



**FIRST-TIER TRIBUNAL  
GENERAL REGULATORY CHAMBER  
Information Rights**

**Appeal Reference: EA/2017/0017**

**Decided at Field House without a hearing**

**Before**

**JUDGE PETER LANE  
JOHN RANDALL  
MARION SAUNDERS**

**Between**

**TIM BRADSHAW**

Appellant

**and**

**THE INFORMATION COMMISSIONER**

Respondent

**DECISION AND REASONS**

1. The appellant appeals against the respondent's decision notice of 10 January 2017, in which the respondent decided that the BBC was entitled to refuse the appellant's request for specified information, on the basis that that information was held for the purposes of "journalism, art or literature".

2. Section 1 of the Freedom of Information Act 2000 confers a general right of access to information held by public authorities. By virtue of sections 3 and 7 of, and Part VI of Schedule 1 to, FOIA, the British Broadcasting Corporation is a public authority within the scope of section 1, only "in respect of information held for purposes other than those of journalism, art or literature".

3. On 4 August 2016, the appellant wrote to the BBC to request a copy of a report, which appeared to have been "leaked" on the internet and the subject of an article in the *Daily Mail*. According to that newspaper, David Cowling, an ex-BBC editor, and former Head of the BBC's political research unit, had written an internal report, following the result of the United Kingdom's EU referendum, in June 2016. In the report Mr Cowling had said:-

"There are many millions of people in the UK who do not enthuse about diversity and do not embrace metropolitan values yet do not consider themselves less a human being through all that. Until their values and opinions are acknowledged and respected, rather than ignored and despised, our present discord will persist.

Because these discontents run very wide and very deep and the metropolitan political class, confronted by them, seems completely bewildered and at a loss about how to respond ('who are these ghastly people and where do they come from?' doesn't really hack it)."

4. The *Daily Mail* article quoted the BBC spokesperson as saying that "This was an internal memo intended to help programme-makers create thought-provoking and broad-ranging impartial coverage. It will be wrong to read anymore into this analysis than that ..."

5. On 4 August 2016, the appellant asked for what he described as "this suppressed report leaked in part to the *Daily Mail*". On 2 September 2016, the BBC told the appellant that it was not obliged to comply with the request. The BBC relied on the derogation within Part VI of Schedule 1 to FOIA.

6. The respondent's notice of decision referred to the judgments of the Supreme Court in Sugar (deceased) v British Broadcasting Corporation [2012] UKSC 4, in which the Court considered the scope of the derogation. The Court agreed with the judgment of Lord Neuberger in MR [2010] EWCA Civ 715 that:-

"... 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 FOIA, even if the information is also held by the BBC for other purposes" (paragraph 44);

"... provided there is a genuine journalistic purpose for which the information is held, it should not be subject to FOIA" (paragraph 46).

7. The Supreme Court, for its part, indicated that there should be a sufficiently direct link between at least one of the purposes for which the BBC holds the information

(ignoring any negligible purposes) and the fulfilment of one of the derogated purposes. The Court did not consider it was correct to confine the derogation to cases where journalism was the main purpose of several:-

“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” (paragraph 75: Lord Walker).

8. At paragraph 104, Lord Brown said:-

“In the event that information *is* held to any significant degree, and we are all agreed that the *de minimis* principle will 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 ... “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”.

9. At paragraph 70 of the judgment, Lord Walker held that, in the context of FOIA, the word “journalism”, co-located as it is with art and literature, “suggests that ‘journalism’ is used to refer primarily to output on news and current affairs (no doubt including sport, an important part of the BBC’s output)”.

11. The respondent in her notice of decision also had regard to the definition of journalism formulated by the Information Tribunal in EA/2005/0032, as comprising three elements:-

- “1. Collecting or gathering, writing and verifying materials for publication.
2. Editorial: this involved the exercise of judgment on issues such as:
  - the selection, prioritisation and timing of matters for broadcast or publication;
  - the analysis of, or review of individual programmes;
  - the provision of context and background of such programmes;
3. 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.”

12. The respondent noted that the BBC argues that the requested information was a memorandum drafted by the former Head of the Political Research Unit of the Corporation and that information held by that Unit is created and intended to be used by BBC editors, journalists and programme makers to support the BBC news output on matters relating to Parliament, legislation, government, political parties and constitutional affairs. The memorandum included the former Head of Political Research’s analysis on the EU referendum poll. It was said to be the function of the Head (as he then was) to prepare such briefings, which provide factual information, analysis and comment, on key news stories for BBC editorial staff about political matters. The purpose is to assist those who have editorial roles. The information was said to provide facts and analysis, which would directly influence editorial decisions.
13. The respondent considered that the BBC had provided sufficient evidence that it held the information for the purposes of journalism. She was satisfied that the information was held for editorial purposes and that there was a clear link between those purposes and the BBC’s output: “Therefore, the information requested clearly falls within the definition of ‘journalism’”.
14. In his grounds of appeal, the appellant said:-
 

“This memorandum is not a collecting or gathering of materials for publication, and so does not or (sic) into section 1 of the Supreme Court’s classification. It does however disclose policy assumptions behind the BBC editorial process and assertive assumptions conditioning BBC writing and outputs. It discloses a fixed bias which Mr Cowling has pointed out to his BBC colleagues, a bias rendering them blind to the views of millions of citizens, a bias condemnatory of these views. This relates to BBC philosophy, not the process of editing as known to the profession of journalism.

If what Mr Cowling criticises is to be called part of the process of “journalism” and “editorial work”, then it is of the kind associated with Pravda and not good, neutral journalism which the BBC Charter imposes on the BBC, to assess all points of view without bias. Mr Cowling exposes a mind set of propaganda in an organism officially committed to balance, and paid for by a licence fee difficult to escape”.
15. The grounds went on to state that in the case of newspapers such as the *Daily Telegraph* and the *Guardian*, “readers will know the orientation of these publications. Bias is expected and catered for by the reader, who does not have to buy or read materials edited towards one side or the other.” The BBC, on the other hand, is, according to the appellant “mandated with the serious task of avoiding bias, doing all it possibly can to respect and take account of orientations which its editors disagree with”.

16. Both parties were content for the appeal to be determined without a hearing and, in all the circumstances we concluded that we could properly do so. In reaching a decision in this case we have had regard to the totality of the materials contained in the appeal bundle, compiled by the respondent. Our decision is unanimous.
17. The appellant considers that the basis of his appeal "is that the defence of "editorial process" does not apply because the memo reveals a collective mindset behind all editorial process, deeper than the process itself and conditioning it, going against balanced editing and journalism".
18. The appeal is misconceived, so far as the appellant seeks to pray in aid what he says are strong public interest considerations, as relevant factors to be considered in deciding whether the information should be disclosed under FOIA. The structure of sections 1, 3, and 7 of the Act together with Part VI of Schedule 1, is such as to prevent the relevant right of access (and its corresponding duty) from applying at all. This can be seen from section 7(1):-
  - (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".
19. There is, accordingly, no scope for applying a public interest balance, in deciding whether the information in question should be disclosed. The position is not analogous to the so called qualified exemptions in FOIA, as to which section 2(1)(b) and (2)(b) provide for the striking of the requisite balance.
20. It is, we find, manifest both from the submission of the BBC (which the respondent has accepted) but also, importantly, from such parts of the "leaked" memo or report as are set out in the *Daily Mail* article, that Mr Cowling was, in essence, advising those involved in the editorial process relating to the BBC's news output, of conclusions that might be drawn, following the EU referendum result.
21. It is impossible to conclude that the memorandum has no direct link with journalism. To do so would be diametrically opposed to the majority judgments of the Supreme Court in Sugar.
22. As regards the three elements of journalism described in EA/2005/0032, the memorandum is, we consider, editorial in nature as well as being directly relevant to the third element, and in particular to "the maintenance of the standards and quality of journalism (particularly with respect to accuracy, balance and completeness)" and to the training and development of journalists.
23. It appears that the appellant's fundamental stance is not that Mr Cowling's memo was not intended to make the BBC's news editors reflect on how those outside the metropolis who had voted to leave the EU might be viewed. Rather, the appellant's stance is that the news journalism practised by the BBC is so biased in favour of a "metropolitan elite" as not to be worthy of the term "journalism".

24. The fact that the appellant vehemently espouses that view does not entitle him to succeed. The Tribunal must construe the word "journalism" in Part 6 of Schedule 1 according to the ordinary principles of statutory construction. Journalism is still journalism, irrespective of whether it is alleged to be inaccurate or biased. The same is true even where the alleged bias is said to occur in an organisation which, for whatever reason, is supposed to be free from bias.

25. As the Tribunal said in EA/2010/0042:-

"38. ... the derogation is not to be construed in a way which ... might undermine the legislative intention to protect from inhibition the journalistic ... functions of the BBC. This applies even in a case where the journalism may be of doubtful quality and subject to legitimate challenge. The BBC will be open to challenge and scrutiny in respect of poor journalism, and may well from time to time deserve criticism, but the effect of the Supreme Court's ruling on the construction of the designation is that those wishing to question and challenge, if the issue relates to journalism ... will not have free access to underlying or unpublished material under FOIA...

...

129. It cannot have been intended ... to assign to the Tribunal the function of determining quality or legitimacy as to the BBC's output. Even bad or worse that ..... journalism is still "journalism" ..."

26. We respectively endorse and adopt what was there said.

### ***Decision***

27. This appeal is dismissed.

Date Promulgated:  
3 August 2017

**Judge Peter Lane**  
**2 August 2017**