



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

Appeal Reference: EA/2019/0373P

**Determined, by consent, on written evidence and submissions.
Considered on the papers on 12 March 2020**

Before
Judge Stephen Cragg Q.C.

Tribunal Members
Ms Alison Lowton
Mr David Wilkinson

Between

Christopher Hastings

Appellant

and

The Information Commissioner

Respondent

DECISION AND REASONS

DECISION

1. The appeal is dismissed.

MODE OF HEARING

2. The parties and the Tribunal agreed that this matter was suitable for determination on the papers in accordance with rule 32 Chamber's Procedure Rules.
3. The Tribunal considered an agreed open bundle of evidence comprising pages 1 to 91.

THE REQUEST AND RESPONSE

4. On 24 March 2019, the Appellant wrote to the BBC and requested information as follows:

I would like to request the following information under The Freedom of Information Act and The Environmental Information Regulations.

I believe the derogation does not apply in this instance because I am trying to find out the extent of the BBC's financial support for an outside organisation – in this case Comic Relief. Comic Relief is not an off shoot of the BBC. On the contrary it is an independent charity with its only [sic] Chief Executive and board of trustees. License fee payers have the right to know how The BBC is using public funds to support the work of this organisation.

I believe the case for disclosure is heightened by the controversy surrounding many of the charity's activities. You will be aware that the Labour MP David Lammy has criticised the way charity portrays Africa. Other members of parliament have criticised what they fear is a new anti Conservative Government bias creeping into the charity's work.

1...Does the BBC hold written documentation which details the extent of its financial support for Comic Relief. This documentation will detail the amount spent on individual Red Nose Day Appeals, for instance the Red Nose Day appeal broadcast on Friday 15 March

2019 as well as the specially themed Comic Relief programmes and events broadcast in the run up to that appeal.

2...If the answer to the above question is yes can you please detail how much The BBC has spent and or is expected to spend on the following three Comic Relief Appeals. (2019, 2017, 2015.). Please include the costs associated with the appeal night itself and the cost of those specific Comic Relief branded/themed programmes and events broadcast in the run up to the appeal. Eg the 2019 figures will include the amount spent by The BBC in planning, arranging, casting and broadcasting the celebrity climb of Mount Kilimanjaro.

3...Has Comic Relief itself ever made a financial contribution to the BBC to cover the cost of the BBC's Red Nose broadcasts and other Red Nose events organised and broadcast by the BBC. If the answer is yes can you please provide details as they relate to the Red Nose Day appeals 2015, 2017, 2019.

4...Since January 1 2018 have any of the following Comic Relief employees and representatives written to Charlotte Moore, the current Director of Content about the extent of the BBC's financial support for Comic Relief, its Red Nose Day appeals and related events.

a...Liz Warner, the Chief Executive of Comic Relief.

b...Richard Curtis, co-founder and trustee.

c...Sir Lenny Henry, co-founder of the charity.

d...Tim Davie, the current chair of the charity who is also a BBC employee.

If the answer is yes can you please provide copies of this correspondence and communication including emails.

5...Since January 1 2018 has Charlotte Moore written to any of the Comic Relief employees and representatives mentioned in the previous question about the extent of the BBC's financial support for Comic Relief and its Red Nose Day appeals and related events. If the answer is yes can you please provide copies of this correspondence and communication including emails.

5. The BBC replied on 16 April 2019 to say that it did not believe that the information was caught by FOIA because it was held for the purposes of 'art, journalism or literature'. It explained that Part VI of Schedule 1 to FOIA provides that information held by the BBC and the other public

service broadcasters is only covered by FOIA if it is held for 'purposes other than those of journalism, art or literature'.

6. The BBC also provided additional information by way of explanation as to how the Comic Relief charity was run and where information could be obtained about its finances. Specific reference was made about Comic Relief's information concerning the Kilimanjaro challenge as follows: -

The Kilimanjaro challenge was funded from Comic Relief's operational budget, which does not include public donations. The costs were covered in cash, or in kind, by support from corporate sponsors and donors, by generous private donations and by Government (including Gift Aid) as well as from investment income and interest. Many items of technical kit and clothing were donated by suppliers. No money donated directly by the public was used to fund the project.

7. On the same day the Appellant contacted the Commissioner to complain and, in particular, to challenge the operation of the derogation in this case on the basis that the BBC's working relationship with Comic Relief is unique.

8. The Appellant argued to the Commissioner that: -

'The BBC's commitment to the bi-annual Comic Relief appeal isn't limited to a single programme ... I am seeking information about the total amount spent on each of the last three Red Nose Day appeals. I believe the derogation should not be used to conceal information about the use of public funds particularly when the request specifically does NOT include the cost of individual programmes or payments to any individual presenters.

He also pointed out that in a decision notice in 2006 in relation to the Children in Need appeal, the Commissioner had ruled that information about costs and payments should be disclosed.

9. On 22 July 2019 the Commissioner invited the BBC to provide its more detailed arguments about why it believed that the information requested falls within the derogation. In the decision notice that was produced on 20 September 2019, the Commissioner says that the BBC provided a background to the requested information to clarify that the BBC does not provide any financial support to the independent charity, Comic Relief. The decision notice sets out the BBC's explanation as follows: -

13. For Comic Relief, the BBC schedules a season of programming across a range of channels and platforms within a specific time period, usually from mid-January until March culminating in Red Nose Day.

14. The BBC's coverage and programming in relation to Comic Relief is no different from any other BBC programming or commissioning and any costs are subsumed as part of the BBC's own programmes and production budgets.

15. The BBC concluded that 'to the extent that information has been requested in relation to programmes and production costs associated with Comic Relief appeals, we submit that this information is held for derogated journalistic purposes...'

10. The BBC considered that 'Information about programme costs and budgets is used by commissioners, controllers and other business leads to inform decisions about how they commission content, and the editorial and creative remit and direction of channels and programmes'. The BBC also said that 'Information about the costs associated with one programme influences decisions that are made about the broader allocation of resources across other content.'

THE LAW

11. It is worthwhile explaining the legal provisions relied upon by the BBC at this point.

12. In effect, a combination of section 3 and section 7 FOIA and Part VI of Schedule 1 to FOIA provides that information held by the BBC is only covered by FOIA if it is held for ‘purposes other than those of journalism, art or literature’.
13. Thus, materially, in relation to the current appeals, if the BBC can show that it holds the information for the purpose of journalism then the FOIA does not apply to the information and the Appellant will not be entitled to its disclosure.
14. The issue as to what is covered by the derogation was considered by the Supreme Court in *Sugar v BBC* [2012] UKSC 4; [2012] 1 WLR 439. The Court held that the BBC does not have to show that the predominant purpose of holding the information is (for example) journalism, so long as it can show that it is *a* purpose for holding the information. *Sugar* was a case about whether an internal report was subject to the derogation and did not directly consider matters such as financial information linked to programme. However, that issue was briefly mentioned in paragraph 42 of the judgment which states that: -
- “.... It is important to note, however, that 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...”
15. A case dealing more directly with financial information held by the BBC is *BBC v Information Commissioner* [2009] EWHC 2348 (Admin); [2010] E.M.L.R. 6 which dealt with a number of requests for financial information about a variety of programmes. One of the requests asked about how much the BBC had paid for the rights to cover the winter Olympics. Another asked for staff costs on the show *Eastenders*. A third asked for various information about staff salaries, payments to a production

company, and the costs of overseas trips for programme making purposes. A fourth requested information about budgets for Eastenders, Top Gear and Newsnight. The High Court found at paragraph 86 that information of this sort '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'.

COMMISSIONER'S DECISION NOTICE

16. The Commissioner concluded as follows: -

31. The Commissioner has previously accepted that any decision taken on costs has a direct impact on the creative scope for the programme and for other programmes because more money spent on one area or one programme means less available for another. The Commissioner recognises that the decision to broadcast fundraising appeals (in this case Comic Relief) relates to editorial decisions about the content that the BBC wants to offer its customers and this in turn relates to the overall editorial decision making process and resource allocation. It is therefore intimately linked to the corporation's output and it is clear that the Commissioner has no jurisdiction in this matter.

34.... the Commissioner is satisfied that the requested information falls under the definition of journalism and is therefore derogated. The Commissioner sees no basis for deviating from the approach as the complainant argues; the information clearly falls within the derogation. The derogation is engaged as soon as the information is held by the BBC to any extent for journalistic purposes...

THE APPEAL

17. In his appeal dated 27 September 2019 the Appellant contends that the information he seeks is not covered by the derogation and is financial information not exempt from disclosure. The Appellant refers to a

previous decision of the Commissioner from 2006 which concerned programme cost. He points out that the *Sugar* case concerned the journalism of the BBC and not programme cost, and that there was a strong public interest in disclosure.

DISCUSSION

18. Given the combined authority in the *Sugar* case and the *BBC v Information Commissioner* case, it seems to us that this is a straightforward case to decide.
19. We do understand that at first blush it is not immediately obvious that financial information in relation to programmes should be covered by the BBC 'journalism' derogation. It is right that the *Sugar* case, from which the Commissioner has cited extensively, concerned an internal report commissioned by the BBC from a journalist on the quality of its coverage, in a particular area of its news reporting, and did not concern financial information.
20. However, the *Sugar* case decided that the 'journalism' derogation did not only apply to information where the predominant reason for holding the information was journalism, and that so long as it was one of the purposes that was sufficient. The *BBC v Information Commissioner* case did explain why financial information about programmes was closely linked with journalistic purposes in any event (and this was supported to a degree by paragraph 42 in the *Sugar* case). Any decision notice from the Commissioner prior to these cases (such as the decision relied upon by the Appellant) is not something which now has any force.
21. In this case the Appellant has been told that the BBC does not provide any financial support to the independent charity, Comic Relief, and he has

been directed to sources where he can find out more about the charity's financial affairs. He has been told also that the Kilimanjaro challenge was wholly funded by the charity.

22. All the other information he has sought falls squarely into the derogation as financial information held with a link to the BBC's journalistic purposes. We accept that the Comic Relief programmes are no different from any other BBC programming or commissioning process and any costs are subsumed as part of the BBC's own programmes and production budgets. Like all such information (see the *BBC v Information Commissioner* case) the information is used at an operational or commissioning level in relation to journalistic purposes.

23. It is undeniable that there may be a public interest in the disclosure of information about the costs of making programmes by the BBC. However, if the derogation, as we have found, applies, then FOIA does not provide a further public interest test for us to apply in those circumstances.

CONCLUSION

24. For these reasons this appeal is dismissed.

Stephen Cragg QC

Judge of the First-tier Tribunal

Date: 4 April 2020.

Promulgated Date: 7 April 2020