



Neutral Citation Number:

**IN THE FIRST-TIER TRIBUNAL**  
**GENERAL REGULATORY CHAMBER**  
**(INFORMATION RIGHTS)**

**Appeal No: EA/2017/0203**

**ON APPEAL FROM:**

**The Information Commissioner's Decision Notice No: FS50690052**  
**Dated: 31 August 2017**

**Appellant: Dr Cally Harrison**

**Respondent: The Information Commissioner**

**Considered on the papers: 13 March 2018**

**Before**  
**Chris Hughes**  
**Judge**  
**and**  
**Anne Chafer & Henry Fitzhugh**  
**Tribunal Members**

**Date of Decision: 20 March 2018**

**Subject matter:**

Schedule One, Part VI Freedom of Information Act 2000

**Cases:**

Sugar (deceased) v British Broadcasting Corporation [2012] UKSC 4

## **DECISION OF THE FIRST-TIER TRIBUNAL**

The Tribunal upholds the decision notice dated 31 August 2017 and dismisses the appeal.

### **REASONS FOR DECISION**

#### **Introduction**

1. The Appellant is concerned about how the BBC makes decisions with respect to the composition of the audience for one of its major tv programmes – Question Time (QT). On 15 June 2017 she wrote to the BBC:-

*“My FOI request is (FOI Act 2000): I would like to know what criteria apply re: selecting successful applicants for QT, who’s involved in the selection process (if not names provide job titles) and if a computer programme is used for the final selection.”*

2. The BBC replied on 6 July 2017 and explained that the information was excluded from the scope of FOI because information held by the BBC is only within the scope of the Act if it is held *“for purposes other than journalism, art, or literature.”* The BBC provided an explanation of how FOI applied to public service broadcasters and how this differed from other public authorities to which FOIA applied. FOIA recognised that these bodies were different and therefore *“..the Act does not apply to information held for the purposes of creating the BBC’s output (TV, radio, online etc) or information that supports and is closely associated with these creative activities.”*

3. The Appellant was dissatisfied and pursued her case with the Information Commissioner (ICO), the ICO expressed her opinion that the information fell within the scope of the exemption however the Appellant insisted:-

*“I find it utterly unacceptable that FOI and DPA legislation have been diluted to a great extent by the powers to be so that the public eventually receives very little info in relation to how government bodies conduct their business...”*

*In line with the law of the land, journalistic privilege should not supersede the Equality Act 2010 and the Public Interest Disclosure Act 1998...”*

4. In her decision notice the ICO explored the words of the statute and the Supreme Court decision in *Sugar*. In that case the Supreme Court endorsed the ICO's definition of journalism: -

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

*2. The second is editorial. This involves the exercise of judgement on issues such as:*

  - \* the selection, prioritisation and timing of matters for broadcast or publication,*
  - \* the analysis of, and review of individual programmes,*
  - \* the provision of context and background to such programmes.*

*3. 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.” However, the Supreme Court said this definition should be extended to include the act of broadcasting or publishing the relevant material. This extended definition should be adopted when applying the ‘direct link test’.”*
5. The ICO considered that the selection of participants in Question Time fell within part 2 and that (DN paragraph 23) *“selecting audience members involves a significant degree of editorial decision-making by the editorial and production team.”* She upheld the position of the BBC.
6. In her notice of appeal, the Appellant argued that *Sugar* was not a precedent for her case, that the Leveson Inquiry, the Equality Act and the Public Interest Disclosure Act were not considered by the ICO in coming to her decision. She advanced arguments relating to openness and her view of professional regulation arguing that *“ICO and the BBC are contorting the definition of professionalism by playing the judge and jury when it comes to editorials and public involvement.* She referred to the values statements adopted by the BBC and the ICO and stated *“I am very frustrated with the exception rights given to the BBC which basically excludes them from providing any info as it all comes under the “so called journalistic privilege.”* She argued that what she called journalistic privilege should not supersede the Equality Act and the Public

Interest Disclosure Act. She also argued that since an independent production company handled the actual selection the BBC should have disclosed the criteria.

7. In resisting the appeal, the ICO maintained the position set out in her decision notice. She submitted that the issue was whether a right to the information existed under FOIA since the request was made under FOIA and the decision had to be made on the basis of the words of the Act as it is drafted. In considering what was or was not journalism the public interest in any disclosure of information was not germane. Furthermore, the issue of the quality of any journalism is not a matter affecting a public interest to be balanced in deciding whether information should be released. The issue was whether the material fell within the definition of journalism established in *Sugar* and so whether the ICO had come to the correct decision or not.

#### Consideration

8. It is important for the Appellant to understand the framework of law which is relevant to this case. She makes claims and assertions as to the Equality Act and other matters; however, the issue is the proper interpretation of the Freedom of Information Act 1998. In general, the public has a right to information under this Act of Parliament only in relation to information held by certain specified bodies; there is no right to information against a body which is not included within the Act. The position of the BBC and other public broadcasters is more nuanced than this since some of their information falls within the Act and other information does not fall within the Act. The issue is how is that boundary defined in the Act and how that definition is to be interpreted in the light of the decision of the Supreme Court when it considered that boundary.
9. The Supreme Court unanimously upheld the ICO's decision in *Sugar* that a report on the nature of BBC coverage of conflict in the Middle East was held for journalistic purposes and not disclosable. Lord Wilson in considering the three linked exclusions from disclosure noted: -

*“So, although one might have an interesting debate whether nowadays the word “journalism” encompasses more than news and current affairs, the debate is likely in this context to be sterile. For any output which did not obviously qualify as journalism would be likely to qualify either as literature or – in particular, in that its meaning has a striking elasticity – as art.”*

10. Lord Walker (paragraph 79) in discussing the exemption elaborated this point: -

*“The real emphasis is on what is not disclosable – that is material held for the purposes of the BBC’s broadcasting output.”*

11. The task for the tribunal therefore is to consider whether the material sought was held for the purposes of the BBC’s broadcasting output.

12. The tribunal considers that it is apparent on the face of the request that what is sought is journalistic material. The information request focuses on *how* the BBC selects individuals to be in the audience of Question Time. As a result of that selection the individual member of the audience, may at the discretion of the host, be in a position to ask the panel a question. That selection process determines who appears and what questions may be asked of the panel so it shapes the content of the broadcast material. It is in essence an editorial decision as much as commissioning an op-ed piece in a newspaper. Material on this decision held by the BBC is held for journalistic purposes, whether a BBC employee carries out the selection or an independent company.

13. The reasoning of the ICO is clear correct in law and this appeal is dismissed.

Judge Hughes

[Signed on original]

Date: 20 March 2018