we refer in more detail to the features within the content of the EFs, which offer clues to “insiders” as to which teacher, form or particular group (e.g., special needs (SEN) pupils) are described. We bear well in mind that a reasonable possibility of identification means that the relevant data are not anonymised.*

#### The Schedule 1 FOIA derogation

11. Section 3(1) FOIA defines ‘public authority’ for the purposes of FOIA:

*3.— Public authorities.*

*(1) In this Act “public authority” means—*

*(a) subject to section 4(4), any body which, any other person who, or the holder of any office which—*

*(i) is listed in Schedule 1”.*

12. Part VI of Schedule 1 lists the BBC, as follows:

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

13. In respect of this derogation, in *Sugar (deceased) v BBC and another* [2012] UKSC 4, the Supreme Court endorsed the approach set out in the Court of Appeal ([2010] EWCA Civ 715, leading judgment of Lord Neuberger), as follows:

*“..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 FOIA,*

*even if the information is also held by the BBC for other purposes' (paragraph 44)."*

14. The Court of Appeal had endorsed the following definition of 'journalism', which the Tribunal in *Sugar* (EA/2005/0032) had set out (CA judgment para 53; Tribunal paras 106-109):

*"106. In relation to functional journalism we find that it covers collecting or gathering, writing, editing and presenting material for publication, and reviewing that material. To further understand functional journalism the Tribunal considers the following three elements constitute functional 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 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 colleagues, professional supervision and guidance, and reviews of the standards and quality of particular areas of programme making."*

### **Grounds of Appeal**

15. The Appellant submits as to part (1) of the request and s.40(2) FOIA:
- i.* The disputed information cannot be used to identify an individual.
  - ii.* Information already on social media identifies members of the Tigrinya service;
  - iii.* Identifying whether staff are Eritrean or Ethiopian involves identification of their nationality, not ethnicity or race.
  - iv.* The BBC has previously identified the team consists of Eritreans and Ethiopians and a particular presenter, as Eritrean, so it cannot consider itself precluded from disclosing individuals' nationality;
  - v.* The BBC's concerns about security risks, were the information disclosed, are not real or justifiable. Members of the Tigrinya service operate in Ethiopia with the blessing of the Ethiopian government.

16. The Appellant submits as to part (4) of the request and the Schedule 1 derogation:

- i.* Complaints made to the BBC are not part of the BBC's 'output'. A complaint is a response to output already created, and therefore does not affect the output of the BBC.
- ii.* The BBC's Charter stresses the need for a complaints process that is 'transparent and accessible'. Licence fee payers, have rights to know that complaints to the BBC are dealt with appropriately.

17. The Commissioner's and the BBC's responses, being essentially aligned, are as follows:

*Part (1) of the request and the application of s.40(2) FOIA*

18. The Commissioner and the BBC point out that the specific information requested does not identify individuals by name. However, as the Appellant acknowledges, there is considerable information already in the public domain about these individuals, who are a very small group. Therefore, disclosure of statistical information about individuals' nationality would be likely to allow them to be identified, taking into account the other information that is publically available.

19. The Commissioner and the BBC submit that information regarding someone's nationality falls within the scope of 'race or ethnicity' for the purpose of s.2 DPA. It is asserted that just because the BBC has previously disclosed such information does not imply that it will always be permissible for it to do so. There is nothing to suggest in this case that disclosure of the sensitive personal data would be fair, such as to override the rights of the data subjects for this information to remain private.

20. The Appellant submits that the Ethiopian government knows members of the Tigrinya service operate in Ethiopia, and must know their nationality. The Commissioner and the BBC accept this may indeed be so. This does not, it is said, rule out threats to individuals, if sensitive personal data were disclosed. The BBC has explained, and the Commissioner accepted, that disclosure of this information may give rise to security risks, given the political context in which its Tigrinya service operates.

*(b) Part (4) of the request, and the Schedule 1 derogation*

21. The Commissioner and the BBC submit that just because the way the BBC handles complaints are not 'output' as such, this does not stop it being held by it for the purposes of journalism. As the Tribunal set out in *Sugar*, 'journalism' in this context includes editorial activities and reviewing and maintaining standards. The information held in response to question 4 of the request, information about how the BBC 'regulates the quality of the Tigrinya Service' is editorial information about programming and complaints-handling.
22. The Appellant submits that, in accordance with the BBC Charter, as a licence fee payer he has a right to know how complaints to the BBC are handled. The Commissioner and the BBC have pointed out that rights deriving from the BBC Charter, are beyond the scope of this appeal. Provisions of the BBC Charter do not affect the statutory FOIA regime.

### **Decision**

23. The Tribunal considered first the request under part (1) and the Commissioner's view that section 40(2) FOIA applied such that the BBC had been correct not to disclose the information. As explained above, the exemption to disclosure provided by s.40(2) FOIA provides that the personal data of a third party is exempt from disclosure if its disclosure would contravene any of the data protection principles set out in Schedule 1 of the Data Protection Act 1998 ('DPA'). Personal data is defined by the DPA as any information relating to a living and identifiable individual.
24. The Tribunal recognised that the requested information does not identify individuals by name. However, information which may nonetheless be used to identify an individual is personal data and may potentially fall within the section 40 exemption. The Tigrinya service is a small team of under ten staff. Given the size of the group and the public nature of the individuals' work as journalists, based on the evidence before it, the Tribunal was satisfied that disclosure of the requested information would identify living individuals. Whilst the answer to question 1 would on the face of it be anonymous, the Tribunal was satisfied that it would be relatively easy for other data to be joined to the disputed information and for individuals to be identified thereby. The Appellant argued that some information about members of the team was already available on social media. The Tribunal took the view however that this made it more

likely that the individuals would be identified (noting also that it was not the BBC itself which had placed this information on social media). As such the disputed information did constitute personal data.

25. The Tribunal was satisfied that the requested information under this part of the request would be 'sensitive personal data' (section 2 DPA) being information which relates to racial or ethnic origin. Contrary to the Appellant's view, it was clear to the Tribunal that given the limited number of ethnic groupings aligned to the Ethiopian and Eritrean nationalities, identification as Eritrean was information that was related to race or ethnicity.
26. The BBC had explained and provided some evidence that disclosure of sensitive personal data about members of its Tigrinya team would raise security risks for those employees, given the political contexts in which they worked. There was evidence before the Tribunal of the pressures on journalists in the region and noted that the individuals in the Tigrinya service were not restricted to just working in Eritrea and Ethiopia. The Tribunal accepted the Commissioner's view that sensitive personal data, by its nature, is likely to be information that individuals regard as their most private information and further, that disclosure of this type of information is likely to have a detrimental or distressing effect on the data subject. The BBC put forward the argument that given the small size of the team and that the individuals were not senior employees of the BBC, they would have a reasonable expectation that their sensitive personal information would remain private. The Tribunal accepted this.
27. The Tribunal was of the view that disclosure of this information would be unfair, and breach the first data protection principle. It was not clear moreover insofar as the disputed information included sensitive personal data, what condition in the Third Schedule to the DPA could apply in order to make disclosure lawful under the First Data Protection Principle.
28. With regard to part (4) of the request and the application of Schedule 1 FOIA derogation the Tribunal was of the view that the requested information was not '*held for purposes other than those of journalism, art or literature.*' The BBC therefore had no obligation to comply with this part of the request. The scope of the derogation was considered by the Court of Appeal (and endorsed by the Supreme Court) in *Sugar* as set out above. Thus, in respect of journalism, the Supreme Court upheld the approach set out by the Tribunal in *Sugar*, that journalism comprises 3 elements: (1) collecting

or gathering, writing and verifying materials for publication; (2) editorial, including the exercise of judgment; and (3) maintenance and enhancement of the standards and quality of journalism. Journalism primarily means the BBC's output on news and current affairs, and the whole of the BBC's output is covered by the purposes of 'journalism, art or literature'. In order for the derogation to apply, 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 activities in producing such output.

29. The Tribunal accepted the Commissioner's submission that information sought by part (4) of the request concerns how the BBC handles certain complaints, how the quality of the Tigrinya service is regulated, and how translations are made. It was of the view therefore that the information falls under the second and third elements identified in *Sugar*, as involving editorial judgment and the review of standards. There was moreover a sufficiently direct link between the purposes for which the disputed information is held and the BBC's journalistic output and activities. The Tribunal concluded that the disputed information falls within the definition of journalism and is held by the BBC for this purpose, such that the BBC was not, further to the derogation, obliged to comply with Parts I to V FOIA in respect of this part of the request.

## **Conclusion**

30. The Tribunal has concluded that the Commissioner correctly concluded that part (1) of the requested information is exempt from disclosure under s.40(2) FOIA, and that the Schedule 1 FOIA derogation applies to part (4) of the request. As such the appeal is dismissed.

Judge Melanie Carter

Judge of the First-tier Tribunal

Date of Decision: 18 September 2018

Date Promulgated 19 September 2018

Amended under Slip Rule on 21 Sept 2018