



ON APPEAL FROM:

**The Information Commissioner's Decision Notice No:
FS50506230**

Dated: 22nd. October, 2013

Appeal No. EA/2013/0253

Appellant: ANDREW MILLER

**First Respondent: THE INFORMATION COMMISSIONER
("THE ICO")**

**Second Respondent: THE BRITISH BROADCASTING
CORPORATION ("THE BBC")**

**Before
David Farrer Q.C.
Judge
and
Dave Sivers
and
Anne Chafer
Tribunal Members**

Date of Decision: 21st. July, 2014

Representation : Peter Ellis appeared for the Appellant

**Kate Gallafent Q.C. and Jonathan Scherbel - Ball appeared for the
BBC.**

The ICO did not appear but made written submissions.

Subject matter:

Information held “for purposes other than those of journalism”. FOIA s.3(1)(a)(i) and Schedule 1

Reported Case: BBC and another v Sugar (No.2) [2010] EWCA Civ 715, [2010] 1 WLR 2278, [2012] UKSC 4, [2012] WLR 439.

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal dismisses the appeal.

Dated this 21st. day of July, 2014

David Farrer Q.C.

Judge

[Signed on original]

REASONS FOR DECISION

1. Since 1957 the BBC has broadcast “Test Match Special” (“TMS”) providing commentary on test matches and latterly one day internationals in England and elsewhere in the world. For a wide audience it has become a broadcasting institution through which several generations of cricket commentators and pundits have become nationally recognised personalities. “Test Match Special” has been a registered BBC trademark for many years.
2. TMS broadcasts live from the ground and seeks to communicate to the listener not only what is happening, but the sounds and atmosphere of the match in progress.
3. The BBC’s broadcasting rights in respect of all international cricket matches involving England derive from a contract with the England and Wales Cricket Board (“The ECB”), which was last renewed, for six years, in 2012.
4. Broadcast sport, whether on television or radio is a highly competitive business and decisions as to acquiring or renewing broadcasting rights are a critical factor in strategic planning. The BBC has a wide range of commercial rivals, whether for cricket or other major sports, such as BSkyB, BT, ITV and TalkSport. Competitors in such a market keep a watchful eye on each other’s products to check on any threat to their share of the market, or possible plagiarism or abuse of intellectual property rights, or as to features of competitors’ output or rival talent at the microphone or in technical production that might improve their own output. The BBC therefore holds a significant store of information on other broadcasters and other media outlets, great and small, for a wide range of purposes. Richard Burgess, the Head of BBC Radio Sport and Sports News, gave detailed evidence of the reasons for holding information on competitors’ coverage and broadcasting talent, evidence which was expressly accepted by Richard Davidson, the only witness for the Appellant.
5. Test Match Sofa (“Sofa”) was established in 2009 as a website offering ball-by-ball commentary from a bedroom in Tooting and comment from invited guests from the world of cricket. A critical difference from TMS coverage is that the Sofa commentator

watches the TV screen. There is no Sofa presence at the ground, hence, the Appellant asserts, no breach of the BBC's exclusive broadcasting rights. Sofa's style is, the Tribunal learned, more informal and irreverent than TMS and generally targets a younger audience.

6. Test Match Extra.com Ltd. ("TME") was established in 2009 as a cricket website. It acquired Sofa in February, 2012. TME owns The Cricketer Publishing Ltd., ("CPL") which publishes "The Cricketer" magazine, a long - established and highly - regarded specialist periodical. Mr. Miller, the Appellant, was the editor of "The Cricketer" at the date of the Request. Mr. Davidson (see paragraph 4) is a director of TME and The Cricketer Publishing Ltd.

The Request

7. The Request, dated 28th. May, 2013, was made by Mr. Price, the Company Secretary of CPL and sought disclosure of -

“ . . . all documents held by the BBC relating to (Sofa), in all locations where the requested information may be found including private email accounts, text messages on mobile phones or in any other media”.

8. On 23rd. June 2013 the BBC refused the Request on the ground that all information within the scope of the Request was held for the purposes of "journalism, art or literature" in respect of which, by virtue of Schedule 1 to FOIA, the BBC was not a public authority and was therefore not subject to the obligation imposed by s.1(1)(b) of FOIA. Clearly, whilst citing all three exclusionary purposes, the BBC relied only on the purposes of journalism. It indicated that, if this contention failed, it would rely on FOIA exemptions. Given his findings as to the purpose for which the relevant information was held, ("the purpose issue"), the ICO made no findings as to exemptions. This appeal was heard on the understanding that, if it succeeded, the Tribunal would consider whether it could hear further submissions as to FOIA exemptions.
9. Mr. Price complained to the ICO on behalf of "The Cricketer" by letter dated 24th. July, 2013, rehearsing some arguments which featured in this appeal and citing passages from

the Supreme Court speeches in *BBC and another v Sugar (No.2)* [2010] EWCA Civ 715, [2012] UKSC 4, [2012] WLR 439. (“*Sugar No.2*”) **The ICO evidently treated the Appellant as the complainant and nothing hinges on any change of identity.**

The Decision Notice

10. By his Decision Notice dated 22nd. October, 2013 the ICO upheld the BBC’s contention as regards the purpose issue. His reasons are discussed later in this Decision. He rejected the complaint.

The Appeal

11. Mr. Miller appealed by Notice dated 19th. November, 2013. His grounds accurately identified the only issue for determination by the Tribunal. They also contained criticisms of the way in which the ICO had reached his decision - as did Mr. Davidson’s first statement. They do not assist the Tribunal, since it hears the appeal afresh on the basis of whatever evidence is presented to it, not as a reviewing tribunal.

The issue

12. The Tribunal is concerned with the single question -
At the date of the Request did the BBC hold all or any of the information relating to Sofa for purposes other than those of journalism ? As already indicated, questions of art or literature did not arise.

The law and the submissions of the parties

13. FOIA s.1(1) provides that the right to information is a right to information held by “public authorities”. S.3(1)(a), so far as material to this appeal, defines a public authority as any body listed in Schedule 1. The BBC is listed as a public authority in Part VI of Schedule 1 -

“in respect of information held for purposes other than those of journalism, art or

literature”.

So, if the information is held for one of those purposes, the BBC is not a public authority in relation to the request concerned and has no obligations under FOIA.

14. *Sugar No.2* provides clear guidance on three important questions of interpretation -

- (i) The Supreme Court, like Neuberger MR in the Court of Appeal, approved a broad tripartite definition of journalism in Schedule 1, as proposed by the Tribunal, namely,

“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, in terms in particular of accuracy, balance and completeness, and the supervision and training of journalists.”

see Lord Wilson at paras. 39 and 42. His Lordship declined to provide more specific guidance.

- (ii) The exclusion applies where a substantial purpose for which information is held is journalism.

At para. 75 Lord Walker stated -

“In my judgment the correct view is that (as Lord Neuberger MR put it at para 44):

“once it is established that the information sought is held by the BBC for the purposes of journalism, it is effectively exempt from production under the Act, even if the information is also held by the BBC for other purposes.”

So in effect there are only two categories: one is information held for purposes that are in no way those of journalism, and the other is information held for the

purposes of journalism, even if it is also held for other (possibly more important) purposes.”

- (iii) As to the closeness of the link between the purpose and the journalism, Lord Walker stated at para. 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. As Irwin J observed in the financial information case [2010] EMLR 121, para 86, in the context of a critique of what was “operational”: “The cost of cleaning the BBC boardroom is only remotely linked to the product of the BBC.”

Lord Phillips endorsed this approach (para. 67)

“I believe that Lord Walker JSC 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 The BBC submitted that the information that it held was held directly for the second and third purposes of the “Sugar” definition of journalism. It acknowledged that it was not related to the first.

- 16 The Appellant, who had not, of course, seen the information and could only surmise its general character, argued that, in so far as the BBC’s purpose in creating and retaining

the information was to damage Sofa, a relatively minor broadcasting rival, such a purpose was not journalism and did not satisfy the requirement that the “immediate object” of holding such information was to use it for one of the purposes of journalism, as emphasised by Lords Phillips and Walker. Its purpose was operational, not directly related to journalism. Furthermore, the information had not been collated for the purposes of journalism, rather the BBC had attributed that status to it when confronted by this Request.

- 17 As indicated above, Mr. Burgess identified in his open witness statement a number of general purposes for which the BBC held information on actual or potential competitors. The key themes of the withheld information were among those which he specified. They included the protection of the value of broadcasting rights, of the quality of output and of BBC “brands”, the management and recruitment of broadcasting talent and marketing strategy in support of that output. In the closed annex to this decision we deal with the classification of the information withheld in a little more detail.

Our Decision

18. If the BBC holds information, at least in part, for the purpose of journalism, then in respect of that information it is not a public authority and FOIA is not engaged. The policy underlying that principle is clearly explained in *Sugar No.2* and can be concisely described as putting the BBC, as regards the accepted confidentiality attaching to journalism, on an equal footing with its broadcasting competitors. Therefore, in assessing the purpose for which information is held, the Tribunal is not concerned with FOIA codes of practice, the normal principles of construction when applying FOIA or questions of public interest. The decision depends on a finding of fact on a balance of probabilities.
19. The question is whether a purpose of holding information is directly linked to an activity constituting journalism as construed in *Sugar No.2*. Discussion of the value or quality of the activity or its impact on competitors, if any, is wholly immaterial. The Appellant’s argument as to the asserted relevance of an intention to damage Sofa is hard to follow. Any activity designed to increase the market share or raise the profile of company A may be seen as involving an intention to damage the interests of its competitor, company B. The test of purposes of journalism approved in *Sugar No.2* does not involve any

measuring of the effect on other organisations, still less any moral judgement on the propriety of the relevant activity. We should add that nothing that we have seen suggests any unfairness or impropriety in the BBC's conduct anyway.

20. Nor is the question of damage to third party interests relevant to the requirement of a direct link to the identified purpose. If information is held with the immediate object of influencing decisions as to how to broadcast test match commentaries or maintaining or enhancing the broadcasting standards of TMS, an intention, if it existed, to use it at the same time to weaken Sofa, even if, contrary to the Tribunal's finding, that were not a purpose of journalism, would not affect the status of the information. It would simply have no bearing on the closeness of the link between information and journalistic activity.
21. The purpose for which information is held is to be assessed at the date of the request. The test is not the purpose for which information is initially collated. Information often accumulates unplanned as a result of events. The Tribunal agrees with the BBC's submission that it would not be expected to identify the purpose or purposes for which it held large quantities of electronically recorded information until the issue was directly raised by a FOIA request.
22. Having seen and analysed the information held by the BBC within the scope of this Request, with the assistance of a helpful schedule provided by counsel for the BBC, the Tribunal finds that it was all held directly for the purposes of the second or principally the third activity constituting journalism in accordance with *Sugar No.2*. A closer consideration of the information leading to that conclusion is contained in the Closed Annex.
23. For these reasons we dismiss this appeal.
24. Our decision is unanimous.

David Farrer Q.C.

Tribunal Judge

21st. July, 2014