



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

**Case No. EA/2013/0049**

**ON APPEAL FROM:**

**The Information Commissioner's  
Decision Notice No: FS50469197  
Dated: 18 February 2013**

**Appellant: Mr ROGER CLIFFE-THOMPSON**  
**Respondent: INFORMATION COMMISSIONER**  
**On the papers: 11 JULY 2013**  
**Date of decision: 12 AUGUST 2013**

**Before**

**ROBIN CALLENDER SMITH**  
Judge

and

**SUZANNE COSGRAVE and ROGER CREEDON**  
Tribunal Members

**Representations:**

For the Appellant: Mr Roger Cliffe-Thompson  
For the Respondent: Mr Mark Thorogood, Solicitor for the Information Commissioner

**FOIA**

Meaning of Public Authorities s.3 and Schedule 1

Authorities to which Act has limited application s.7

**CASE**

*Sugar (Deceased) (Represented by Fiona Paveley) v BBC* [2012] UKSC 4

**DECISION OF THE FIRST-TIER TRIBUNAL**

The Tribunal upholds the decision notice dated 18 February 2013 and dismisses the appeal.

**REASONS FOR DECISION**

Introduction

1. The Appellant requested information about the number of disabled presenters on specific BBC broadcasts.
2. The BBC explained the information was covered by what is called the *derogation* in the Act in respect of information held for the purposes of “journalism, art or literature” and was excluded from the FOIA.

The request for information

3. The Appellant wrote to the BBC on 18 October 2012 and asked for:
  - 1) The number of new DISABLED female presenters on BBC TV News Channel since 1st of May 2011?
  - 2) The number of new DISABLED female weather presenters on BBC TV News Channel since 1st of May 2011?
  - 3) The number of new DISABLED female presenters on BBC ONE since 1st of May 2011?

- 4) The number of new DISABLED female presenters on BBC TWO since 1st of May 2011?
  - 5) The number of new DISABLED female presenters on BBC THREE since 1st of May 2011?
  - 6) The number of new DISABLED female presenters on BBC FOUR since 1st of May 2011?
4. The BBC responded on 18 October 2012. It explained that it believed that the information requested was excluded from the FOIA because it was held for the purposes of 'journalism, art or literature'.
  5. It explained that Part VI of Schedule 1 to FOIA provided that information held by the BBC and the other public service broadcasters was only covered by FOIA if it was held for 'purposes other than those of journalism, art or literature'.
  6. It concluded that it was not required to supply information held for the purposes of creating the BBC's output or information that supported and was closely associated with such creative activities. It therefore would not provide any information in response to the request for information.
  7. The Information Commissioner, on the basis of the Supreme Court decision in *Sugar*, upheld the BBC's response.

#### The appeal to the Tribunal

8. The Appellant commented that the decision implied that any information requested about the employment of broadcasters by the BBC seemed to be, in effect, over-protected by virtue of the protected purposes of journalism: he stressed that what he was seeking was employment statistics.
9. He believed that the Equality Act 2010 made it quite clear that employers and service providers were under a duty to make reasonable

adjustments to their workplaces to overcome barriers experienced by disabled people.

10. It would not be possible to ascertain how the BBC was fulfilling its statutory duty to disabled people without the information being requested.

11. The Appellant did not believe that the BBC was included in the list of public bodies exempt from the requirements of the 2010 Act.

### Conclusion and remedy

12. The *Sugar* case, a recent decision from the Supreme Court which is the highest court in the United Kingdom and which binds all lower courts, is the most comprehensive examination of the BBC's position in terms of the derogation from the effects of FOIA when information requests relate to journalism, art or literature. The effect of the decision is clearly binding on this First-Tier Information Tribunal as it considers the issues raised by the Appellant.

13. Once information falls within the description "held for the purpose of journalism, art or literature" it does not matter that it is not the only nor even predominant purpose for which the information is held. The Supreme Court made it clear that, when determining whether information was held for the purposes of journalism, regard should be had to the "directness of the purpose" and the "proximity between the subject-matter of the request and the BBC's journalistic activities and end-product".

14. It is clear to the Tribunal that information requested seeking the number (in a series of different categories) of disabled female presenters on the domestic range of BBC television channels closely links "the subject matter of the request and the BBC's journalistic activities and end-product".

15. In terms of the meaning of “journalism”, the binding effect of *Sugar* is even more demonstrable when set against the series of information requests within this appeal. The Supreme Court endorsed the then Information Tribunal's analysis of the term “journalism” given in EA/2005/0032. The relevant passages of that Tribunal's analysis are as follows :

105. ... [A] more useful distinction may be between functional journalism and the direction of policy, strategy and resources that provide the framework within which the operations of a [public service broadcaster] take place ...

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. In order 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 judgment on issues such as: the selection, prioritisation and timing of matters for broadcast or publication; the analysis of and review of individual programmes and 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 colleagues, professional supervision and guidance, and reviews of the standards and quality of particular areas of programme making."

16. The requested information would be held for the purposes of the employment of journalists and presenters. There is a clear and direct link between the BBC's journalism – in the employment of such individuals - and the production of such output to the public. It cannot be disclosed under FOIA.

17. The significance of the Equality Act 2010 requires employers to make reasonable adjustments to their workplaces to overcome barriers experienced by disabled people. The Appellant questions how the public can determine whether or not the BBC is deliberately avoiding employing disabled people in order to avoid the cost of making reasonable adjustments if the sort of information he requested is not made available.

18. As the Response on behalf of the IC observes, disclosure of the requested information would not assist the Appellant in determining whether or not the BBC is failing to employ disabled people in order to avoid the cost of making reasonable adjustments. The IC also makes clear that whether or not there is a public interest in the disclosure of the requested material is not a relevant consideration if, as in this case, the information is excluded from FOIA.

19. As a separate issue, and outside the provisions of FOIA, those who believe that they have been unlawfully discriminated against because of disability can lodge claims with the Employment Tribunal.

20. For all these reasons this appeal fails.

21. Our decision is unanimous.

22. There is no order as to costs.

**Robin Callender Smith**

Judge

12 August 2013