

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

**Appeal Reference: EA/2017/0177**

**Before**

**Judge**

**David Farrer Q.C.**

**Tribunal Members**

**Paul Taylor**

**and**

**Stephen Shaw**

**Between**

**Peter Blades**

**Appellant**

**and**

**The Information Commissioner ("The ICO")**

**First Respondent**

**and**

**The British Broadcasting Corporation**

**Second Respondent**

**The appeal was determined on written submissions.**

### **Decision and Reasons**

The Tribunal finds that, at the material time, the BBC held the requested information for the purposes of "journalism, art or literature" so that, as regards that request, it was not a public authority, as defined in s. 3(1)(a)(i) of, and Schedule 1 to the Freedom of Information Act, 2000 ("FOIA") and therefore not subject to the provisions of FOIA. The appeal is therefore dismissed.

1. Sandra ("Sandi") Toksvig is a popular and versatile presenter and panel member on radio and television quiz shows and other programmes broadcast by the BBC. In May 2015 she founded the Women's Equality Party and was actively involved in its campaign for the 2017 general election.
2. During the period to which this appeal relates (see §3) Ms. Toksvig took part in three series of programmes -
  - (i) As host of "News Quiz" on Radio 4, though she stood down from this engagement in 2015.
  - (ii) As a guest on "I'm sorry I haven't a clue" on Radio 4.
  - (iii) As guest host of "Q1" on BBC Two. The BBC states that this programme was produced by an independent production company, which holds the requested information. Whether or not that is so has no bearing, however, on the question whether the requested information in respect of it is information about journalism.

3. On 22nd. May, 2017, having made various introductory statements about Ms. Toksvig's political activities, her appearances in BBC programmes and the BBC's duty of political neutrality, Mr. Blades made the following requests -

*"1 Please provide the total amount of money (including all expenses) the BBC has paid in return for services rendered by Sandi Toksvig from 08/05/15 to .17/04/2017 inclusive.*

*2 Please also provide the total amount of money (including expenses and anticipated payments) the BBC has paid in return for services rendered by Sandi Toksvig from 18/04/2017 to 08/06/2017 inclusive. In the event that this figure is calculated before 08/06/2017, please include all anticipated payments (e.g., regular royalties) due to be made within the same date range.*

*Please note that this request is not limited to money paid directly to Sandi Toksvig as a salary. It includes all payments made by the BBC in return for services rendered by Toksvig (for example, payments made to production companies owned or controlled by Toksvig)".*

- 4 Request 1 seems to cover the period from the formation of the party to the calling of the election and request 2 for the ensuing period ending on the day of the poll.
5. The BBC replied, saying that the requested material was not caught by FOIA because it was held for the purposes of "journalism, art or literature". Following a complaint to the ICO, she upheld the BBC's claim in her Decision Notice, citing passages from the leading judgment of Lord Neuberger MR in the Court of Appeal in *Sugar v British Broadcasting Corporation and Another* [2010] EWCA Civ 715 and the judgments in the ensuing appeal to the Supreme Court ([2012] UKSC 4). Her findings require no summary because the Tribunal accepts that her view of the relevant law was correct.
6. Mr. Blades appealed to the Tribunal.

7. His case was concisely and skilfully presented in the grounds of appeal and subsequent written submissions. In substance, he submits -

(i) that the information he seeks is not journalism, still less art or literature. He points out that *Sugar* includes warnings, both in the Court of Appeal and the Supreme Court, against a broad interpretation of “journalism”;

(ii) that, if the information was initially journalism, it was no longer journalism at the date of his request because the relevant programmes had been broadcast;

(iii) that the preparation and broadcasting of quiz shows would not be described as journalism in ordinary english usage;

(iv) that the BBC contradicts its own case by disclosing financial information relating to broadcasters more evidently relevant to journalism than that which he requested;

(v) that there is a clear public interest in disclosure of such information, given the link to party politics.

#### The reasons for our decision

8. Section 3(1) of FOIA provides that a “public authority” is any body listed in Schedule 1 to FOIA. Section 7 provides -

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

As to the BBC, Schedule 1 Part 6 reads -

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

So, if the requested information falls within any of those three categories, FOIA does not apply to the BBC, in respect of a request for such information. The exception applied to the BBC by Schedule 1 is referred to as “the derogation” in this decision.

9. The preparation for, and broadcasting of quiz shows are not activities which obviously amount to “journalism” as that term is generally understood. However, the Court of Appeal and the Supreme Court provided guidance in *Sugar v BBC* as to what amounts to journalism, to which we refer below.
10. The national media, whether newspapers, TV or radio, provide a wide range of news, sport, the creative arts and other forms of entertainment in a highly competitive market. The rationale underlying the derogation is evidently the protection of the BBC from commercial disadvantage through disclosure of sensitive information as to its creative output, to which its competitors are not subject. This is the “powerful public interest” identified by Lord Walker in *Sugar* at §78. That output includes quiz shows and similar entertainment. It is hard to see why, in respect of quiz shows, Parliament should deny the BBC the protection afforded to it in respect of news programmes, drama or concerts. On the other hand, it would have been easy to define the derogation in such terms as “ other than (the purposes) of its broadcast or published output”, if it was intended to apply to everything that it produced.
11. The Supreme Court was not required to define “journalism” in order to decide *Sugar*. The disputed information was the Balen report, a study which the BBC had commissioned to examine the balance or imbalance of its coverage of issues in the Middle East. It was accepted on all sides that a purpose of holding the report was journalism. The issue for the Court’s determination was - where information is held by the BBC both for the purposes of journalism and for other purposes, does the derogation apply only if the dominant purpose is journalism? The Court ruled, by four to one, that it sufficed that journalism was a purpose for which the information was held.
12. The decision provides authoritative guidance on (i) what amounts to journalism and (ii) the relationship between the disputed information and the journalism necessary to invoke the derogation, which we treat as a separate, albeit closely related issue.

An unusual feature of the judgments in *Sugar* is that the lead judgment was given by the sole supporter of the “dominant purpose” test, Lord Wilson, though he agreed that the appeal should be dismissed because the dominant purpose for which the BBC held this financial information was journalism. None of the observations that he made regarding (i) or (ii), provoked disagreement from his colleagues.

13. The Administrative Court, the Court of Appeal and the Supreme Court were all content to accept as correct the tripartite definition of “journalism” proposed by the Tribunal at first instance. It was -

*“The first (element) is the collecting or gathering, writing and verifying of materials for publication.*

*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.*

*The third element is the maintenance and enhancement of the standards and quality of journalism (particularly with regard 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.”*

The second element appears to be the most relevant to this appeal.

13. This definition, understandably tailored to the facts in *Sugar*, may not give a decisive answer to the question : is there any element within the material broadcast or transmitted by the BBC, on radio or television, that does not fall within the three derogated classes of information? Lord Wilson suggested (*Sugar* §38) that the key to the meaning of the three classes “journalism, art or literature” lies in the word “output”, which, according to Article 5 of the BBC’s Royal Charter, “consists of information, education and entertainment” supplied by

*means of television, radio, online and similar services*". Lord Wilson noted that the ICO had stated to Mr. Sugar that he interpreted the derogation broadly so as to include all types of the BBC's output. He continued -

*"In this respect I discern no dissent from his view in any of the three subsequent decisions in these proceedings; and in my opinion he was right. 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 to be sterile. For any output which did not obviously qualify as journalism would be likely to qualify as literature or - in particular, in that its meaning has a striking elasticity - as art".*

An alternative view is that the "output" test involves a degree of elasticity in the interpretation of journalism, which is necessary to give effect to the plain purpose of the derogation.

14. Lord Walker (§§69 and 70) proceeded from the proposition that both the Schedule 1 derogation and the "special purposes" provision in s.3 of the Data Protection Act, 1998 were aimed at promoting freedom of expression, in accordance with Article 10 of the ECHR. He concluded that the composite expression "*journalism, art or literature*

*"- - - seems to be intended to cover the whole of the BBC's output in its mission (under article 5 of the Royal Charter ) to inform, educate and entertain the public".*

15. Lord Phillips (§65) adopted a similar purposive approach to the derogation so that the whole broadcasting function of the BBC is protected.

16. This Tribunal therefore treats "journalism" as covering the whole output of the BBC, whether broadcast or published, in whatever form or medium.

17. This appeal relates to financial information. Such information is inevitably held, at least partly, for accounting purposes. On the other hand, it could be argued that all BBC expenditure is for the purposes of journalism, art or literature because those are the sum of the

BBC's mission. The Court of Appeal (Lord Neuberger MR) and the Supreme Court gave clear answers to the question where, in the context of financial information, the line was to be drawn.

18. Lord Wilson observed (§42) -

*“ 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”.*

19. Lord Walker (§83) had regard to *“the directness of the purpose . . . . the proximity between the subject - matter of the request and the BBC's journalistic activities and end - product”*. He quoted an example given by Irwin J., in a related case, of *“the cost of cleaning the BBC Boardroom”* being *“only remotely linked to the product of the BBC”*. He then (§84) endorsed the observations of Lord Neuberger (C.A. §55) -

*“ - - 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. . . .  
. . . whether information is held for the purposes of journalism should thus be considered in a relatively narrow rather than a relatively wide way”.*

20. Lord Phillips (§67) , dealing more generally with the issue of broad or narrow interpretation ,stated -

*“Information should only be found to be held for purposes of journalism, art or literature if an immediate object of holding the information is to use it for one of those purposes.”*

21. The Supreme Court, in adopting the “output” interpretation of the three terms in the derogation, applied by implication, quite a broad meaning to “journalism”. It is to the issue of proximity of financial information to BBC output rather than the general ambit of “journalism” that the guidance as to a narrow interpretation is directed. It does not assist Mr. Blades in his construction of “journalism” as excluding quiz shows in the context of Schedule



1 to FOIA. The financial information that he requested is specific to the programmes in which Sandi Toksvig appeared.

22. The request was made within the period covered by the request. In our judgment, it cannot be said that, with reference to the second part of the approved definition of journalism, the financial information requested was not then still held for the purposes of analysis and review. Presumably, such information continues to be significant to BBC output even for some time after a series has ended, since costings and audience size may guide future decisions as to scheduling.

23. The fact that the BBC, whether voluntarily or, as it says is the case here, in compliance with the updated conditions of its Charter, discloses the approximate level of remuneration of senior employees, has no bearing on its reliance on the derogation.

24. The balance of public interests in disclosing or withholding this information from the public is not an issue which arises in the context of applying the derogation.

25. Mr. Blades' concerns and his request were reasonable and fairly and reasonably advanced, to the ICO and to the Tribunal. He has raised a clear issue of law, however, on which, guided by the Supreme Court, we are bound to find against him.

26. We therefore dismiss his appeal.

27. This is a unanimous decision.

Signed

David Farrer QC,

Judge of the First-tier Tribunal

Date: 24th. January, 2018

Promulgated date: 12 February 2018