



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

**Appeal Reference: EA/2022/0175
Neutral Citation number: [2022] UKFTT 00460 (GRC)**

Decided following a 'remote' hearing by CVP held on 15 November 2022

Before

**JUDGE ANTHONY SNELSON
MS SUZANNE COSGRAVE
MS KATE GRIMLEY EVANS**

Between

MR ALISTAIR BONNINGTON

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

DECISION

On hearing the Appellant in person and reading the written representations on behalf of the Respondent, the Tribunal unanimously determines that:

- (1) The requests to which the appeal relates were for information which, if held, was held for the purposes of journalism and, by virtue of the Freedom of Information Act 2000 ('FOIA'), section 7(1), the British Broadcasting Corporation ('BBC') was not obliged to comply with them.
- (2) Accordingly, the appeal is dismissed.

REASONS

Introduction

1. The Appellant, Mr Alastair Bonnington, is a lawyer by background and was for some years employed by BBC Scotland in a senior role. On 30 March 2022 he sent an email to himself, the material parts of which read as follows.

During the months January to March 2022 (inclusive) -

1) How many contacts by email or other electronic message sending system, phone call, letter or other method of communication were made by the following to BBC Scotland News on the subject of BBC Scotland's News output:

a) the SNP

b) ministers of the Scottish Government or civil servants of the Scottish Government

c) Special Advisors (SPADs) on behalf of the Scottish Government.

The information sought must include contacts by agents or any other intermediaries acting on behalf of the said groups mentioned in (a), (b) and (c)?

2) Further, what percentage of these contacts (1) urged a change in the BBC Scotland's existing news output or (2) urged that certain information being supplied to the BBC in the contact should become a news story which BBC Scotland included in its output?

His case, which is not challenged, is that he sent a printed version of the email by post to BBC Scotland on or around that date.

2. Having received no reply, Mr Bonnington forwarded the email to BBC's Information Rights Team in London, on 22 April.
3. On 26 April the BBC acknowledged the request of 22 April and stated that they had no record of having received the paper version said to have been submitted in March.
4. On 16 May the BBC delivered a substantive response to the request of 22 April, the material part of which stated as follows.

If held, the information you requested is held for the purposes of 'art, journalism or literature'. The [Freedom of Information] Act provides that the BBC is not obliged to disclose this type of information.

5. Mr Bonnington then complained to the Respondent ('the Commissioner'). An investigation followed.
6. By a Decision Notice dated 20 June 2022 the Commissioner determined that the BBC had been entitled to refuse Mr Bonnington's request, for the reason cited.
7. By his notice of appeal dated 30 June 2022 Mr Bonnington challenged the Commissioner's decision on a number of grounds.
8. In a response dated 17 August 2022 the Commissioner resisted the appeal, relying on and amplifying the grounds contained in the Decision Notice.

9. The appeal came before us on 15 November this year for hearing by CVP. Mr Bonnington represented himself. The Commissioner elected not to participate, preferring to rely on the Decision Notice and response. We had before us a refreshingly slender bundle of documents and Mr Bonnington's written submissions sent in shortly before the hearing. Having heard oral argument from Mr Bonnington, we reserved our decision.

The applicable law

10. FOIA, s1(1) enacts a general right of access to information held by public authorities. Parts I to V (ss1-61) set out the scope of the right, the numerous limitations and exemptions to which it is subject, and the machinery by which it is enforced.

11. 'Information' means information recorded in any form (s84).

12. FOIA, s7 includes:

(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.

13. The list of public authorities contained in Part VI of Schedule 1 to FOIA includes:

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

14. In *Sugar v BBC & another (No. 2)* [2012] UKSC 4, the Supreme Court considered the nature and scope of the s7(1) 'derogation' as it applies to the BBC. By a 4-1 majority (consisting of Lords Phillips, Walker, Brown and Mance), the Court held that, once it is established that the information sought is held by the BBC to *any* significant degree for the purposes of journalism it is exempt from production under FOIA, even if the information is also held for other purposes. In his judgment Lord Phillips observed:

64. We are concerned with a provision that provides protection against the disclosure obligations that are the object of the Act. What is the purpose of that protection? ... The protection is designed to prevent interference with the performance of the functions of the BBC in broadcasting journalism, art and literature. ...

65. A purposive construction of the *definition* will prevent disclosure of information when this would risk interference with the broadcasting function of the BBC. This will not depend upon the predominant purpose of holding the information. It will depend upon the likelihood that if the information is disclosed the broadcasting function will be affected. ...

66. Lord Neuberger of Abbotsbury MR at para 53 remarked that "today's journalism is tomorrow's archive" ... No doubt the BBC has recourse to its archives for journalistic purposes from time to time and, if "held for purposes of journalism" is given a broad meaning it could be said in relation to the BBC that one of the purposes of holding archived material is journalism, albeit a relatively remote purpose.

67. However, Lord Neuberger accepted that archived material would not, as such, fall within the protection afforded by the *definition*. I consider that he was right to do so. Disclosure of material that is held only in the archives will not be likely to interfere with or inhibit the BBC's broadcasting functions. It ought to be susceptible to disclosure under the Act. If possible "information held for purposes other than those of journalism, art or literature" should be given an interpretation that brings archived material within that phrase. Can this be achieved? I believe that Lord Walker has the answer. He has concluded, as have I, that the protection is aimed at "work in progress" and "BBC's broadcasting output". He suggests that the Tribunal should have regard to the directness of the purpose of holding the information and the BBC's journalistic activities. I agree. 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. If that test is satisfied the information will fall outside the *definition*, even if there is also some other purpose for holding the information and even if that is the predominant purpose. If it is not, the information will fall within the *definition* and be subject to disclosure in accordance with the provisions of Parts I to V of the Act.

15. In his judgment, Lord Walker, having acknowledged the important public interest in freedom of information, went on to make these remarks.

78. In this case, there is a powerful public interest pulling in the opposite direction. It is that public service broadcasters, no less than the commercial media, should be free to gather, edit and publish news and comment on current affairs without the inhibition of an obligation to make public disclosure of or about their work in progress. They should also be free of inhibition in monitoring and reviewing their output in order to maintain standards and rectify lapses. A measure of protection might have been available under some of the qualified exemptions in Part II of FOIA, in particular those in sections 36 (Prejudice to effective conduct of public affairs), 41 (Information provided in confidence) and 43 (Commercial interests). But Parliament evidently decided that the BBC's important right to freedom of expression warranted a more general and unqualified protection for information held for the purposes of the BBC's journalistic, artistic and literary output. That being the purpose of the immunity, section 7 and Schedule 1 Part VI, as they apply to the BBC, would have failed to achieve their purpose if the coexistence of other non-journalistic purposes resulted in the loss of immunity.

79. That is confirmed by the language of these statutory provisions. The disclosable material is defined in terms ("held for purposes other than those of journalism, art or literature") which are positive in form but negative in substance. The real emphasis is on what is not disclosable - that is material held for the purposes of the BBC's broadcasting output. It is the most natural construction, which does not depend on reading in any words. ... The unspoken premise is that Parliament must have intended to lay down a workable test, and both an "exclusively" and a "predominantly" test would raise almost insoluble problems in their practical application.

...

82. I would therefore dismiss this appeal ... I would add that I am conscious that this interpretation of the limitation may be seen as conferring on the BBC an immunity so wide as to make the particular statutory redemptions redundant, and leave the BBC almost free of obligations under FOIA. ...

83. In my view the correct approach is for the Tribunal, while eschewing the *predominance* of purpose as a test, to have some regard to the *directness* of the purpose. That is not a distinction without a difference. It is not weighing one purpose against another, but considering the proximity between the subject-matter of the request and the BBC's journalistic activities and end-product. ...

84. I respectfully agree with the measured comments of Lord Neuberger MR (para 55):

"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."

That is the best way forward in order to strike the difficult balance of competing interests for which Parliament must be taken to have been aiming. ...

16. Lord Brown commented as follows:

104. Really it comes to this. With regard both to the BBC (together with the three other listed broadcasters) and the Bank of England, Parliament, for differing but in each case compelling reasons of national interest, was concerned not to subject these institutions to the operation of the Act ... save only in strictly limited circumstances. In the case of the BBC and other broadcasters it is only in respect of "information held for purposes other than those of journalism, art or literature". 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. Quite simply, it remains information held for the purposes of journalism and therefore constitutes (within the meaning of section 7) "other information" than "information held for purposes other than those of journalism". The mere fact that it may be held (even perhaps to a predominant extent) also for purposes other than those of journalism cannot sensibly serve to enlarge the basic category of information in respect of which the BBC is listed and with regard to which, therefore, the Act is not disapplied by section 7.

105. In short, like Lord Walker, I find that the natural construction of the Act, and Parliament's evident concern to ensure that the interests of free expression trump without more those of freedom of information, supports the BBC's case on this issue.

106. As for the point at which information will cease to be held to any significant degree for the purposes of journalism and become held instead, say, solely for archival purposes, that necessarily will depend on the facts of any

particular case and involve a question of judgment. I too agree with Lord Walker that the central question to be asked in such a context will be, not which purpose is predominant, but rather whether there remains any sufficiently direct link between the BBC's continuing holding of the information and the achievement of its journalistic purposes.

17. In his judgment, Lord Mance stated:

111. In the present case, the special consideration to which the legislator gave effect was the freedom of the BBC as a public service broadcaster in relation to its journalistic, artistic and literary output. Information held for any such purposes of journalism, art or literature was absolutely exempt from disclosure. The legislator was not content with the more qualified protection from disclosure, often depending on a balancing exercise or evaluation, which would anyway have been available under section 2, read with sections 28, 29, 36, 41 and 43. To read into the words "information held for purposes other than those of journalism, art or literature" a need to evaluate whether such purposes were dominant seems to me unjustified. I share Lord Walker's view (para 79) that the real emphasis of the words is on what is *not* disclosable, so that the exemption applies, without more, if the information is held for any journalistic, artistic or literary purpose. ...

112. Lord Phillips discusses the position regarding archived material. We were not given any clear picture when or on what basis archiving might occur. I assume that the reference is 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. A library maintained for current reference would in contrast contain material held for the purposes of journalism, art or literature.

18. The appeal is brought pursuant to FOIA, s57. The Tribunal's powers in determining the appeal are delineated in s58 as follows:

- (1) 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.

Mr Bonnington's case

19. So far as now material¹, Mr Bonnington's submissions can be summarised in this way.

¹ As we explain in para 21 below, a part of his case as presented on paper was not pursued.

- (1) FOIA enacts a presumption in favour of freedom of information. It is for the Commissioner to show that the derogation applies, not the other way around.
- (2) The Commissioner wrongly conflated the two parts of the request.
- (3) The first part was simply a request for a number.
- (4) The Commissioner erred in ignoring the nature and quality of the information sought.
- (5) The information sought had not been “gathered” by the BBC (for journalistic or any other purposes). It had just been forced on it from outside sources.
- (6) The information sought could not have been seen as “newsworthy” at the time of the request and the BBC cannot have held it with a view to reporting it publicly.
- (7) The derogation should not be held to apply given that the BBC routinely publishes complaints about its services, including allegations of breaches of its duty of political impartiality.
- (8) The derogation is inapplicable because the BBC did not hold it with the *immediate* object of using it for journalistic purposes (*Sugar*, para 67 (Lord Phillips)); alternatively there was not the necessary *proximity* between the subject matter of the request and the BBC's journalistic activities and end product (*Sugar*, para 83 (Lord Walker)).

The Commissioner's case

20. So far as now material, the Commissioner submitted as follows.

- (1) The information sought by both parts of the request was held for the purposes of the BBC's news output and, as such, for journalistic purposes.
- (2) The derogation was applicable because there was a sufficiently close link between the information sought and the journalistic purposes.

Conclusions

21. In his written submission Mr Bonnington complained, as a preliminary matter, that the BBC had falsely accused him of being untruthful about the date on which he had first presented his request. We were shown no evidence of any such accusation. At all events, after brief debate before us he sensibly elected to leave that distraction to one side. We will say no more about it.
22. Turning to the substance of the appeal we are bound to say that we find it singularly devoid of merit. Indeed, it is not easy to imagine a plainer case. We can state our reasons in a brief series of propositions which broadly follow the scheme of his argument as we have summarised it.

23. First, the Commissioner has not ignored the structure of FOIA or constructed a presumption against freedom of information. The correct question has been addressed, namely whether the derogation is engaged, in accordance with the principles expounded by the majority of the Supreme Court in *Sugar*.
24. Second, the two parts of the request have not been conflated. The Commissioner did address the request compendiously, which was, in our view, appropriate, for reasons which immediately follow.
25. Third, Mr Bonnington is simply wrong to say that the first part of the request merely asks for a number. It asks for recorded information of or about communications received from the SNP and others in January to March 2022 “on the subject of BBC Scotland’s news output”. As the case-law demonstrates, requests under FOIA are to be read broadly and in a non-technical way. If the derogation did not apply, any such communications would be disclosable as would any internal BBC document generated solely for the purpose of logging them. In the circumstances, we see no arguable ground for differentiating between the first and second parts of the request and henceforth references to the “information” sought are to the totality of the information sought by the entire request.
26. Fourth and much more generally, it is plain and obvious that, if held, the information is held “for the purposes of journalism”. It is concerned with very recent inquiries, complaints or representations (if any) about BBC Scotland’s news output and/or attempts (if any) to influence the content of such output. In the course of argument we invited Mr Bonnington to suggest any non-journalistic purpose for which it might be held. After some hesitation, his reply was that it was held for no purpose whatever. With due respect to him, that answer makes no sense. If the information is held at all, it can only be held wholly, predominantly or at the *very* least to a material (more than *de minimis*) extent² for the purposes of reviewing and evaluating its news output and for similar and/or associated purposes related to editorial policy and practice. Those can only be characterised as journalistic purposes.
27. Fifth, there is no magic in the word “gather” used in *Sugar*. As Lord Walker pointed out (para 78), gathering news and comment is part of the stock-in-trade of public service broadcasters. But FOIA, s7(1), adopting the standard terminology of the freedom of information scheme, is concerned with information “held”. It is no doubt true that the BBC did not solicit any

² Mr Bonnington rightly accepted that, in light of *Sugar*, a submission that the information was held partly for non-journalistic purposes would not avail him. Also rightly, he did not contend that any journalistic purposes were *de minimis*. And, rightly again, he did not argue that this was an “archive” case. That would not have been a promising contention, since the request related to material (if any) generated in the period from January to March 2022, a period which ended less than a month before the April request. But Mr Bonnington did run a “directness” argument, which is addressed in our eighth point below.

communications within the scope of the request, but that has no bearing on the issue of the purposes for which the relevant information (if any) was held.

28. Sixth, it is equally irrelevant that the BBC would be unlikely to contemplate publishing any communications within the scope of the request. Mr Bonnington is mistaken in so far as he suggests that information held “for the purposes of journalism” is confined to material which the holder considers “newsworthy” or, perhaps, which the Tribunal objectively regards as “newsworthy”. Neither limitation is warranted by the statutory language and both would be wholly incompatible with the broad policy objective (identified in *Sugar*) of protecting the freedom of public service broadcasters to determine their own journalistic output without external interference.
29. Seventh, all the more obviously irrelevant is the fact that the BBC publishes complaints about its services. The apparent suggestion that a public body which engages publicly with service users’ complaints in order to improve its offering and serve the interests of accountability and transparency somehow thereby forfeits the protection offered by s7(1) and Schedule 1 is a spectacular *non sequitur* and lacks any legal foundation. The argument makes a vice of openness, not a policy goal underlying FOIA. It also misses the elementary point that we are concerned with identifying the purposes for which *the information to which the request relates* is held. Our answer to that question (which we have given in our fourth point above and will not repeat) is not affected by the fact that the BBC publishes some criticisms of its services.
30. Eighth, we see no force in Mr Bonnington’s submission that the Commissioner failed to engage with the “difficult and delicate” inquiry which was required in that there was no, or no proper, focus on the immediacy or proximity of the connection between the subject matter of the request and the journalistic purposes of the BBC (see para 19(8) above). As *Sugar* stresses (in particular at paras 79, 111), the statutory emphasis is on what is *not* disclosable, namely any information which is held *to any material extent* for the purposes of journalism. For the reasons already stated, we are unable to discern *any non-journalistic* purpose that the BBC might have for holding the requested information (if it holds any). As to “immediacy”, “proximity” or “directness”, we struggle to see what part these concepts can play in the current context. Here, if the information is held and we are right that the holding is, at the very least, *to a material extent* for the purposes of journalism, the necessary link is plainly shown. We have found (para 26) that any relevant information was held for the purposes of reviewing and evaluating news output and for similar and/or associated purposes related to editorial policy and practice. There is no parallel with the examples debated in *Sugar* where the link (say, between budgetary information and programme-making) was inherently tenuous or where, over time, an original purpose has diminished in significance (essentially, the “archive” case, which, as already noted, Mr Bonnington sensibly does not pursue). On any view, there remained at the time of the refusal of the request,

and no doubt still remains, a “sufficiently direct link between the BBC's continuing holding of the information and the achievement of its journalistic purposes” (*Sugar*, para 106 (Lord Brown)).

31. Ninth, we have stepped back to review the arguments in the round. Having regard to the purpose of the derogation as explained in *Sugar* (see para 28 above), we are entirely satisfied that the Commissioner arrived at the correct outcome and we can see no possible ground for reaching a different view.

Outcome

32. The appeal is dismissed.

(Signed) Anthony Snelson
Judge of the First-tier Tribunal

Dated: 8 December 2022

Promulgated on : 12 December 2022