



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

Appeal Reference: EA/2021/0220

**Heard remotely by CVP
On 2 February 2022
Representation:
Appellant: Simon Murray (Counsel)
Respondent: Did not appear**

Before

**SOPHIE BUCKLEY
KATE GRIMLEY-EVANS
PAUL TAYLOR**

Between

DAVID KEIGHLEY

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

MODE OF HEARING

This hearing was held by CVP (remote video hearing) which has been consented to by the parties. A face to face hearing was not held because it was not practicable and all the issues could be determined in a remote hearing.

DECISION

1. For the reasons set out below the appeal is dismissed.

REASONS

Introduction

1. This is an appeal against the Commissioner's decision notice IC-76825-W4T0 of 2 August 2021 which held that any information held by the British Broadcasting Corporation ('the BBC') within the scope of elements 1 and 8 of the request would be held for the purposes of journalism, art or literature and would therefore fall outside the Freedom of Information Act 2000 (FOIA). The Commissioner did not require the BBC to take any steps.
2. We have read and taken account of an open bundle of documents and heard oral submissions and read a skeleton argument from Mr. Murray on behalf of the Appellant.

Background

3. Since 2010 the BBC has annually commissioned the independent research and polling company, Ipsos Mori, to conduct a representative survey of the UK public on their perception of BBC standards (including, but not limited to, impartiality) in BBC output.
4. The survey in question in this appeal is a 2018 IPSOS MORI survey ('the Survey'). The results relevant to this appeal appear on p 19 of the BBC Group Annual Report and Accounts, which reports that 52% of UK adults think that the BBC is effective at providing news and current affairs that is impartial. It includes a pie chart which shows that 44% of 1,829 UK adults who follow the news, April-May 2019 answered 'the BBC' to the question 'Of all the news sources (TV, radio, newspaper, magazine, website, app or social media) which one source are you most likely to turn to for news you trust the most?'

Request

5. This appeal concerns a request made on 17 June 2020 by Mr Keighley in the following terms.

I refer to page 19 of the BBC Group Annual Report and Accounts 2018/2019 giving the results for several survey questions showing that 52% of people asked think that the BBC provides impartial news and that 44% turn to the BBC if they want impartial news. The source for both is given as IPSOS MORI.

Please can you provide information and all relevant documents relating to the following for both the 52% and 44% results:

1. A copy of and details of the brief and instructions that were given to IPSOS MORI or any relevant meeting notes when they were commissioned to carry out the survey that led to the above two results and any underlying contracts;
 2. How the audience sample was chosen and what were the criteria to include or exclude survey participants in each case;
 3. A list of the coding options used and raw data received back from the survey participants in each case;
 4. Details as to how the survey answers were coded in each case or otherwise how the raw data was extrapolated to create the percentage results shown in the annual report;
 5. Whether reports by the organisation News-watch on the subject of the BBC's impartiality obligations played any part in the production of the conduct of the IPSOS MORI survey and the content of the BBC Annual Report and, if so, what?
 6. A copy of the original report and any interim reports by IPSOS MORI to the BBC; and
 7. How the BBC altered or changed the presentation of the results mentioned above.
 8. Please also provide copies of all complaints to the BBC about impartiality from 2015 to date and the BBC responses to the same.
6. The BBC replied on 25 June 2020, stating that the information requested, if held, would be held for the purposes of journalism, art or literature and was excluded from FOIA.
 7. Mr Keighley referred the matter to the Commissioner on 11 December 2020.
 8. During the course of the Commissioner's investigation the BBC indicated in a letter dated 19 July 2021 that the information requested in parts 2, 3 & 4 was publicly available and provided a link. It stated that the information requested in parts 5 and 6 was not held.
 9. It maintained that the information requested in parts 1, 7 and 8 was held for the purposes of journalism. It stated that the information 'related to how the BBC analyses adherence to the BBC's editorial standards and seeks to understand audience perceptions of its commitment to high editorial standards, in particular by reference to impartiality standards. This is clearly a function of the third limb of the Sugar definition of 'journalism'; to maintain and enhance standards of output.'

Decision Notice

10. In a decision notice dated 2 August 2021 the Commissioner decided that any information held by the BBC within the scope of parts 1 and 8 of the request would be held for the purposes of journalism, art or literature and would fall outside the scope of FOIA.

11. In relation to the scope of the case, the Commissioner considered, for the same reasons given below, that even if the BBC did hold information within the scope of parts 5 and 6 it would be covered by the derogation. In relation to part 7 she considered that because the raw data from Ipsos Mori and the BBC's annual report were in the public domain Mr. Keighley affectively had an answer to part 7 and the Commissioner did not consider it further.
12. The Commissioner stated that for the information do fall outside FOIA 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 the BBC's journalistic or creative activities involved in producing such an output.
13. In relation to part 8, the Commissioner has repeatedly ruled that information relating to complaints about the BBC's output is information relating to the maintenance of editorial standards. There is a clear and direct link between the complaints the BBC receives, its editorial process or review based on those complaints and its subsequent output. The information falls squarely within the third element of journalism because it relates to the maintenance of editorial standards.
14. In relation to part 1 of the request, the Commissioner accepts that whilst some of the information may be held for other purposes, it is also held for journalism. A survey asking people whether they consider output impartial is done because the BBC wishes to measure the quality of its output. Presumably if the percentages of people who considered the BBC delivered impartial news had been low, the BBC would wish to take action to improve the quality of its output.
15. The Commissioner accepted that the BBC's audience research and the correspondence that proceeded it is information the BBC held for the purpose of monitoring and influencing its output and was covered by the third limb of the journalism exception.

Grounds of Appeal

16. The Grounds of Appeal are set out in a witness statement. In essence Mr. Hunter argues as follows:

Ground 1 – the ICO erred in law in its application of the tests for ambit of the 'journalism' derogation and incorrectly applied the test described in Sugar v BBC [2009] UKHL9 (Sugar)

17. Under the terms of the BBC Charter and Communications Act 2003 the BBC has an obligation of 'due impartiality' in providing its content. The request clearly related to the machinery and methodology used by the BBC in ensuring compliance with the Charter.

18. It is submitted that the exclusion does not apply to information relating to constitutional, governance or compliance issues such as those contained in its editorial guidelines and complaints about impartiality as opposed to matters of journalistic content.
19. The Commissioner failed to consider the issue of disclosure in the 'narrow way' envisaged by Lord Neuberger in the Court of Appeal in Sugar. The request concerned the contents of the BBC's annual report.
20. The broad interpretation applied by the Commissioner would make the BBC largely exempt from the provisions of FOIA in relation to this type of material which cannot have been the intention of the legislature. It is contrary to the legislation, guidance in Sugar and the public interest.
21. The documents requested in part 1 are principally commercial and cannot reasonably fit withing the journalism exception. There is no evidence that the documents in part 7 and 8 were likely to be held for the purposes of informing editorial judgments and training new journalists.
22. The Commissioner adopted an impermissibly expansive approach to the journalism exception.
23. The Commissioner did not consider whether the information was currently held for journalistic purposes.

Ground 2 – the ICO fettered its discretion by pre-determining its response dated 2 August by not giving proper consideration to the additional submissions provided by the Appellant dated 28 July 2021

The Commissioner's response

Purpose

24. The Commissioner submits that the information within parts 1 and 8 falls under the third element of journalism namely the maintenance of standards and quality.
25. The Supreme Court explained that "journalism" primarily means the BBC's "output on news and current affairs", and that "journalism, art or literature" covers the whole of the BBC's output to the public. The Supreme Court indicated that there should be a sufficiently direct link between the purpose for which the information is held and the production of the BBC's output and/or the BBC's journalistic or creative activities involved in producing such output.

Whether there is such a link on the facts of this case is the issue before the Tribunal.

26. The Commissioner submits that the DN is in accordance with the two-part test as per the majority judgments in *Sugar (No 2)* namely: is the information held in some (more than minimal) respect for the purposes of the BBC's output? If so, is there a 'sufficiently direct link' between its holding and that output?
27. The Commissioner refutes the Appellant's argument that the instructions concerning the Ipsos Mori survey and any underlying contracts (relevant to request 1) is principally commercial. The information is held by the BBC's Audience Research Team and the Ipsos Mori survey is used by the BBC to better understand audience perception of BBC programming with a view to improving the quality and diversity of output.
28. The Commissioner acknowledges that some of the information relevant to part 1 of the request such as survey costs and the BBC's terms of engagement with Ipsos Mori is commercial in nature. The BBC explained that the Ipsos Mori survey is funded from editorial budgets and that editorial teams determine such costs alongside decisions on programming costs. The Commissioner accepts that such budgetary decisions have a direct impact on the BBC's creative output since money spent on the Ipsos Mori survey means less is available for other areas or programmes.
29. In para 36 the Commissioner states that the DN 'did determine whether the derogation applied'. The tribunal assumes from the references to para 7(iv) of the Response and 11 of the Decision Notice that this is a typographical error because those paragraphs make clear that the DN *did not* determine whether the derogation applied to part 7.
30. In relation to part 8, the majority in *Sugar (No 2)* rejected the predominant purpose test. The Commissioner maintains that the information relevant to part 8 of the request is associated with the BBC's output, because the BBC will use information generated by the complaints it receives to make editorial decisions about its journalistic output such as programmes concerning the impartiality issues raised in the complaints.
31. The appeal does not concern information far removed from the BBC's output such as the cost of cleaning the BBC's boardroom. It concerns information relating to complaints of impartiality since 2015 about the BBC's output. The requested complaints and the BBC's responses to them will have remained of significant editorial value to the BBC at the time of the request (June 2020) and will have been used to review the BBC's output.
32. To the extent that the BBC continue to cover the subject of the complaints the BBC will be required to retain the requested information to e.g. ensure balance

to its programmes and in order to address specific aspects of e.g. future complaints concerning impartiality.

Direct link

33. Having established the purposes for which the requested information is held, consideration should then be given to whether there is a sufficiently direct link between at least one of those purposes and the production of the BBC's output to the public and/or the journalistic or creative activities that underpin such production.
34. If it were the case that the requested information in this case was simply kept by the BBC only for archival purposes in case it may be useful in future but for no other present discernible reason or "current purpose", the information would not fall within the definition.
35. Given the BBC's remit and the fact that OFCOM regulates its independence, it is difficult to see how complaints of impartiality from 2015 until 17 June 2020 and the BBC's responses to them, would not continue to be relevant to assist the BBC in responding to current complaints and for the BBC's editorial team to review and refine BBC output at the time of the Appellants request. This would help to ensure that BBC content meets the requisite standards. Accordingly, the Commissioner considers that a sufficiently direct link exists between the purposes for which the information is held and the BBC's output.
36. It is refuted that the interpretation applied by the Commissioner is contrary to the legislation, guidance in Sugar and the public interest. There is powerful public interest against the BBC's general subjection to freedom of information.
37. The ground that the Commissioner fettered her discretion by predetermining the Decision Notice is not a valid ground for appeal.

Appellant's reply

38. The Appellant confined his reply to the question of whether or not the tribunal had jurisdiction to consider ground 2. Given that the tribunal exercises a full merits appeal there is no need for us to consider this ground and we do not set out the arguments on this point.

Oral submissions and skeleton argument by Mr. Keighley's representative

39. The request is for information relating to statistics from an IPSOS MORI survey ('the Survey') set out on p 19 of the BBC Group Annual Report and Accounts 2018/2019. Under the terms of the BBC Charter and Communications Act 2003 the BBC has an obligation to comply with an obligation of "due impartiality" in

providing its content. The purpose of publishing the report is so that compliance with the Charter obligations can be assessed. The request relates to the machinery or methodology used by the BBC in ensuring its compliance with the Charter. The purpose of the annual report is not to maintain and enhance their output, but to report on compliance with the Charter.

40. The impartiality survey in the Annual Report is not a mechanism of itself for “the maintenance and enhancement of the standards of the output by reviews of its quality, in terms in particular of accuracy, balance and completeness, and the supervision and training of journalists”. It is instead a device to allow the BBC to provide an overview of its activities for public consumption. Given the charter obligations imposed on the BBC it is consistent that such a report should be produced, but that report, of itself is not for the maintenance and enhancement of standards, it is more broadly a report on activities in that reporting period.
41. The information sought in part 1 is not journalistic in content. The documents are akin to routine financial documents. There is no logical reason why a contract with IPSOS MORI should fall within the exemption.
42. In terms of the BBC’s submission that the costs of the survey should be considered journalistic in nature because they derive from editorial budgets that are determined by editorial teams: this is too tenuous. It comes very close to what Lord Neuberger said in para 55, agreed with by Lord Walker at para 84 of **Sugar**:

In my view, whatever meaning is given to journalism I would not be sympathetic to the notion that information about, for instance, advertising revenue, property ownership or outgoings, financial debt, and the like would normally be held for purposes . . . of journalism. No doubt there can be said to be a link between such information and journalism: the more that is spent on wages, rent or interest payments, the less there is for programmes. However, on that basis, literally every piece of information held by the BBC could be said to be held for the purposes of journalism.

43. The BBC and the Commissioner have interpreted the scope of the exemption too broadly to cover more information than should be covered on an ordinary reading of the statute. The BBC and the Commissioner were wrong to conclude that the Supreme Court in **Sugar** gave a wide meaning to ‘the purposes of journalism’. Lord Walker, at para 84 of **Sugar** agreed with Lord Neuberger’s comments, at para 55 that:

The question whether information is held for the purposes of journalism should thus be considered in a relatively narrow rather than a relatively wide way.

44. Applying the exemption to all editorial complaints that are not published is too broad an application, contrary to the ‘relatively narrow’ application of the exemption adumbrated in **Sugar**.

45. Even if the information had originally been held for reasons of journalism it had ceased to be so held by the date of the request in June 2020. This is particularly so in relation to the complaints from 2015 onwards which are unlikely to have any current impact.
46. The case of Sugar can be distinguished because the information sought was different, and the core issue in Sugar was different: whether a document partly held for the purposes of journalism, even though predominantly held for another purpose, would be covered by the journalism exemption.
47. The tripartite description of journalism set out in Lord Wilson's speech is a summary account of the reasoning of the first-instance tribunal. It is not a statutory provision.
48. The Commissioner did not address part 7 and should have done.
49. In relation to the fettering of the Commissioner's discretion, given that this is a de novo hearing, Mr. Murray accepted that there was no demerit to Mr. Keighley in the Commissioner having fettered her discretion because the tribunal has heard the matter afresh.

Legal Framework

50. Section 7(1) of the Act provides:

Where a public authority is listed in Schedule 1 only in relation to information of a specified description, nothing in Parts 1 to V of this Act applies to any other information held by the authority

51. Schedule 1 of FOIA lists the public authorities to which it applies. A small number are listed in respect of only certain information, including the BBC, which is listed as:

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

52. 'Information held for purposes other than those of journalism, art or literature' ('the *definition*') will be subject to FOIA. Information that does not fall within the *definition* will not be subject to FOIA. We have adopted the Supreme Court's approach of referring to this as 'the *definition*'.
53. The Supreme Court in **BBC v Sugar (No. 2)** [2012] UKSC 4 ('Sugar') concluded that if information is held partly for the purpose of journalism and partly for other purposes it does not fall within the *definition* and it is not necessary to ask which purpose is predominant.

54. The Supreme Court held that the question of whether information was held for the purposes of journalism should be considered in a 'relatively narrow rather than a relatively wide way', by having some regard to the directness of the purpose and considering the proximity between the subject-matter of the request and the BBC's journalistic activities and end product. It gave the example of the cost of cleaning the boardroom being only remotely linked to the product of the BBC (see Lord Walker at para 83).
55. Lord Phillips agreed with Lord Mance that the tribunal should have regard to the directness of the purpose of holding the information and the BBC's journalistic activities: 'Information should only be found to be held for the purposes of journalism, art or literature if an immediate object of holding the information is to use it for one of those purposes.' (para 67).
56. The Supreme Court also considered the position in relation to 'archived material'. This was assumed by Lord Mance at para 112 to be a reference to 'material not envisaged as having any current purpose, but stored for historical purposes or against the possibility of some unforeseen need to revisit, or produce evidence of, past events.'
57. Lord Phillips considered that archived material ought not fall within the protection afforded by the *definition* because disclosure of material held only in the archives will not be likely to interfere with or inhibit the BBC's broadcasting functions. He held that the protection is aimed at 'work in progress' and 'BBC's broadcasting output'. This could be achieved by having regard to the directness of purpose in the way set out above.
58. The information tribunal in Sugar identified three types of activity within the word 'journalism'. As Lord Wilson noted in the Supreme Court in Sugar, the criticism of the tribunal's decision in that appeal was not directed at that analysis. Lord Neuberger in the Court of Appeal in Sugar said:

It seems to me that the word should be given its natural meaning, and, in that connection, the Tribunal's analysis in that part of its decision which is quoted in paragraph 30 above is not one which I could improve on, at least in the present context.

59. Lord Wilson stated, at para 42:

Apart from pointing out that its tripartite classification does not readily encompass the actual exercise of broadcasting or publishing the material, the BBC does not quarrel with the tribunal's analysis of what falls within and without the concept of journalism for the purposes of the Act. In my view, and subject to that point, this court should endorse the tribunal's analysis but should decline the BBC's invitation to clothe it with greater specificity.

60. We note that the approval by Lord Wilson of the tribunal's definition of journalism is not part of the ratio of the Supreme Court judgment, and his reasons were not adopted by the other Lords (whist reaching the same conclusion he decided the appeal on a different basis to the other Lords). We

also bear in mind that this should not be elevated to the status of a statutory definition. However, it is a useful guide to what might be considered to be 'journalism' and, in our view, is an appropriate definition to adopt in this appeal, given its approval by Lord Wilson and Lord Neuberger.

61. The information tribunal's definition of journalism in Sugar, with the addition by Lord Wilson of the actual exercise of broadcasting or publishing material, is set out at para 107-109 of its judgment:

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 colleagues, professional supervision and guidance, and reviews of the standards and quality of particular areas of programme making.

Issues

62. Does the information that was held fall outside the *definition* in Schedule 1, i.e. was the information held at the relevant time for the purposes of journalism?

Discussion and conclusions

Ground 2

63. The tribunal's remit is governed by s.58 FOIA. This requires the tribunal to consider whether the decision made by the Commissioner is 'in accordance with the law, or to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently'. As the Upper Tribunal noted in IC v Malnick and ICOBA [2018] AACR 29:

90. ... Although the statutory language is less than helpful, this formulation embraces all errors, and is not limited to the traditional taxonomy of errors of law. As is clear from section 58(2) and *Birkett* (see paragraph 45 above), the F-tT exercises a full merits appellate jurisdiction and so stands in the shoes of the Commissioner and decides which (if any) exemptions apply. If it disagrees with the Commissioner's decision, the Commissioner's decision was "not in accordance with the law" even though it was not vitiated by public law error.

...

94. ...the appellate machinery in FOIA is not concerned solely with public law error. As already noted, *Birkett* makes clear that on a proper reading section 58 is concerned with any

error of law or fact or even a difference in view. It follows the F-tT may allow an appeal because it makes a different assessment to that of the Commissioner even though the Commissioner has not made any error of law in the public law sense... under the FOIA regime it is simply unnecessary to raise any considerations of *ultra vires*. If the F-tT decides that the Commissioner's decision was made in error of law but agrees with the decision, then it will dismiss the appeal. If the F-tT decides that the Commissioner's decision was not made in error of law but disagrees with it, then the appeal will be allowed and a different decision notice will be substituted. The legal validity of the F-tT's decision (which itself is subject to appeal for error of law to the UT) satisfies the rule of law.

...

102. ...The decision in *Birkett* means that there is no limitation on the issues which the F-tT can address on appeal, and the focus of its task is the duty of the public authority. This means that the tribunal must consider everything necessary to answer the core question whether the authority has complied with the law.

64. The Tribunal may receive evidence that was not before the Commissioner and may make different findings of fact from the Commissioner. The tribunal has a full merits appellate jurisdiction.
65. In those circumstances we do not intend to decide whether or not the Commissioner unlawfully fettered her discretion. As the Upper Tribunal states in **Malnick**, if we decided that the decision was made in error of law but agreed with the decision we would, in any event, dismiss the appeal.

Ground 1

66. In summary, the Appellant's argument is that the Commissioner was wrong to conclude that the information fell outside the *definition*.
67. As a preliminary point, we consider that the appropriate time to consider whether information was held for the purposes of journalism should be consistent with the time for assessing whether information was held, or the time for assessing the public interest. There was no internal review in this case, but given that the BBC effectively issued a new substantive response in July 2021, we find that July 2021 is the appropriate time to determine the purpose for which the information was held.
68. At the start of his request Mr. Keighley sets the context. He refers to 'page 19 of the BBC Group Annual Report and Accounts 2018/2019 giving the results for several survey questions showing that 52% of people asked think that the BBC provides impartial news and that 44% turn to the BBC if they want impartial news. The source for both is given as IPSOS MORI'.
69. Having set the context, he asks for 'information and all relevant documents relating to the following for both the 52% and 44% results'.

Part 1 and part 7 of the request

70. Part 1 of the request specifies the following documents: 'A copy of and details of the brief and instructions that were given to IPSOS MORI or any relevant meeting notes when they were commissioned to carry out the survey that led to the above two results and any underlying contracts.'
71. Specifically he is asking for:
- The brief
 - The instructions
 - Any relevant meeting notes
 - Any underlying contracts
72. The BBC argues that these were all held for the purposes of journalism.
73. Part 7 of the request, read with the introduction, is for all relevant documents relating to how the BBC altered or changed the presentation of the 52% and 44% results. The Commissioner took the view that she did not need to address this part of the request because Mr. Keighley had access to the original results and the BBC's presentation of those results. Given that the BBC confirmed that it held information within scope of part 7, and did not suggest that such information was in the public domain, we disagree. In our view, we must determine whether such information as was held by the BBC fell within the *definition*.
74. We consider parts 1 and 7 together.
75. In July 2021, the information was held by the Audience Research team in BBC Strategy. This team was responsible for commissioning the annual survey of the UK public 'on their perception of BBC standards (including, but not limited to, impartiality) in BBC output'. The team is more broadly responsible for facilitating ways that the BBC can better understand its audience.
76. The BBC explains that the Ipsos Mori survey is one of many ways that the BBC seeks to better understand audience perception of BBC programming with a view to improving the quality and diversity of output. The survey results are analysed by the BBC News Board, BBC Board and Executive Committee. The survey also feeds into annual performance reviews of BBC output to understand how the BBC is meeting its public service mission under its Royal Charter to 'inform, entertain and educate audiences'.
77. In addition, the BBC states that the results are used by Editorial Standards and Policy in training sessions to explain how perceptions of impartiality relate to the BBC's editorial landscape as a way of reinforcing how audiences will regard BBC coverage. This can directly impact on how content is 'signposted' in a programme.

78. The BBC further states that information about the underlying scoping of the survey and the terms provided to Ipsos Mori would disclose internal considerations about how the BBC perceives of its content and how it seeks to engage audiences. The survey costs derive from editorial budgets determined by editorial teams alongside other budgetary decisions like programming costs, more money spent on one area means less available for another.
79. The Appellant argues that the survey is a device to allow the BBC to provide an overview of its activities for public consumption in a reporting period.
80. We accept that is one of the purposes of the survey. In our view impartiality is a fundamental aspect of the BBC's journalism output. We find that presenting the figures on impartiality to the public in an annual report is intrinsically and directly linked to its journalistic output.
81. Further, we accept that the survey results are also used by the BBC to 'better understand audience perception of BBC programming with a view to improving the quality and diversity of output'. They are also used in training sessions to 'explain how perceptions of impartiality relate to the BBC's editorial landscape' and can directly impact on content.
82. In our view, this falls squarely within 'journalism'. It concerns the maintenance and enhancement of the standards and quality of journalism (particularly with respect to balance). It can directly impact on the output of the BBC.
83. On this basis, we conclude that all the peripheral information which was created in order to produce that survey (the underlying contracts, the brief, instructions, any related meeting notes) was held, at least in part, for the purposes of journalism.
84. As stated above, in our view, the presentation of these figures on impartiality in an annual report is intrinsically and directly linked to the BBC's journalistic output. Therefore the any information which related to how the presentation of the results was changed was held, at least in part, for the purposes of journalism.
85. The Appellant submits that the documents caught by part 1 are 'of their nature not journalistic in content but more akin to routine financial documents' so that they fall within the *definition* relying on Lord Neuberger at para 55 of the Court of Appeal judgement in *Sugar v BCC* [2010] EWCA 715. Lord Neuberger states:

In my view, whatever meaning is given to "journalism" I would not be sympathetic to the notion that information about, for instance, advertising revenue, property ownership or outgoings, financial debt, and the like would normally be "held for purposes ... of journalism". No doubt there can be said to be a link between such information and journalism: the more that is spent on wages, rent or interest payments, the less there is for

programmes. However, on that basis, literally every piece of information held by the BBC could be said to be held for the purposes of journalism. In my view, save on particular facts, such information, although it may well affect journalism-related issues and decisions, would not normally be "held for purposes ... of journalism". The question whether information is held for the purposes of journalism should thus be considered in a relatively narrow, rather than a relatively wide, way.

86. In the tribunal's view the requested information, including, for example, the terms upon which the survey was to be produced and the brief is not akin to information about advertising revenue, property ownership or outgoings or financial debt. All of those are only very remotely linked to the BBC's output.
87. The requested information in this case is much more closely linked to the BBC's output because it was directly used to commission a survey to be used to influence content and it includes 'internal considerations about how the BBC perceives of its content and how it seeks to engage audiences'. Looking at the directness of the purpose, we find that the requested information is sufficiently proximate to the BBC's journalistic purposes and the end product. It was an immediate object of holding the information to use it for one of those purposes.
88. We accept that the BBC's specific argument about the budget used to fund the survey is not too many steps removed from Lord Neuberger's observations about the link between the information he described and journalism: 'the more that is spent... the less there is for programmes'.
89. However, the BBC's argument is more focussed: it is not simply an argument that financial information on spending unrelated to journalism is held for the purposes of journalism because the spending reduces the overall pot available to the BBC as a whole. It is specific to the editorial budget. In our view this supports the BBC's assertion that the information is held for the purposes of journalism. Further this is not simply a request for the cost of the survey. The requested information consists of the contract, the brief etc. which were, as we have stated above, directly used to commission a survey for, at least in part for the purposes of journalism, and in itself contained the internal considerations referred to above.
90. We have considered whether, at the time of the request, the information in parts 1 and 7 was still held for those purposes. We have concluded that the information was still, in July 2021, held for the purposes for which it had originally been held. The reason BBC holds it remains as it was in 2019. There is no evidence that the requested information has been 'archived' in any sense of that word.

91. We accept that there is no binding authority to the effect that information held for editorial complaints falls outside the scope of FOIA.
92. The information requested in part 8 of the request is 'copies of all complaints to the BBC about impartiality from 2015 to date and the BBC responses to the same.'
93. This information is held by Audience Services who administer BBC complaints and the Executive Complaints Unit who handle appeals.
94. In support of its submission that these complaints were held for the purposes of journalism the BBC has referred the tribunal to a number of previous decision notices concerning complaints.
95. It is apparent from the information submitted to the Commissioner in this and in other investigations that the consideration of complaints by the BBC is an important tool used by the BBC to monitor, maintain and enhance its journalistic output and to ensure the impartiality of that output.
96. The BBC has explained in the course of previous investigations that information relating to editorial complaints is held for editorial purposes to influence editorial direction and inform future content. It plays a significant role in improving the quality of journalistic output.
97. In our view, it is clear that BBC uses previous complaints to inform content. In the particular context of bias, this use will undoubtedly include the use of previous complaints to monitor, maintain and enhance its journalistic output and to ensure the impartiality of that output.
98. In our view, given the use to which the BBC puts previous complaints, they are clearly held for the purposes of journalism. Their use is directly linked to the BBC's journalistic output.
99. Mr. Murray has asked us to infer that at least some of the complaints in the requested period will no longer have been held for the requisite purposes at the relevant date. There is no evidence before us that complaints are no longer envisaged as having any current purpose, but stored for historical purposes, after a certain date. There is no evidence before us on which we could base a finding that complaints before a certain date were no longer referred to and therefore could not be seen as work in progress. The BBC stated in July 2021 that the requested information was held by the Audience Services who administer BBC complaints and the Executive Complaints Unit who handle appeals. This suggests to us that it was still in current use. On this basis we find that the information was still held, at the relevant time, for the purposes of journalism.

100. On the above grounds, we conclude that the Commissioner reached the correct decision, and we dismiss the appeal.

Signed Sophie Buckley

Judge of the First-tier Tribunal

Date: 7 February 2022

Promulgated 16 February 2022