



IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

Case No. EA/2009/0114

ON APPEAL FROM:

**The Information Commissioner's
Decision Notice No: FS50231940
Dated: 17 November 2009**

Appellant: ANDREW MONTFORD
Respondent: INFORMATION COMMISSIONER
Second Respondent: BRITISH BROADCASTING CORPORATION

**Determined on the
Papers on: 19 July 2012**

Date of decision: 14 August 2012

Before

Robin Callender Smith
Judge

and

Alison Lowton
Rosalind Tatam
Tribunal Members

Representations:

For the Appellant: Mr A Montford
For the Respondent: Mr Mark Thorogood
For the Additional Party: BBC Litigation Department

Subject matter:

FOIA 2000

Meaning of Public Authorities s.3 and Schedule 1
Authorities to which the Act has limited application s.7

Environmental Information Regulation 2004

Definitions, Reg 2

- Environmental information
- Public authority

Cases:

Sugar (deceased) (Represented by Fiona Paveley) v BBC and another [2012] UKSC 4; *BBC v Sugar & Information Commissioner* [2009] EWCA 2349; *BBC v Information Commissioner* [2009] EWHC 2348 (Admin); *Smartsources v IC* [2011] 1 Info LR 1498; *Network Rail Ltd v IC and Network Rail Infrastructure Ltd* (EA/2006/0061 and EA/2006/0062); *Port of London Authority v IC and Hibbert* (EA/2006/0083) and *Bruton v IC and the Duchy of Cornwall* (EA/2010/0182).

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DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal upholds the decision notice dated 17 November 2009 and dismisses the appeal.

REASONS FOR DECISION

Introduction

1. The Appellant made information requests to the BBC on 15 December and 16 December 2008 about an organisation known as the Cambridge Media and Environment Program (CMEP). He asked various questions about the expenditure of the BBC in relation to CMEP, who authorised the expenditure and its legal status.
2. The BBC refused to provide the requested information on the basis that it was outside the scope of FOIA, specifically because it was held for the purposes of journalism, art or literature. The BBC indicated it was happy to provide information about the seminars and the role of the CMEP generally on a voluntary basis.
3. The information which is the subject of this appeal was requested by the Appellant on two consecutive dates. On 15 December 2008 the Appellant requested
 - (a) Annual amounts paid to CEMP (sic) since 2001. (b) The name and position of the person(s) responsible for authorising expenditure with CEMP (sic) since 2001. Here I am thinking of the person who commits the BBC to the expenditure. (c) I would then like to see any internal documents produced by or sent to the people named in (b) where these relate to CEMP (sic). (d) Any information relating to the legal status of CEMP (sic) would also be useful.

4. On 16 December 2008, he asked for

copies of all correspondence from July 2005 to date between Roger Harrabin and or Joe Smith of the Open University, particularly information relating to their work on the Cambridge Media & Environment Program (which I have also seen referred to as Cambridge Environment and Media Program), but also any and all correspondence.

5. The Tribunal notes that the Decision Notice dated 17 November 2009 refers to the two information requests detailed above, as does the BBC in its response of 2 April 2012 (Paragraphs 14 and 15), and the Commissioner in his Amended Response of the same date. The focus of the latter arguments and the open witness statement of Mr Harrabin (at pages 70 – 73 in the open bundle provided to the Tribunal) is on the request dated 16 December 2008, but the thrust of the points made applied to both requests.

6. The BBC described this disputed information in the following terms:

The Disputed Information relates to the development and organisation of the CMEP seminars. The Disputed Information also includes personal data about Mr Harrabin and Dr Smith and some correspondence with third parties.

Insofar as the Disputed Information relates to the organisation of the CMEP seminars, which were organised by the BBC as a tool to reflect upon and ultimately improve BBC output, and which have led to improved coverage of certain issues by the BBC, the BBC relies on the designation at Schedule VI of Schedule 1 of the Act as the information was at the time of the request held to a significant extent for the purposes of journalism. The BBC is therefore not obliged to disclose the information to the Appellant and his Appeal should be dismissed. Insofar as any e-mails contain any information not relating to the organisation of CMEP seminars or contains personal data, the BBC relies upon the absolute exemption to the Act at s.40 (2) as the information "constitutes personal data".

7. The CMEP is the title of a programme of seminars that had been running since 2005. BBC editorial staff of all kinds – including editors and journalists – attended and participated in the seminars which were known as "Real World" seminars. The BBC characterises them as being

designed to be a forum in which broadcasters and experts can meet and discuss world issues and how they are covered in the media.

8. It states that the initial objective was to improve BBC journalism on slow moving issues such as environmental change and world development. This had progressed to providing

a safe space for self-critical analysis of numerous challenges to and opportunities facing staff from different areas of the BBC in communicating with audiences in and about an increasingly complex and inter-connected world. The seminars support the BBC's Charter commitment to bring 'the UK to the World and the World to the UK' and have covered a range of topics including ageing, food, risk, future superpowers, technology, climate change, business investment, biodiversity, entrepreneurship, public health, population, migration, investment flows and innovation.

9. According to the BBC, the seminars are now organised by an informal partnership comprising the BBC and Dr Joe Smith, a senior geography lecturer at the Open University. The only purpose of the CMEP had been to research and plan the seminars. Mr Harrabin, a BBC Environmental Analyst, was employed by the BBC and received no remuneration from CMEP. The BBC did not fund Dr Smith for his work on the CMEP seminars and the BBC paid its own expenses for the participation of its own staff at the seminars.

10. Participation in the seminars had been diverse in terms of opinions and backgrounds according to the BBC. Generally the seminar participants were 50% from the BBC and 50% from external invitees. In terms of the BBC participants they included a mix of senior editorial managers and directors, editors and also less senior journalists.

11. The BBC's views about the seminars are summarised in Paragraph 16 of the final submissions dated 8 June 2012:

The seminars have encouraged BBC managers, editors and journalists alike to consider candidly the shortcomings of journalism in dealing with slow-moving news stories, and are widely judged by senior BBC managers to have led to improving coverage of many issues. The seminars have led to BBC producing written guidance to journalists on the reporting of risk and to a major BBC survey on

public attitudes to public health that influenced how the BBC reports on health stories generally. They were the inspiration for a number of BBC programmes including the India and Pakistan Season and the acclaimed BBC comedy drama "Taking the Flak" which followed a team of journalists in an African war zone. The seminars also helped inform the BBC's Year of Science. One seminar led the editor of the Ten o'clock News to find a new way of covering the warning from the Government's Chief Scientist about a predicted "Perfect Storm" concerning water, food and energy.

FOIA and the BBC

12. The term "public authority" is defined in section 3 (1) FOIA and to include the bodies listed in Schedule 1 Part VI FOIA. In the case of the vast majority of public authorities, the FOIA regime applies to all the information that the public authority holds. However, for a limited number of public authorities – including the BBC – there is no requirement to comply in relation to certain types of information that they hold (see section 7 (1) FOIA).

13. The BBC's entry in Schedule 1 FOIA is in the following terms:

The British Broadcasting Corporation, in respect of information held for the purposes other than those of journalism, art or literature.

14. The result of this is that, where a FOIA request is made for information that is held by the BBC for the purposes of "journalism, art or literature" the duty to disclose that information under Section 1 FOIA does not arise. Information sought – where this applies – is often described as "falling within the derogation".

15. A finding that information is not held for the purposes of journalism, art or literature does not mean that disclosure will necessarily follow. It means that the information in question is subject to Parts I to V of FOIA and, where appropriate, the BBC is obliged to disclose the information on request subject to any of the exemptions in respect of that set out in Part II FOIA.

16. A series of cases have explored the nature of the derogation and the most relevant are the first three cited at the beginning of this decision.
17. Of those cases, the one whose principles particularly govern this decision is *Sugar (deceased) (Represented by Fiona Paveley) v BBC and another* [2012] UKSC 4. This recent decision of the Supreme Court – although it comes after the date of the information being requested by the Appellant – sets out the relevant law in relation to the derogation.
18. This appeal was stayed so that the Tribunal and the parties could consider the outcome of the issues before the Supreme Court which is why, although the appeal was originally received in 2009, it has taken until 2012 to be decided.
19. The Appellant lodged amended grounds of appeal with the Tribunal on 16 April 2012, having considered the Supreme Court's ruling. The other parties were given leave by the Principal Judge in this Tribunal to lodge further supplementary responses to the amended grounds of appeal.
20. The Appellant's points in the amended grounds of appeal can be summarised as follows:
 - (1) He believed that an examination of the details of what was known about CMEP seminars suggested that they were not *bona fide* attempts at "self-critical analysis" (as per the Supreme Court's observations about the nature and extent of 'journalism' in connection with the Derogation).
 - (2) In particular his view was that it was implausible that the CMEP seminars were *bona fide* attempts to assess the state of the scientific understanding of man's effect on the climate or to improve the BBC's output on climate change. As such, information from them was not held for journalism purposes.
 - (3) He believed that the Supreme Court ruling meant that, in order to take advantage of the Derogation, the BBC had to show that information was held to a "significant extent" for the purposes of journalism, art or literature and that notice should be taken of

"directness of purpose". In respect of the correspondence he had requested between Mr Harrabin and CMEP he argued that there was no direct or substantial relationship. The information he was requesting was three stages away from programme output because the correspondence he wanted related to arrangements for the seminars (which informed decision-makers who then decided editorial policy which then informed programme output).

- (4) As a separate point he believed that the information he was seeking was environmental information under the Environmental Information Regulations 2004 and that it should be disclosed on the basis that it was not subject to the Derogation regime within FOIA. Because the Environmental Information Regulations gave direct effect to the Aarhus Convention – and there was no mention of an exemption for broadcasters – he believed that the EIRs were defective and the Tribunal should rule that the information should be disclosed.

The questions for the Tribunal

21. What bearing, if any, does the regime under the Environmental Information Regulations 2004 have in respect of this appeal?
22. Does this appeal fall to be decided under the FOIA regime?
23. If so, does the BBC's statutory Derogation under FOIA apply so that the disputed information need not be supplied on the basis that it is held for the purposes of journalism, art or literature?
24. Although the original appeal was not formulated with the questions set out above in that sequence – and did not have submissions on the Supreme Court decision of *Sugar* 2012 – it may assist the Appellant and others who may read this decision if the EIR points are addressed first before turning to the Derogation issues.
25. The BBC's further submissions on this point were comprehensive and the Tribunal found them to the point, relevant and persuasive.

The issue of the Environmental Information Regulations 2004 (EIR)

26. The Aarhus Convention¹ and the EU Directive on public access to environmental information² were implemented into English law by the Environmental Information Regulations 2004. The Convention provides for the grant of rights of access to information, public participation in decision-making, and access to justice in environmental matters. It was ratified by the United Kingdom and, of itself, the Convention does not have direct effect. Article 4 of the Convention provides for the provision by public authorities of environmental information to the public upon request, in the form requested and without the need to show an interest in the information.

27. "Public authorities" are defined by Article 2 (2) of the Convention as:

- (a) Government at national, regional and other level;
- (b) Natural or legal persons performing public administrative functions under national law, including specific duties, activities or services in relation to the environment;
- (c) Any other natural or legal persons having public responsibilities all functions, or providing public services, in relation to the environment, under the control of a body or person falling within subparagraphs (a) or (b) above;
- (d) The institutions of any regional economic integration organisation referred to in article 17 which is a Party to this Convention.

This definition does not include bodies or institutions acting in a judicial or legislative capacity.

28. The Convention defines environmental information as:

any information in written, visual, aural, electronic or any other material form on:

- (a) The state of elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;

¹ The UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters.

- (b) Factors, such as substances, energy, noise and radiation, and activities or measures, including administrative measures, environmental agreements, policies, legislation, plans and programmes, affecting or likely to affect the elements of the environment within the scope of subparagraph (a) above, and cost-benefit and other economic analyses and assumptions used in environmental decision-making;
- (c) The state of human health and safety, conditions of human life, cultural sites and the built structures, inasmuch as they are or may be affected by the state of the elements of the environment or, through these elements, by the factors, activities or measures referred to in subparagraph (b) above.

29. The aim of the Directive is to guarantee the right of access to environmental information held by or for public authorities and to set out the basic terms and conditions for ensuring that environmental information is progressively made available and disseminated to the public. While an EU Directive is binding as to the result to be achieved, the formal method for achieving this is a matter for EU Member States. Directives are not generally binding except in certain defined circumstances (which do not exist within the confines of this appeal).

30. "Public authorities" are defined within the Directive as meaning

- (a) Government or other public administration, including public advisory bodies, that national, regional or local level;
- (b) any natural or legal persons performing public administrative function under national law, including specific duties, activities or services in relation to the environment; and
- (c) any person having public responsibilities all functions, or providing public services, relating to the environment under the control of the body or person falling within (a) or (b).

² 2003/4/EC.

31. The Regulations transposed the Directive into UK law. Regulation 3 (1) provides that the Regulations apply to public authorities. Regulation 2 (2) of the Regulations defines public authorities as:

(a) government departments;

(b) any other public authority as defined in section 3 (1) of the Act, disregarding for this purpose the exceptions in paragraph 6 Schedule 1 of the Act but excluding –

(i) any body or office-holder listed in Schedule 1 of the Act only in relation to information of the specified description; or

(ii) any person designated by Order under section 5 of the Act;

(c) any other body or other person, then carries out functions of public administration; or

(d) any other body or other person, that is under the control of a person falling within the sub-paragraphs (a), (b) or (c) and –

(i) has public responsibilities relating to the environment;

(ii) exercises functions of a public nature relating to the environment; or

(iii) provides public services relating to the environment.

32. The Tribunal notes that the Regulations define "environmental information" in the same way as Article 2 (2) of the Directive. Guidance on how "environmental information" is to be construed is set out in the DEFRA guidance "What is covered by the Regulations?" That guidance notes that there should be a sufficiently close connection between the information and the probable impact on the environment before it can be said that the information is "environmental information". The Tribunal concurs with the proposition that a merely remote connection with safeguarding the environment will not suffice.

33. In determining whether the BBC is a public authority, within the definition set out within the EIR, the Tribunal finds that the BBC is not a government department and therefore does not fall within the definition of EIR.

34. The BBC is only listed in Schedule 1 of the Act in relation to information of the specified description. The BBC is excluded from the definition of public authority by virtue of EIR s. 2 (2) (b) (i) regardless of the purpose for which the information is held. That interpretation accords with the Information Commissioner's interpretation of the provision both in the IC's supplementary response in respect of this appeal (2 May 2012) and the published guidance which notes that the Regulations apply to "most" but not all of the public authorities covered by the Freedom of Information Act 2000.
35. The effect of this provision is to ensure the bodies such as the Renewable Energy Advisory Committee, the Natural Environment Research Council, and the Environment Agency are covered by the EIR while excluding bodies like the Bank of England, the Criminal Injuries Compensation Appeals Panel, the Competition Commission and public service broadcasters from the remit of the Regulations.
36. The BBC asked the Tribunal to consider the effect of a series of relevant authorities about the interpretation of EIR s.2 (2) (e) and (d). For the record these are *Smartsources v IC* [2011] 1 Info LR 1498;; *Network Rail Ltd v IC and Network Rail Infrastructure Ltd* (EA/2006/0061 and EA/2006/0062); *Port of London Authority v IC and Hibbert* (EA/2006/0083), *Bruton v IC and the Duchy of Cornwall* (EA/2010/0182) together with DEFRA's note on EIR as updated in July 2010.
37. The Tribunal agrees that it is not sufficient that the body carries out functions of the public nature. Those functions must be expressly *administrative* functions. The limiting effect of the word "administration" is critical and determinative when interpreting EIR s.2 (2) (c). A body which carries out public functions will not fall within the scope of the Regulations unless it is *also* a body which performs public administrative functions and those functions include "specific duties,

activities or services in relation to the environment” to interpret the Regulations in conjunction with the Directive.

38. Considering the "multi-factor approach" set out in detail in *Smartsource* (at Paragraph 64) the Tribunal finds that the BBC does not perform public administrative functions and therefore cannot fall within the scope of the Regulations. The BBC does not perform any functions which could typically be described as "governmental" in nature and its "mission" under the Royal Charter is to "inform, educate and entertain" through the provision of television, radio and online services. That is not "governmental" in the nature or functions that would ordinarily be performed by a government or the state.
39. The fact that they are matters in which the state has an interest does not mean that those who provide the service are providing a public function.
40. The Tribunal agrees with the BBC submissions that it should have regard to a purposive approach to statutory construction. The special position of the BBC was emphasised by the Supreme Court in *Sugar* (at Paragraph 22 of that judgement). In essence, the fact that Parliament clearly intended that the BBC's right to freedom of expression meant that a general and unqualified protection for information held for the purposes of the BBC's journalistic, artistic and literary output was warranted in order to avoid any interference with its broadcast functions.
41. Further, in relation to s.2 (2) (d), the extent of the control necessary for the purposes of that portion of the Regulation requires a decisive level of control, which is not present in this case. The BBC is independent in all matters concerning the content of its output, the times and manner in which the content is supplied and the management of its affairs. The level of control necessary to bring the BBC within the scope of the Regulation is contradicted by the BBC's independence from government control.

42. The Appellant has not identified which of the elements of EIR s.2 (1) (a) to (f) definitions of "environmental information" the Disputed Information might fall within his wide-ranging requests. The Tribunal – having had the advantage of seeing the Disputed Information in terms of e-mails concerning the organisation, administration and content of the seminars in the closed material available to it – finds that this is not information on any of the matters relating to the environment within the definition of s.2 (1).
43. When exercising its function of considering closed information which is not available to the Appellant, the Tribunal is always aware that the exercise must be conducted rigorously and sceptically, as has been in this case.
44. The fact that the BBC's journalism training involves information concerning the environment is not sufficient to bring it within EIR s.2 (1) and there is no link between the information sought – which relates to training for BBC journalists in relation to the environment – and the environment. The Tribunal finds that the Disputed Information does not fall within the scope of "environmental information" as defined in the Regulation.
45. In short the answers to the two questions posed at Paragraph 21 and 22 earlier are, respectively, "none" and "yes".
46. Focusing finally on the answer to the question in Paragraph 23 – does the Derogation apply? – the Tribunal finds that it does. The reasons for this are contained within the Supreme Court's most recent decision in *Sugar*.
- (1) The purpose of the BBC's derogation is to prevent interference with its broadcasting functions. To give effect to Parliament's intention to avoid such interference, a purposive construction of FOIA is required in respect of that Derogation.

(2) The scope of the BBC's Derogation in respect of information held for the purposes of journalism, art or literature covers the entirety of the BBC's output to the public.

(3) The focus of the Derogation is the purpose for which the information is held.

(4) If the BBC holds information to any significant degree (something that is more than minimal) for the purposes of journalism, art or literature – and this includes its output – even if that is not the predominant purpose of holding the information, the information is exempt from production under FOIA.

47. The Tribunal finds that the Disputed Information is held directly for journalistic purposes, including the training of BBC journalists, and falls squarely within the scope of the Derogation and is exempt from disclosure under FOIA. The BBC is not a public authority under the EIR and the Regulations do not apply to it. The Disputed Information does not constitute "environmental information" within the definition set out in the EIR.

48. Although the Tribunal has not examined this final proposition in any detail – because of its primary findings – it is also satisfied that the Disputed Information should not be disclosed under the personal data exemptions contained both in FOIA and EIR.

49. The appeal is dismissed.

50. There is no order as to costs.

51. Our decision is unanimous.

Robin Callender Smith

Judge

14 August 2012