



**IN THE MATTER OF AN APPEAL TO THE FIRST-TIER Tribunal  
UNDER SECTION 57 OF THE FREEDOM OF INFORMATION ACT 2000**

**Appeal No. EA/2012/0054**

**BETWEEN:**

**MODELLING INFORMATION SERVICE**

**Appellant**

**and**

**THE INFORMATION COMMISSIONER**

**Respondent**

---

**Strike Out Ruling**

---

1. On 5 October 2011 the Appellant sent the BBC a request for information (under section 1 of the Freedom of Information Act 2000 ("FOIA")) about a particular programme in which a modelling contract with a top agency would be a prize. The request was for :  
  

*"... (i) the name of the 'top agency' concerned. (ii) Full details of the 'modelling contract'".*
2. The request was refused, and the refusal was upheld by the Information Commissioner in a decision notice dated 15 February 2012, on the basis that the requested information was held by the BBC for the purposes of programme making. The basis for that contention is that the BBC is not to be treated as a public authority, to which the provisions of FOIA apply, in respect of some of its functions, namely. "... *journalism, art or literature.*"
3. The Tribunal has been given the clearest and most authoritative guidance as to how it should treat information requests to the BBC, which may extend to information relating to programme development and transmission. In the case of *Sugar v BBC* [2012] 1 WLR 439 the Supreme Court decided:
  - a. if the requested information is held for the purpose of journalism, art or literature at the time of the request, then the information falls outside the scope of the Act; and
  - b. this is so even if that is not the predominant purpose for which the information is held or if the information is held for more than one purpose.
4. On 5 March 2012 the Appellant launched an appeal against the Decision Notice. He argued, first, that as the name of the agency had been disclosed after the date of his request, the whole of the requested information should be disclosed. The Information Commissioner has asserted in his Response to the Grounds of Appeal that the fact that part of the requested information fell into the public domain after the date of the original request does not have any impact on the BBC's decision at the time to refuse disclosure.

5. The second ground of appeal was that as the prize, as a matter of contract law, had been described in a misleading manner (it was said that any contract must exist between the agency and the BBC, not the contestants) information about it could not fall within the derogation. In response to that argument the Information Commissioner asserted in his Response that the Appellants concerns “*fall outside the Commissioner’s remit as he can only consider the purpose for which the requested information is held and whether or not this renders the information subject to the Act. As the Appellant has failed to provide any arguments which address this specific issue, the Commissioner’s position is that this appeal has no reasonable prospects of success.*”
6. The grounds of appeal also included a wholly unsupported and irrelevant allegation of bias in respect of the individual currently holding the office of Information Commissioner.
7. The Information Commissioner submitted in his Response that the appeal had no reasonable prospect of success and that it should therefore be struck out under rule 8(3)(c) of the Tribunal Procedure (First-tier Tribunal (General Regulatory Chamber) Rules 2009 (“the Rules”). Accordingly I gave directions on 4 April for the parties to file submissions limited to the strike out issue.
8. In his written submission the Appellant returned to his argument that the prize had been described in what he considered to be misleading terms, which may have breached various regulations and guidance. He concluded that the prize, as so described, did not actually exist and “*it cannot be held by the BBC that information about something which does not exist was or is held by the BBC for the purposes of ‘journalism, art or literature’.*”
9. The Appellant also argued that details of the prize should have been made available to contestants at the outset. That is an argument which very clearly does not address the derogation issue in any way. He relied, in part, on the Conduct of Employment Agencies and Employment Business Regulations 2003, which he said had the effect of requiring disclosure “irrespective of the Freedom of Information Act 2000”. The jurisdiction of the Tribunal derives, of course, from the very statute that, by inference, the Appellant suggests should be ignored. He argues that consideration should instead be given to another statute, under which the Tribunal has no jurisdiction.
10. The Appellant submitted that, in light of the arguments he had put forward the BBC “*cannot therefore apply the derogation which precluded the BBC from being required to supply the information*”. However, the derogation has not been made subject to any qualification, such that it may only be relied upon in certain circumstances. It arises, as a fact, from the nature of the information and the identity of the organisation holding it.
11. In the light of what I have said about the individual arguments put forward by the Appellant, which do not address the true nature of the derogation argument put forward by the BBC and accepted by the Information Commissioner, I have concluded that his appeal has no reasonable prospect of succeeding and I therefore direct that it should be struck out under rule 8(3)(c) of the Rules.

Signed: **Chris Ryan**  
**Tribunal Judge**

Dated: 4 May 2012



**IN THE MATTER OF AN APPEAL TO THE FIRST-TIER TRIBUNAL  
GENERAL REGULATORY CHAMBER (INFORMATION RIGHTS)**

**Appeal No. EA/2012/0054**

**BETWEEN:**

**MODELLING INFORMATION SERVICE**

**Appellant**

**and**

**THE INFORMATION COMMISSIONER**

**Respondent**

---

**DECISION ON APPLICATION FOR LEAVE TO APPEAL**

---

1. The Appellant has applied for permission to Appeal to the Upper Tribunal (Administrative Appeals Chamber) from my decision dated 4 May 2012 striking out his appeal on the basis that it had no reasonable prospect of succeeding (“the Decision”).
2. An application for permission to appeal is made under Rule 42 of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (“the Rules”). I am satisfied that the Application satisfies the procedural requirements of Rule 42 and that it was made in time.
3. Rule 43(1) provides that, on receiving an application for permission to appeal, I should first consider whether to review my decision. The procedure for such a review is set out in Rule 44 which reads, in relevant part:

*“(1) The Tribunal may only undertake a review of a decision –*

*(a) pursuant to rule 43(1) (review on an application for permission to appeal); and*

*(b) if it is satisfied that there was an error of law in the decision.”*

4. The basis for the Appellant's proposed appeal is that I erred in fact and in law. It is said that I attributed claims to the Appellant which it did not make and that my decision did not take account of the most relevant grounds of appeal. I proceed on the basis that if I took account of facts that I should have ignored, or ignored facts that I should have taken into account, this could constitute an error of law for the purpose of Rule 44.
5. The basis of my decision was that the requested information related to the making of a programme and that it therefore fell within the area of the BBC's activities that fall outside the scope of the Freedom of Information Act 2000. This results from the nature of the information and the identity of the organisation holding it.
6. The application for permission to appeal criticises my summary of the grounds of appeal. Then, at paragraph 96 of the application he explains that the true ground of his appeal is that *"the 'prize' which is the subject of the requested information did not exist and that, therefore, the BBC could not hold the information about to be or have been held for the purposes of 'journalism, art or literature' and therefore the requested information cannot be held to be subject to the derogation"*. That, it seems to me, demonstrates the Appellant's continuing wish to concentrate on the detailed content of the information, when it is its broad nature, (as material prepared as part of the scenario created for the purposes of a reality tv programme), that places it very firmly within a category of information falling within the scope of the BBC's derogation.
7. In the light of what I have said I do not believe that there is any error of law in my decision and I accordingly decline to review it.
8. Having refused to review my decision I am required, by Rule 43 (2), to consider whether to give permission to appeal. For the reasons given above I decline to do so.

**Chris Ryan**  
Tribunal Judge

20 June 2012