



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

**Appeal Reference: EA/2019/0039**

**Decided without a hearing  
On 30 July 2019**

**Before**

**JUDGE HAZEL OLIVER  
MRS SUZANNE COSGRAVE  
MR PAUL TAYLOR**

**Between**

**PATRICK SHEPHARD**

Appellant

**and**

**INFORMATION COMMISSIONER**

Respondent

**DECISION**

The appeal is dismissed.

**REASONS**

**Background to Appeal**

1. This appeal is against a decision of the Information Commissioner (the “Commissioner”) dated 21 January 2019 (Decision Notice FS50789115, the “Decision Notice”) in which the Commissioner decided that certain information should be not disclosed by the appellant under the Freedom of Information Act 2000 (“FOIA”). It concerns disclosure of information about publication of podcasts by the British Broadcasting Corporation (the “BBC”).
2. The parties opted for paper determination of the appeal. The Tribunal is satisfied that it can properly determine the issues without a hearing within rule 32(1)(b) of The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (as amended).

3. On 2 August 2018 the appellant wrote to the BBC and made the following request, which is the subject of this appeal:

*“Will you please be kind enough to tell me whether the computer system, by which above-mentioned podcasts have been listed at <http://www.bbc.co.uk/programmes/p02pcny/episodes/downloads> , is capable of being used automatically to update, at predetermined times, the Web content provided by the server, in such a way that specific podcasts become (without further human intervention) listed and available for download.*

*If the computer system is so capable, then please tell me why it would seem that it is not used in the way that I suggest above.*

*Will you please also be kind enough to tell me why a podcast of a “5 live Science” programme, that I understand to have been broadcast between 5 a.m. and 6 a.m. on Sunday 01 July 2018, would seem NOT to be mentioned on the Web page at <http://www.bbc.co.uk/programmes/p02pcny/episodes/downloads> .”*

4. The BBC responded on 12 September 2018, and explained that the information is excluded from FOIA because it is held for the purposes of journalism, art or literature, with reference to Part VI of Schedule I to FOIA. The appellant made a complaint to the Commissioner dated 24 September 2018.

5. The Commissioner decided that the information is held by the BBC for the purposes of ‘journalism, art or literature’ and does not fall within the scope of FOIA. The Commissioner referred in her decision to Schedule 1, Part VI of FOIA, which provides a specific derogation for the BBC, and the decision of the Supreme Court in ***Sugar (Deceased) v British Broadcasting Corporation*** [2012] UKSC 4 (“***Sugar***”).

### **The Appeal**

6. The appellant appealed against the Commissioner’s decision. The appeal is put on the following basis:

- a. The Commissioner has wrongly interpreted the word “journalism” in FOIA.
- b. The UK needs many people skilled in science, technology and engineering, and podcasts could help encourage young people to take up those subjects professionally. It is important that material is available for download as podcasts if they are broadcast early in the morning, and this had not been done at least 3 times in the last 8 months.
- c. The Commissioner was unhelpful in response to his request for information about a 2014 case.

7. The Commissioner’s defends the appeal, and the response can be summarised as follows:

- a. The information was held for the purposes of journalism on a proper application of the test set out in *Sugar*. This test covers journalistic output, and there is sufficient proximity between the subject matter of the request (computer programs used to

publish podcasts and podcasts generally), and the BBC's journalistic activities and end product.

- b. The other matters raised by the appellant are beyond the scope of this appeal.
8. The appellant provided a reply to the Commissioner's response as follows:
- a. The derogation should be interpreted more narrowly and the information requested does not have a sufficiently direct connection with the creative process of journalism.
  - b. The engineering process of disseminating the material is likely to be done by different types of people from those who created the material, and so providing the information would not significantly damage the BBC's future creative journalistic activities. The technical means of making the podcast available is far removed from journalism itself, even if "journalism" is defined to include the product of the activity of journalism.
  - c. The use of the word "output" in **Sugar** did not intend to imply that the activity of broadcasting or disseminating the BBC's output ought to be considered within the derogation.
  - d. A purposive approach and common sense should be used.

#### **Applicable law**

9. The relevant provisions of FOIA are as follows.

**1 General right of access to information held by public authorities.**

- (1) Any person making a request for information to a public authority is entitled—
- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
  - (b) if that is the case, to have that information communicated to him.

.....

**7 Public authorities to which Act has limited application**

- (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.

.....

**58 Determination of appeals.**

- (1) If on an appeal under section 57 the Tribunal considers—
- (a) that the notice against which the appeal is brought is not in accordance with the law, or
  - (b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,
- the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner; and in any other case the Tribunal shall dismiss the appeal.
- (2) On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.

10. Under Schedule 1 Part VI of FOIA, the BBC is listed as a public authority covered by FOIA “*in respect of information held for purposes other than those of journalism, art or literature*”.

11. The meaning of this provision was considered in detail by the Supreme Court (“SC”) in **Sugar**. The SC endorsed the Tribunal’s analysis of three types of activity as covered by the word “journalism” – “*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...*” (paragraph 39, Lord Wilson, expressly endorsed at paragraph 42). It is clear from the SC’s judgment that journalism includes output – see paragraphs 38 (Lord Wilson), 67 (Lord Phillips), 70 and 79 (Lord Walker).

12. By a majority (Lord Wilson dissenting), the SC held that only information which is held exclusively for non-journalistic purposes falls within FOIA. It is necessary for a Tribunal to consider “*the proximity between the subject-matter of the request and the BBC’s journalistic activities and end-product.*” (paragraph 83, Lord Walker). But, once this proximity has been established, FOIA does not apply to the information – “*In the event that information is held to any significant degree (and we are all agreed that the de minimis principle would otherwise apply) for the purposes of journalism, then to my mind it would seem artificial and impermissible to construe the Act as applying to that information.*” (paragraph 104, Lord Brown).

## **Evidence**

13. We had an agreed bundle of open documents consisting of the appeal, response from the Commissioner, appellant’s reply and supporting documents, all of which we have read. Both parties had agreed that this matter could be dealt with on the papers. We have considered and taken all of this material into account in making our decision.

## **Discussion and Conclusions**

14. The issue for the hearing is whether the specific information requested by the appellant falls within the definition of “information held for purposes other than those of journalism, art or literature”.

15. The first question is whether “journalism” includes the BBC’s output in terms of publication of podcasts of radio programmes which have previously been broadcast live. The SC’s judgment in **Sugar** makes it very clear that output is included, as set out in paragraph 11 above. As stated by Lord Walker (paragraph 70), “*...the purposes of journalism, art or literature would be, quite simply, the purposes of the BBC’s entire output to the public.*”

16. The appellant says that use of the word “output” in **Sugar** did not intend to imply that the activity of broadcasting or disseminating the BBC’s output ought to be considered within the derogation. We disagree. We find that this falls squarely within the concept of the BBC’s output, and specifically within the second type of journalistic activity endorsed by the SC – “*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.*” (paragraph 39). Information about a decision to publish (or not publish) a podcast and how to do so is information about the BBC’s output and its journalistic activities.

17. **Sugar** clearly established that FOIA only covers information held by the BBC exclusively for purposes other than journalism – as set out in paragraph 12 above. We have considered whether there is a sufficiently close connection between the subject matter of the request and the BBC’s journalistic activities, and we find that there is. The appellant has asked for information about how podcasts are made available for download. This is very directly connected to “*the determination of when and how the [BBC’s] material should be broadcast*”, which forms part of the second category of types of journalistic activity endorsed by the SC, whether or not this material had previously been broadcast live. This means that the information is not held exclusively for purposes other than journalism.

18. The appellant says that the information requested does not have a sufficiently direct connection with the creative process of journalism. We agree that information on podcast availability of material that has already been broadcast may be said not to relate to the original creation of new output, but as explained above the concept of “journalism” is much wider than this and includes determining when and how material should be broadcast.

19. The appellant also says that the engineering process of disseminating the material is likely to be done by different types of people from those who created the material, and so providing the information would not significantly damage the BBC’s future creative journalistic activities - the technical means of making the podcast available is far removed from journalism itself. Again, we find that this point is answered by the three-part definition of journalism that was endorsed by the SC in **Sugar**. The information requested is about when and how material should be broadcast, and the “how” includes the methods of broadcast.

20. The appellant’s reply quotes Lord Walker in **Sugar** (paragraph 84), in which he agrees with comments made by Lord Neuberger in the Court of Appeal that certain information (such as advertising revenue, property ownership or outgoings and financial debt) would not normally be held for purposes of journalism, and the question should be considered in a “relatively narrow” way. The appellant makes the point that the Tribunal should adopt a purposive approach and focus on the intention of the derogation being to protect the creative processes of the BBC from unfair or undue influence.

21. It is correct that the underlying purpose of the derogation is to prevent disclosure of information when this would risk interference with the broadcasting function of the BBC (see for example paragraphs 64 and 65, Lord Phillips). This is why the de minimis principle applies, and we must consider the proximity between the subject-matter of the request and the BBC’s journalistic activities. However, the examples given by Lord Neuberger are very different from the information in issue in this case. The appellant’s request relates to the method of making podcasts available for download, covering both the technical means and the reasons behind the non-publication of certain podcasts. As already explained above, this is directly related to journalism in the sense of when and how material should be broadcast. It fits squarely within the definition of journalism endorsed by the SC. Where information is closely connected with journalism, the derogation will apply - there is no need for the Tribunal to go on and consider whether on the facts the disclosure of this information may interfere with the broadcasting function of the BBC.

22. For these reasons we find that the information sought does fall within the derogation. It is information which is at least partly held for the purposes of journalism, and therefore does not need to be disclosed by the BBC under FOIA.

23. The appellant is seeking this information to understand why some science podcasts are not made available, in the cause of encouraging more young people to take up science, engineering and technology. This aim may well be in the public interest. However, the purpose of the request is not relevant in this case, and it does not matter how weighty the public interest is in the information. The BBC's derogation applied irrespective of the public interest in the relevant information.

24. Any issues with how the Commissioner approached a request for information about another case are not something that the Tribunal can deal with in this appeal.

25. For the reasons given above, we uphold the decision of the Information Commissioner and dismiss the appeal.

Signed: Hazel Oliver  
Judge of the First-tier Tribunal

Date: 3 August 2019  
Promulgation date: 5 August 2019