IN THE FIRST-TIER TRIBUNAL **Case No.** EA/2014/0298
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

ON APPEAL FROM:

The Information Commissioner's
Decision Notice dated 2 October 2014
FS50547905

Appellant: **W.R. Tomlinson**

First Respondent: **Information Commissioner**

Second Respondent: **British Broadcasting Corporation**

Considered on the papers

Before
John Angel
(Judge)
and
Pieter De Waal and Rosalind Tatam

Subject matter: s.3 and Schedule 1 Part VI FOIA (the BBC derogation)

Cases: *BBC v Sugar (No 2)* [2012] 1 WLR 439, [2012] UKSC 4 (Sugar No 2)
BBC v Information Commissioner [2009] EWHC 2348 (Admin)
BBC v Information Commissioner EA/2009/0015
Home Office & Information Commissioner (EA/2008/0027)
Home Office & Information Commissioner & Ian Cobain (EA/2012/0129)

DECISION

The Tribunal upholds the Decision Notice and dismisses the appeal.

REASONS FOR DECISION

Background

1. On 3 June 2014 Mr Tomlinson wrote to the British Broadcasting Corporation ("BBC") requesting certain information ("the Request"):

> "*Can you please advise me [of] the operating costs, for each of the last 5 financial years, for each of the following regional/local BBC UKPSB services:*
>
> *BBC Channel Islands News*
> *BBC Radio Guernsey*
> *BBC Radio Jersey*
> *BBC Isle of Man*"

2. The BBC responded on 9 June 2014. It explained that it did not intend to disclose the information, as it took the view that the information was not subject to FOIA because it was held for the purposes of journalism, art or literature ("the Derogation"). It informed Mr Tomlinson that, in the BBC's view, the information was held for the purposes of creating the BBC's output or the information supported or was closely associated with such creative activities.

3. On 12 July 2014 Mr Tomlinson complained to the Commissioner, asserting that the Derogation did not apply to the information he sought. The Commissioner informed Mr Tomlinson, on 4 August 2014, that in his preliminary view the Derogation did cover the information sought, and suggested that Mr Tomlinson withdraw his request. He declined to do so, providing a number of arguments as to why the information sought was held for purposes other than those of journalism, art or literature. These were essentially that (i) he had asked for general figures on each service, not the costs of a particular programme/event, (ii) the Supreme Court decision in *BBC v Sugar (No 2)* [2012] 1 WLR 439, [2012] UKSC 4 (***Sugar (No 2)***) suggested that financial information was only held for the purposes

of journalism if it 'directly related' to journalistic output, and (iii) the FTT decision in *BBC v Information Commissioner* EA/2009/0015 ("***BBC FTT**")* suggested that "*the global amount of spending by [a] BBC station*" was not held for the purposes of journalism, art, or literature.

The Decision Notice ("DN")

4. The Commissioner issued his DN on 2 October 2014. He noted that the BBC was a public authority within the meaning of FOIA, but only had to deal with requests for information "*in respect of information held for purposes other than those of journalism, art or literature*". Accordingly where information was held for those purposes, the BBC had no obligation to comply with Part I of FOIA (DN/10-11).

5. The Commissioner noted the judgments of the Court of Appeal and Supreme Court in ***Sugar (No 2)***. The Supreme Court had endorsed Lord Neuberger MR's judgment in the Court of Appeal that "*provided there is a genuine journalistic purpose for which the information is held, it should not be subject to FOIA*", and considered that the Derogation applied even if journalism/art/literature was not the predominant purpose for holding the relevant information (DN/12-14). The Supreme Court had however suggested that there should be a "*sufficiently direct link*" between the holding of the information and the fulfilment of one of the derogated purposes (DN/15).

6. The Commissioner considered the statements of the Supreme Court that journalism, art, or literature means, in effect, the whole of the BBC's output to the public. The question was therefore whether there was a sufficiently direct link between the purposes for which the information is held and the production of the BBC's output, or the BBC's journalistic or creative activities involved in producing such output (DN/16-18).

7. The BBC had submitted certain arguments to the Commissioner in relation to the four services covered by Mr Tomlinson's request. These were that:

a. BBC Channel Islands News is not a standalone service, but a dedicated television programme broadcast on weekdays on BBC One in the Channel Islands. Its budget is contained within the budget for BBC News. Its operating costs "*inform the editorial process of reviewing and planning for future programmes and therefore affects the creative output of the BBC*" (DN/19-20). That creative output is directly influenced by the allocation of funds which is in turn determined by editorial decisions (DN/22).
b. BBC Radio Guernsey and Radio Jersey are local radio services. Their budgets, together with 38 other local radio stations, are amalgamated in the BBC's existing reports under the BBC Local Radio service licence. Editorial decisions are taken in respect of the Local Radio service licence as a whole, rather than individual stations, and the allocation of funds within that service licence reflects editorial judgments of the Controller, English Regions. Accordingly the budget for an individual local radio station is functionally similar to an individual programme cost for a national radio station. Moreover, for any given local radio station, around 80% of that budget consists of staff and talent costs which are directly connected to the journalistic, artistic or literary output of the BBC (DN/26-28).
c. BBC Isle of Man is not a discrete broadcasting station, but is an online source of news, sport, and weather for the Isle of Man. Its operational budget falls within the budget for BBC English Regions which is itself contained within the overall budget for BBC News. The costs of the service are included in the BBC Online service licence. That budget, like those above, is used to inform the editorial process of reviewing and planning for future content and therefore affects the creative output of the BBC (DN/30-31).

8. On a number of previous occasions the Commissioner had concluded that (i) certain requests made to the BBC fell within the Derogation (Decision Notices FS50404473, FS50497318, FS50319492, FS50363611), (ii) that annual budgets of BBC local radio stations fell within the Derogation

(Decision Notices FS50302135 and FS50386740), and (iii) that, since the BBC has a fixed resource in the Licence Fee, resource allocation as between different programmes goes to the heart of creative decision making (Decision Notice FS50314106). The same principles applied to this case (DN/21, 29, 33).

9. Mr Tomlinson's reference to ***BBC FTT*** did not assist: the Tribunal in that case was not asked to determine whether station by station spending *per se* fell under the Derogation, and the FTT's decision was that FOIA did not apply to the information actually requested (station by station spending broken down by topic) (DN/34-36). Accordingly, the Commissioner concluded that the information fell within the Derogation (DN/37).

Appeal to the Tribunal

10. Mr Tomlinson lodged a notice of appeal with the First-tier Tribunal ("FTT") on 27 November 2014. His grounds of appeal, formulated with the assistance of the Campaign for Freedom of Information, are as follows:
    a. That while information about the costs of making a particular programme may be information which is held for the purpose of journalism the BBC's non-programme costs are not held for the purposes of journalism;
    b. That, accordingly, where an aggregated cost composed of programme and non-programme costs is requested, that aggregate figure is not held for the purposes of journalism.
    c. That Lord Wilson's judgment in ***Sugar (No 2)*** indicated that financial information was likely to be held for purposes other than journalism, art or literature;
    d. That ***BBC FTT***, properly understood, is an authority directly in his favour. The appellant's request in that case, Mr Tomlinson says, was for "both *the total spending for each station* and *the breakdown of those costs*". The FTT ruling held that "*the breakdown by topic, but not the undifferentiated total, was held for the purposes of journalism*"; and

e. That even if the present year's figures were "*held for the purposes of journalism*", past years' figures would "*cease to be so held after an appropriate period of time*", since "*[a]ny actual decision which is required to be made now or in the future for the purpose of journalism is unlikely to rely to any significant extent*" on the allegedly historic information. Such figures would now be held for archival, accounting, or accountability reasons.

11. The BBC was joined as a party. All parties agreed that the case could be considered by the Tribunal on the papers provided to it by the parties without an oral hearing.

The Evidence

12. The BBC provided a witness statement of David Holdsworth who is the Controller of English Regions at the BBC. In that role, he is responsible for editorial leadership and overall management of 3,000 staff in the production of local output and newsgathering for the BBC across 12 television regions, 39 local radio stations and a comprehensive local online service.

13. Mr Holdsworth's evidence can be summarised as follows:

a. His role as the Controller of BBC English Regions is essentially an editorial position. He has direct editorial responsibility for the content produced for the various different forms of output within the division, including the forms of output identified in the Request.

b. The BBC does not hold a single figure relating to the total cost of providing each form of output identified by Mr Tomlinson for each of the last five years.

c. The information which the BBC holds and which is specifically attributed to the radio stations, programme and web-index referred to in the Request is the budgetary information which relates directly to the additional cost of providing localised editorial content on each

form of output. It is the cost of creating additional local content for these services to interact with the relevant BBC audience.

d. The budgets which the BBC attributes to each of the forms of output identified by Mr Tomlinson do not include costs borne more broadly across the BBC such as the cost of providing content relating to weather and music rights. Equally, the budgets which the BBC attributes to each of the forms of output do not include the costs of capital, property, insurance, infrastructure or distribution costs. These are held centrally by the BBC and are not attributed to individual platforms or programmes. The BBC accounts for these costs according to its various service licences (e.g. BBC Local Radio as a whole), rather than by reference to individual programmes or forms of output (e.g. BBC Radio Jersey or BBC Isle of Man).

e. The information which the BBC does hold and which is specifically attributed to the forms of output relates to the budgets allocated annually by Mr Holdsworth for producing the additional content on each of the relevant output services. This largely compromises the cost of staff (80%) who produce the content, e.g. radio show presenters, station managing editors and journalists. The balance is made up of costs that are directly related to the output which the service produces, including newsgathering expenditure and incidental costs directly relating to the production of output. These budgets relate to the funding of content production on each form of output.

f. The allocation of budgets to each form of output is driven by an assessment of the editorial requirements for that form of output specifically and also collectively within the context of demands for editorial resources across the various forms of output encompassed by BBC English Regions. The budgetary information is therefore

held and used to inform editorial decisions about the allocation of finite resources and to plan future output.

g. This budgetary information is held and used by the BBC to:

   i. assist and inform editorial decision-making on a day-to-day, weekly and monthly basis in relation to the BBC's output and the level of resources to be provided for the production of that output. This includes considering ad hoc requests for additional resources to cover exceptional events or the allocation of extra funding which may become available during the course of a year;

   ii. assist and inform editorial decision-making in relation to annual budgeting exercises in relation to the BBC's output on each service/programme and the level of resources which can be provided for the production of output; and

   iii. assist and inform longer term editorial decision-making which feeds into and responds to major financial and editorial restructuring reviews, such as Delivering Quality First (DQF) or five yearly editorial service licence reviews by the BBC Trust.

h. Mr Holdsworth believes that the release of the annual budgets which are linked to particular local services will impinge upon the BBC's ability to make decisions about finite journalistic resource allocation on a purely editorial basis. Instead those editorial decisions will be subject to external commentary and pressure as between different areas of the BBC's output, both across platforms and between different geographical parts of the area covered by the BBC.

The Law

14. Firstly we should say that we are not bound by decisions of the Commissioner or other FFTs, only by decisions of higher courts and tribunals. However we can take note of such decisions to see if they can provide any assistance in coming to our findings.

15. FOIA provides a right of access to information held by a public authority: s. 1 FOIA. Public authorities are those listed in Schedule 1 FOIA: s. 3 FOIA. However, although the BBC is listed in Schedule 1, it is not subject to FOIA in respect of all the information it holds. Schedule 1 Part VI provides that one public authority is "*The British Broadcasting Corporation, in respect of information held for purposes other than those of journalism, art or literature*". Accordingly it is necessary, in respect of requests for information made to the BBC, to determine whether or not the requested information is held for those purposes.

16. The key authority on the meaning and scope of the Derogation is ***Sugar (No 2)***. That case concerned a request not for financial information, but for an internal report into the transparency and impartiality of the BBC's media output on Israel-Palestine issues. The appeal concerned the approach to the BBC's FOIA status where the requested information was held "*partly for purposes of journalism and partly for purposes other than those of journalism*" (per Lord Wilson JSC at [2]). In that context the BBC's primary argument was that, so long as the requested information was held for the purposes of journalism to a more than minimal extent, it fell within the Derogation and hence outside FOIA. Its subsidiary argument was that so long as the information was not predominantly held for purposes other than journalism, it fell within the Derogation. The appellant's argument was the reverse of the BBC's former contention: in his view, provided that the non-journalistic purposes were significant (i.e. more than minimal), the information fell outside the Derogation (per Lord Wilson at [1]-[5]).

17. The Supreme Court held 4:1 (Lord Wilson dissenting) that the correct construction was that put forward in the BBC's primary argument. The

main majority judgment on this issue was given by Lord Walker, with short concurrences by Lord Phillips and Lords Brown and Mance . In summary the majority's position was that:

a. The undefined words "*journalism, art or literature*" seem "*to be intended to cover the whole of the BBC's output … the purposes of journalism, art of literature would be, quite simply, the purposes of the BBC's entire output to the public*" (at [70] per Lord Walker JSC). Lord Wilson, in the minority, seems to accept this at [38]. This is the central theme of the Supreme Court's ruling that there is a requirement for a "purposive construction" of the Derogation in order to give effect to Parliament's intention in limiting the applicability of FOIA to the BBC.

b. In the case of the BBC there was a "*powerful public interest*" against the BBC's general subjection to freedom of information: "*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*" (per Lord Walker at [78]). As Lord Phillips PSC noted, "*[t]he protection is designed to prevent interference with the performance of the functions of the BBC in broadcasting journalism, art and literature. That is why it focuses on the purpose for which the information is* held" (at [64]).

c. Accordingly, the proper construction of the Derogation was that information "*held for the purposes of journalism, even if it is also held for other (possibly more important) purposes*" falls outside FOIA. Only information "*held for purposes that are in no way those of journalism*" falls within FOIA (at [75] per Lord Walker JSC, approving the conclusion of Lord Neuberger MR in the Court of Appeal). The "*real emphasis [of the derogation] is on what is not*

disclosable – that is material held for the purposes of the BBC's broadcasting output" (at [79] per Lord Walker JSC).

d. Interpreting the BBC's Derogation in light of these considerations, *"the key"* to the meaning of "journalism, art and literature" under FOIA *"lies in the omnibus word "output"* (per Lord Wilson at [39]). In construing the BBC's Derogation and specifically the meaning of *"journalism"* in this context, the Supreme Court noted that it was not constructive to have an exhaustive definition. However, the Supreme Court approved (per Lord Wilson at [39]) the Tribunal's analysis of "journalism"[1], subject to also including the exercise of broadcasting or publishing:

"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 judgment 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."

[1] para.107 to para.109 of its decision in Appeal No. EA/2005/0032 of 29 August 2006

e. However, this did not mean that almost all the BBC's information fell outside the Act. It would be necessary for the Tribunal to "*have some regard to the directness of the purpose*", considering "*the proximity between the subject-matter of the request and the BBC's journalistic activities and end-product*" (at [83] per Lord Walker JSC). Two examples of information that would, it appears, fall within FOIA were given from the judgments below (all [83-84]):

   i. The cost of cleaning the BBC boardroom;
   ii. Information about advertising revenue, property ownership or outgoings, financial debt and the like.

   The rationale of the latter category (approving the statements of Lord Neuberger MR in the Court of Appeal) was that a link as tenuous as "*the more that is spent on wages, rent or interest payments, the less there is for programmes*" would not suffice.
   "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."

18. That 'remoteness' criterion was considered by Lords Phillips, Brown, and Mance in the context of archival material. Lord Phillips at [67] put the general point slightly differently, but to the same effect: the Derogation only applied if "*an immediate object of holding the information is to use it for one of [the specified] purposes*". Lord Brown considered at [106] that Lord Walker's formulation was appropriate: the question was "*whether there remains any sufficiently direct link between the BBC's continuing holding of the information and the achievement of its journalistic purposes*". Lord Mance considered that such material would fall outside

FOIA if the material was "*not envisaged for 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*" (at [112]).

19. Lord Wilson gave a dissenting judgment. In his view the 'predominant purpose' test was the correct one.

20. The initial appeal to the High Court in ***Sugar (No 2)*** was handed down together with another case, ***BBC v Information Commissioner*** [2009] EWHC 2348 (Admin) ("**the *Financial Decision***"). That case did concern a number of requests for financial information, set out at [7-10] of the judgment. Those requests included "*BBC Newsline's annual budget for outside broadcasts in each of the last five years?*", "*the total cost of BBC NI Spotlight programmes involving overseas travel in the past three years?*", the amount paid for the broadcast rights for the 2006 Winter Olympics, and the annual budgets for Top Gear, Newsnight, and Eastenders.

21. Irwin J considered the scope of the Derogation, concluding that the Derogation applied to information held "*to any significant extent for the [specified] purposes*" (and thus presaging the Supreme Court's decision considered above) at [72], and that the Tribunal's decision (which had been that the 'predominant purpose' test applied) should be quashed. However, in case he was wrong he went on to consider the application of the 'predominant purpose' test to the requested information. He noted that since the information was not itself journalistic, artistic, or literary the question was whether it was held for those purposes (at [85]). The evidence was that the information was "*held for "operational" purposes*", and that it was "*difficult to say that [information so held] is not held for the purposes of "journalism, art or literature*". This would not however cover all the BBC's information: the judge compared the "*cost of cleaning the BBC*

boardroom", a non-operational cost, to "*the operating cost of creating an episode of a programme*" (at [86]).

22. The evidence of the BBC's witnesses had been that "*the information … is used at an operational or commissioning level to enable the BBC to monitor expenditure against a fixed budget, and to help predict future costs, or in other words as they would say directly for journalistic or creative purposes*". The Tribunal did not find that that evidence was wrong (at [88-89]). The judge concluded that "*information which comes to be aggregated continues to be held within the BBC at an operational level and for journalistic, literary or artistic purposes. … [[T]he Tribunal] failed properly to grapple with the evidence … and … their conclusions were flawed*".

23. Where the information requested comprises information partly held for the purpose of journalism and partly for other purposes, the relevant test laid down in ***Sugar (No 2)*** is whether the information is held *"to any significant degree"* (i.e. more than *de minimis*) for the purpose of journalism, art or literature (per Lord Brown at [104]). Lord Brown advised that when determining at what stage the information will cease to be held to any significant degree for the purposes of journalism and will become held instead for archive purposes will necessarily *"depend on the facts of the case and involve a question of judgment"* [106]. Lord Mance also adopted a similar approach at [111] stating that *"the exemption applies, without more, if the information is held for any journalistic, artistic or literary purpose".* Therefore it appears that if the information in question is held to any such degree, the information falls within the scope of the Derogation and there is no obligation for the BBC to produce the information, even if that purpose is not the predominant purpose for holding the information.

Grounds of Appeal

24. Having set out the evidence and the law we now consider each of Mr Tomlinson's grounds of appeal in turn. Before doing this we set out the BBC's general submissions.

25. The BBC's core submission is that the information which the BBC holds in relation to the Request is clearly held and used by the BBC for editorial purposes directly related to the BBC's output. It is therefore held for the purposes of journalism, art or literature and falls within the scope of the BBC's Derogation under FOIA. There is therefore no obligation on the BBC to disclose this information under FOIA.

26. The BBC first notes that the directness of the link between the information sought and the BBC's output is inherent in Mr Tomlinson's original request itself which seeks "the operating costs…for each of the following regional/local BBC UKPSB services." UKPSB stands for United Kingdom Public Service Broadcasting. Mr Tomlinson therefore, it says, is seeking the costs associated with providing the BBC's public service journalistic output on each of these services. On its face, the BBC maintains, that is information which directly relates to the BBC's journalism and output, and which the BBC would hold for the purposes of journalism.

27. Further, having regard to the facts set out at paragraphs 12 and 13 above, summarising the evidence of Mr Holdsworth it is clear, the BBC says, that it uses the budgetary information which it does hold for the purpose of editorial decision-making about the allocation and apportionment of finite journalistic resources in the short, medium and longer term.

28. The BBC says that Mr Holdsworth's statement makes clear that the BBC does not hold a single figure for each year for the cost of each of the forms of output identified by Mr Tomlinson. The budgetary information which it does hold and which it directly attributes to each of the forms of output relates to the cost of producing additional localised content on each form of output. The BBC does not allocate the costs of infrastructure, distribution or capital to individual forms of output or shared costs such as weather and music rights. These costs are held centrally by the BBC and are not allocated or attributed to different programmes or local radio

stations within the BBC but are accounted for at a higher level, e.g. across all local radio stations.

29. The information which the BBC does hold and which is specifically attributed to each of the forms of output the BBC says is the budgetary information relating to the cost of producing additional localised content on the various forms of output, other than content which is paid for and borne by other parts of the BBC. This budgetary information is directly related to the BBC's output. This information is held and used by the BBC to inform editorial decisions about the availability of extra resources to meet exceptional journalistic needs, to plan and consider annual budgets for these forms of output and to consider and evaluate the apportionment of resources between different geographic areas and competing and complementary forms of output. This allocation of resources reflects the editorial judgments necessary to produce distinctive local content and provide an appropriate mix of local programmes.

30. The information held by the BBC is used by senior editorial figures including Mr Holdsworth when considering long-term service licence performance and whether the BBC is meeting its editorial obligations under the BBC Charter in respect of local content and how such content should be funded. Mr Holdsworth's statement explains these are editorial decisions about the allocation of journalistic resources. In this regard, there is no meaningful distinction between the cost of an individual programme and a series of programmes, whether that is across a particular radio station or as part of a linear series.

31. This information is held and used by the BBC, it contends, for the second and the third categories of 'journalism' approved of by Lord Wilson in ***Sugar (No 2)***, namely it is held for editorial purposes of exercising judgment as to the selection and prioritisation of output. It is used and held by the BBC to inform the BBC's editorial strategy in the short, medium and longer term and to maintain, develop and enhance the BBC's journalism, including review of the standards and quality of particular areas of

programming making vis-à-vis the BBC's public service broadcasting remit. Mr Holdsworth explains in his statement [at paragraph 48], that longer-term reviews such as service licence reviews are editorial in their focus – they examine output, engage with audience research and then consider any necessary or appropriate changes to editorial approach.

32. The requested information, the BBC says, is precisely the type of information which Mr Justice Irwin expressly found in the ***Financial Decision*** (see §20 above) was held by the BBC for the purposes of journalism.

33. This information, the BBC contends, informs current and future consideration of the allocation of journalistic resources. In this regard, it is specifically noted that this budgetary information is used by BBC management when considering both the BBC Trust Service Licence Reviews of output which take place for each service licence on a five yearly basis, and which inform editorial and output direction. The last such review took place in 2012, with another due in the near future. The information will be used to inform any similar major financial and editorial reviews of the BBC's output in future.

34. The Supreme Court recognised in ***Sugar (No 2)***, that the very purpose of the BBC's Derogation under FOIA is to ensure that the BBC's public service broadcasting purposes and editorial independence are not undermined or inhibited through the requirement or threat of disclosure under FOIA. Yet this is precisely the potential effect of the disclosure sought in this case, as Mr Holdsworth addresses at paragraph 51 of his witness statement. Disclosure would lead to additional and unnecessary pressure on programme makers and senior editorial staff as to the allocation of resources by the BBC between one station or programme versus another, most likely to be played out by the media at large. The BBC's Derogation under FOIA is intended to ensure that it occupies a level playing field in respect of editorial judgments compared to its commercial

competitors, and is not put in a worse position than commercial broadcasters.

35. Against the background of the BBC's submissions we now consider Mr Tomlinson's grounds of appeal.

Ground 1

36. Dealing with each ground of appeal in turn Mr Tomlinson's first ground (§10.a. above) is that non-programme costs cannot be held for the purposes of journalism. This contention appears to be based partly on an extrapolation from Irwin J's 'cleaning the BBC boardroom' example at [86] of his judgment, in which the judge compared such activity to "*the operating cost of creating a programme*" which is "*much more closely linked*" to the designated purposes. Irwin J's example is clearly correct, for the reasons given above: cleaning costs, like information about advertising revenue or property ownership, are too remote from the specified purposes to fall outside FOIA. However, it does not follow that the test for remoteness is anything other than the "*sufficiently direct link*" or "*proximity*" test adopted by the majority of the Supreme Court and presaged by Irwin J. The judge did not suggest an artificial bright line between programme and non-programme costs, and (even if he had) such a suggestion would be incompatible with the Supreme Court majority's later reasoning.

37. Such an artificial bright line would also have odd results. For example, consider the requested information in the ***Financial Decision*** case, which included the annual budgets of Newsnight, Eastenders and Top Gear. These are flagship BBC programmes, which presumably have significant budgets formed of a large number of costs some more directly related to the programme's creative output, others less so. There is no necessary reason why the budget for a single large programme should be outside FOIA while e.g. the budget for the programmes and other expenses of a small radio station should be within FOIA. The majority approach in ***Sugar (No 2)*** provides the correct test of principle to determine the application of FOIA to the BBC.

38. In the application of that test to the first ground of appeal in this case, we have reached a divided view. In the minority view, the budget for a programme may clearly relate to the journalistic output (where that budget excludes the non-programming costs element, such as capital costs or cleaning). The information sought in ***Sugar (no 2)*** was a report, and not an overall cost figure. In this case, the information sought is wider and would be compiled / assembled by the BBC from information held by Mr Holdsworth and information held by other senior staff (those responsible for the property portfolio, the music contracts, etc.) By contrast, the BBC's current use of information, as described by Mr Holdsworth, relates **only** to the budgetary information referred to and held by Mr Holdsworth, and does not encompass the information more broadly described by Mr Tomlinson; and no evidence has been supplied to suggest that the overall, centrally held information described by Mr Tomlinson is used for the purposes of journalism.

39. The majority take the view that even were Mr Tomlinson correct that there is a sharp delineation between programme and non-programme costs, he would not be entitled to the information he seeks. As the BBC has explained in evidence, BBC Channel Island News is a programme, for and shown in a particular geographical area. Further, the majority accept Mr Holdsworth's view that local radio stations, such as BBC Radio Guernsey and Radio Jersey, are analogous in terms of size and editorial decision-making to individual programmes within a national radio station. Again, BBC Isle of Man is a small online information source, functionally equivalent to a programme.

40. Moreover Mr Tomlinson's assertion does not reflect the way that the BBC actually holds, records and attributes budgetary information. As described in Mr Holdsworth's statement, the information which the BBC does hold and which is specifically attributed to each of the forms of output identified by Mr Tomlinson is the editorial budget for producing additional local content on those forms of output. It does not include the capital,

distribution or property costs which are accounted for across BBC service licences as a whole, rather than allocated individually to the specific forms of output identified by Mr Tomlinson. Mr Holdsworth's statement explains how the information which the BBC holds is used to inform editorial decision-making. This is in keeping with how the FTT, the High Court, the Court of Appeal and the Supreme Court have consistently found this type of information falls within the scope of the BBC's Derogation under FOIA.

41. The majority therefore do not uphold this ground of appeal. In the minority view this ground is upheld in that the overall, centrally-held costs as described in the Request are not, in that form, held for the purpose of journalism.

Ground 2

42. The second contention is that "*[t]he figure I have sought for each of the four services is made up of the total of their programme and non-programme costs … the aggregate figure is not held for the purposes of journalism*" (§10(b) above). Mr Tomlinson expands on this ground in his Additional Response date 25 June 2015 as follows.

43. The BBC's Response to the Grounds of Appeal of 28 May 2015 states "The BBC does not hold a single figure relating to the total cost of providing each form of output identified by the Appellant" (paragraph 14(b)).

44. It also explains that the station specific information which the BBC does hold is budgetary information used to "assist and inform editorial-decision making" (paragraph 14(g)).

45. These statements are supported by the witness statement of Mr Holdsworth, (in particular at paragraphs 26-33). Mr Holdsworth explains that (a) he is responsible for allocating the budget across BBC local radio stations (b) these decisions are based on editorial considerations (c) the budgetary information which he holds and uses for these purposes consists of information about the staff and programme-making costs of individual radio stations or services (d) this information is therefore held for the purposes of journalism.

46. Mr Tomlinson accepts that this information is held for the purposes of journalism, art or literature. However, he does not accept that the requested information is held for those purposes.

47. The BBC, he contends, has approached this appeal in part by asking itself the wrong question. Mr Holdsworth states in his evidence:

> "I understand that the Tribunal has specifically enquired *whether the BBC holds a single figure for each year* for the cost of each of the forms of output referred to in the Appellant's request. For the reasons which I now set out in more detail below, the BBC *does not hold a single figure* relating to the total cost of providing each form of output identified by the Appellant (i.e. BBC Channel Island News, Radio Jersey, Radio Guernsey and BBC Isle of Man) for each of the last five years." (paragraph 26) (emphasis added in italics)

A similar reference to "a single figure" is made in the BBC's Response at paragraphs 10, 14(b) and 46.

48. For the BBC to hold the requested information for FOIA purposes it is not necessary for it to hold an existing record containing a *single figure* for the overall costs (both editorial and non-editorial) of each service. It would be sufficient for the BBC to separately hold cost figures from which such a single figure could be compiled and for it to be capable of carrying out that exercise within the 'appropriate limit' under section 12 of FOIA.

49. This, he says, has been the Tribunal's well established approach to the question of whether information is 'held' for FOIA purposes. In *Home Office & Information Commissioner & Ian Cobain* (EA/2012/0129) the Tribunal stated:

> "32. Public authorities are frequently requested under FOIA for statistics. They may not previously have extracted the particular statistic from their records but may be able to do so easily. In that case, the authority would be regarded as holding the requested information. By contrast, where the requested statistic cannot be derived readily from the existing records (because, say, the request is for a level of detail which simply cannot be ascertained from existing records), then it would be regarded as a request, falling outside FOIA, for the public authority to create new information, and the authority

> would be entitled to respond that it did not hold the requested information."[2]

50. In *Home Office & Information Commissioner* (EA/2008/0027), the Tribunal held that:

> "13. Since the Home Office's database undoubtedly contains a record of each of the work permits granted to the named employers in the years in question, it seems to us that it must follow that the Home Office hold information as to how many such work permits were granted. It is quite clear…that the legislation is concerned with information as an abstract phenomenon (ie facts which are recorded) and not with documents or records as such. Thus the fact that the total number of permits is not recorded anywhere as a number is in our view irrelevant: the number is implicit in the records of the relevant permits when put together and whether it comes in the form of a list of individual work permits or a total figure seems to us to be simply a matter of the form.
>
> 14. We accept that…the information which [the requester] wants…is not information which the Home Office normally requires for its own business purposes…we cannot see that the Home Office's normal business requirements have any relevance to the issue of whether they hold information or to their obligations under the Act. The Act was clearly designed to impose on public authorities obligations which may well go beyond those imposed by their normal business activities."

51. Mr Tomlinson further contends that, although the BBC's Response and Mr Holdsworth's witness statement describe the way *editorial* costs are held in detail, the way in which the *non-editorial* costs are held is dealt with extremely briefly. Mr Holdsworth states that the information which the BBC 'holds' in relation to each service does not include:

> "other costs such as capital, property, insurance, or infrastructure, distribution costs or, as noted above, content provided by other areas of the BBC." (paragraph 34)

[2] This finding was not questioned in the subsequent decision of the Upper Tribunal in that case, [2014] UKUT 306 (AAC) (02 July 2014)

52. Mr Holdsworth states that information about the costs of the management and upkeep of buildings is held by 'BBC Workplace' which is part of the BBC's Finance and Operations division and that the capital costs of new premises are held by the BBC's Technology Department (paragraph 35). He adds:

> "the budgets which the BBC attributes to each of the forms of output identified by the Appellant do not include the costs relating to capital, property, insurance, infrastructure or distribution to individual radio stations such as BBC Radio Guernsey, BBC Radio Jersey or the BBC Isle of Man web-index. These costs are held by the BBC centrally, and are not allocated or attributed to individual programmes or platforms." (paragraph 36)

53. Mr Tomlinson says the question of whether the individual departments responsible for these non-editorial costs or for monitoring expenditure are capable of identifying them by reference to the individual services is not addressed.

54. Mr Tomlinson then proceeds to suggest that it would be remarkable if the BBC does not link its records of expenditure to the service, programme or commissioning individual or department associated with the service or programme. Without such information, the BBC would be unable to control its expenditure or take even the most elementary precautions against fraud.

55. In the unlikely event that the expenditure is not linked in this way, he says, there may be other ways of associating expenditure with the service concerned, for example, by a search carried out by reference to the relevant location or postcode.

56. Mr Tomlinson then surmises that it seems most unlikely that the BBC holds this information only in such a highly aggregated form that it could not identify the relevant expenditure even where it needed to. He refers to an example, in 2010, when the BBC gave evidence to an inquiry by a select committee of the Tynwald (the Isle of Man Parliament) into the payment of the BBC license fee. BBC witnesses revealed that the cost of local provision of BBC services to the Channel Islands was £2.4 million[3] and the cost for the Isle of Man was

[3] Select Committee of Tynwald on the Television Licence Fee, Report 2010/11, PP108/11, www.tynwald.org.im/business/pp/Reports/2011-PP-0108.pdf. (Subsequently cited as "Select Committee"). Q30, page 95

between £100,000 and £200,000.[4] Some actual expenditure figures were provided, indicating that this information can indeed be retrieved. For example the BBC revealed that:

> "The BBC bases three staff at the offices of Manx Radio in Douglas and contributes £12,500 per annum in rent/utilities (plus a half share of Manx Radio's annual internet connectivity charge - currently £18,000)."[5]

57. Mr Tomlinson then suggests that the questions which therefore need to be determined are:

    (a) whether the BBC holds information from which the aggregate spending, both editorial and non-editorial, on each of the services concerned can be derived. (He stresses that he is seeking a 'ballpark' figure, not the precise cost of every conceivable item of expenditure, and that "[a]ny search for cost information should be reasonable rather than exhaustive".[6])

    (b) whether that can be achieved within the appropriate limit

    (c) whether such aggregate figures once compiled are 'held' for purposes *other than* those of journalism, art or literature.

58. Mr Tomlinson does not accept the BBC's argument that an "aggregate" cost figure would contain a sufficiently direct link to the purposes of journalism to fall outside FOIA.

59. Such a figure, he argues, is not, as the BBC has explained, used for the purpose of journalism, art or literature and furthermore in its view is not even held by it at all. The components of such a figure, such as capital, property, insurance and infrastructure do not form part of any editorial decision making process, as the BBC has stressed. The BBC would presumably not make any

[4] Select Committee, Q31, page 95

[5] Letter from Mark Byford, Deputy Director General of the BBC, 26.1.2010, Select Committee page 204.

[6] Mr Tomlinson refers to the Tribunal's comment in *Greg Muttitt & Information Commissioner & The Cabinet Office* (EA/2011/0036 "A search should be conducted intelligently and reasonably. If the Cabinet Office or any other public authority maintains a refusal of FOIA disclosure based on s12, where the costs estimate includes the costs of looking in unlikely places where the information is not expected to be held, we would expect the Commissioner and the Tribunal to decide that s12 is not properly engaged and does not justify the refusal. As Mr Muttitt pertinently observed, in line with the policy of the Act, requesters would generally prefer a good search which delivered most relevant documents to a hypothetical exhaustive search which would deliver none because it would exceed the costs limit."

journalistic use of an aggregate figure if it produced one. The aggregate figure would not allow the editorial costs to be deduced because the non-editorial costs vary independently of the editorial costs. Any increase in the overall figure from one year to another could be caused by the employment of more journalists – or by the added legal costs of a new dispute, the capital costs of a new building, an increase in rent, the need to repair severely damaged premises or an increase in the advertising budget.[7]

60. The BBC takes a different approach. It contends that it is incompatible with Irwin J's conclusion at [92] of the ***Financial Decision*** that, in that case, aggregated information remained held for journalistic purposes (cf. §20 above).

61. We are also divided on our view of Mr Tomlinson's argument under this ground of appeal. The majority consider that even if it is possible to aggregate all the editorial and non-editorial costs to give "the operating costs" (i.e. the requested information) for each service in question then that figure, on the evidence before us, will contain a significant component of journalistic costs to bring it within the Derogation following the majority decision in ***Sugar No 2*****.** It does not matter that the actual aggregated figure is not currently used by the BBC. The Derogation covers information held for the purpose of journalism and if a substantial part of that "aggregated" information is held for the purpose of editorial or journalistic output then it is not caught by FOIA.

62. The minority takes a different view. Mr Tomlinson's argument is, in effect, accepted. While an aggregated top level figure of "operating costs" for each of the services may not be kept by the BBC, it may be "held" under FOIA if that overall figure may possibly be derived from information which does exist. Furthermore, on the BBC's evidence and as a matter of fact, such an aggregated figure of "operating costs" for the services in question is not used by the BBC for the purposes of journalism, art or literature and

[7] Mr Tomlinson points out that the BBC has disclosed a local station's external advertising budget in response to a FOIA request, indicating that it does not regard that expenditure as for the purposes of journalism. Decision Notice FS50302135, 1 March 2011.

therefore cannot be covered by the Derogation. In addition, Parliament could not have intended that such a figure should be excluded from disclosure under FOIA. This is supported in the ***Financial Decision*** (§91), which refers to where the requested information is "held" by the BBC in a different form and in a different place to the information it actually uses to inform editorial decision-making and states "*The only way this can square with the evidence is if the ''contribution'' made by the requested information is by way of its being aggregated, which in truth actually means that it becomes different information, held in a different form and in a different place within the organisation."*

Ground 3

63. Mr Tomlinson's third ground asserts that Lord Wilson JSC's judgment in ***Sugar (No 2)*** suggests that financial information is likely to be held for purposes other than journalism, art or literature.

64. The BBC and the Commissioner do not accept this ground for two reasons. Firstly, this is not the effect of Lord Wilson's judgment. The only passage to which Mr Tomlinson can point is two sentences in [42] of the judgment, where Lord Wilson says "*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*". There is no statement in the judgment that financial information is generally likely not to be so held: the question for Lord Wilson was whether the information was "*directly related*" to the specified output. This is, it is submitted, effectively the same test applied by the majority (cf. §16(d) above).

65. Secondly to the extent that there is any difference between Lord Wilson's approach and that of the majority, they argue that Lord Wilson's comments are both *obiter* and made in dissent. We as the Tribunal are bound to follow the clear statement of principle given by Lord Walker's majority judgment as concurred in by Lords Phillips, Brown and Mance (cf.

judgment at [67], [82], [103], [110]) and summarised at §16 above. The difference of view between Lord Wilson JSC and his judicial colleagues was highly relevant to this issue: the reason Lord Walker JSC set out the 'directness' test was because he was aware (cf. [82]-[83]) that without it his approach (unlike Lord Wilson's) could be seen as "*conferring on the BBC an immunity so wide as to make the particular statutory redemptions redundant*". The directness test was a feature of his approach not present in Lord Wilson's reasoning. If Lord Wilson's reasoning is different, it must be because he considered that such financial information would normally not be 'predominantly' held for the specified purposes. This is not a conclusion that is relevant to this case, given the terms of the majority judgments.

66. This is particularly important in relation to one point. Lord Wilson referred to "*the making of a particular programme, or group of programmes*". Mr Tomlinson may consider that this isolated phrase supports his view that non-programme costs fall outside the purposes of journalism. However, it does not. The Commissioner considers it was simply an example. In the same paragraph Lord Wilson considered the information requested in the ***Financial Decision***, which included non-programme costs: the "*price paid for [the BBC's] right to cover the winter Olympics in Turin*", for example. It would be very odd, the Commissioner says, if Lord Wilson had intended to draw such an arbitrary line (arbitrary for the reasons given above §26) and, had he intended to do so, he would surely have given his reasons in a more detailed fashion. In any event, the programme output of a small radio station is, as the BBC has explained, effectively that of a "*group of programmes*".

67. We unanimously reject this ground of appeal and accept the arguments of the BBC and Commissioner.

Ground 4

68. Mr Tomlinson's fourth ground is that ***BBC FTT*** supports his case, since "*the FTT … did not find that the undifferentiated total of station by station*

spending was held for journalistic purposes: it was only the breakdown by topic that was excluded from the Act's scope".

69. This, the BBC and Commissioner say, is based on a misreading of that decision. As can be seen from [§2] of the FTT's reasons, a certain number of requests for information had been made and the BBC had refused to provide information in relation to any of the requests. The Commissioner had then decided "*that some of the information was properly withheld and that some ought to be disclosed*". The BBC appealed against that decision (cf. [§4]), which was stayed pending the High Court ***Sugar (No 2)*** decision and the ***Financial Decision***. The appeal was then allowed by consent in the light of those judgments (at [§5]). There is no suggestion in the FTT's reasons that the appeal was not allowed in relation to <u>all</u> the information which the Commissioner had previously decided should be disclosed. By inference the list of information in the decision is that information which the Commissioner had ordered to be disclosed, and which decision the FTT overturned. The Tribunal simply did not have to deal with the issue whether such information, if held at a higher level of aggregation, would have been disclosable.

70. We unanimously agree with the Commissioner. In any case we are not bound by the Tribunal's decision in ***BBC FTT.***

Ground 5

71. Mr Tomlinson's last ground of appeal is that some older requested information may well be held for archival purposes. His argument is that older information is no longer held for the purposes of journalism. In the light of Mr Holdsworth's explanation of how the BBC holds and uses the budgetary information we do not consider this is correct. The information is used to reflect and inform not only short term and medium term planning of editorial services, but longer term editorial planning including five year service licence reviews of editorial strategy and output and also major financial and editorial restructuring programmes such as DQF. The

evidence is that the information will continue to inform any such future major reviews.

72. The Commissioner makes two points on this. The first is that ***Sugar (No 2)*** indicates that this is essentially a factual question parasitic on the 'proximity' issue: does the "*immediate object*" of holding the information remain the advancement of the BBC's purposes, or has the object of holding the information changed over time to an archival or storage function? The BBC's evidence is that the relevant information remains held for the purposes of creating the BBC's output.

73. Secondly, there is no basis on which to assume that information stored for a period of time necessarily falls outside the BBC's purposes. This can be seen from the ***Financial Decision***: the information sought there included BBC Newsnight's budget over five years and BBC NI Spotlight's over three years (cf. §19 above). Irwin J's judgment was extensively referred to in the Supreme Court in ***Sugar (No 2)***, and none of the judges who dealt with the 'archiving' point sought to criticise his view that the material sought was "*held at an operational level in order to assist in the making of editorial and creative choices and so was held partly (and, if relevant, predominantly), for purposes of journalism*" (at [42] of ***Sugar (No 2)*** per Lord Wilson JSC.

74. We have considered these arguments and the evidence in this case and the majority agree with the Commissioner and BBC that the older requested information is not held for archival purposes. In the minority view, this ground of appeal is upheld, for the reasons given above (§60), that the total operating costs are not currently compiled by the BBC (these are "held" for the purpose of FOIA in more than one place) and thus are not held for journalistic purposes.

Conclusions

75. We unanimously reject grounds 3 and 4 to this appeal. In relation to grounds 1, 2 and 5 there is a majority decision to reject the grounds of appeal.

76. We therefore dismiss the appeal and uphold the DN.

Signed:

Prof. John Angel
Judge

Date: 6 July 2015