



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

Case No. EA/2009/0118

**Information Commissioner's
Decision Notice No: FS50176386
Dated: 17 November 2009**

Appellant: Anthony George Foster Newbery

Respondent: Information Commissioner

Determined on the Papers Alone

Before

David Marks QC
(Tribunal Judge)

Representation:

For the Appellant
For the Respondent

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal acting by a Principal Judge alone does not grant the Respondent Commissioner's application to dismiss summarily or both parties' application to stay the above appeal.

REASONS FOR DECISION

Introduction

1. This appeal concerns the BBC. The Appellant wishes to have disclosed to him information regarding a seminar referred to in a BBC Trust published report which dealt, it seems, with issues relating to reporting on climate change. The request was made on 20 July 2007. In August 2007, the BBC responded to the public authority to the request refusing to supply the bulk of the information requested, principally the agenda for the seminar referred to, the attendees and records of the proceedings in question. It is not necessary to go any further into the content and scope of the actual request.
2. The BBC refused to supply the above information, principally on the basis that the Freedom of Information Act 2000 (FOIA) did not apply to the information requested in that the information sought fell outside the scope of the Act.

3. The Commissioner upheld the BBC's decision. The crux of the matter concerns the question which has been a principal subject-matter of reported case law, both in this Tribunal as well as in the High Court including what was formerly the House of Lords, now the Supreme Court, arising out of litigation instituted by Mr Sugar against the BBC.
4. At the time of the request and at the time the Commissioner investigated the refusal to disclose the information sought, the BBC and the Commissioner together adopted what was called a dominant purpose test. This involved, as it is said in the Decision Notice in this case (which is dated 17 November 2009) a consideration of whether the requested information was held for purposes listed within Schedule 1 of FOIA as well as for other purposes. Both those parties took the view that if it was held for what are sometimes called derogated and non-derogated purposes, the Commissioner was required to carry out a balancing test to determine the predominant purpose for which the information was held.
5. For present purposes, it is sufficient to refer to section 3 of FOIA which states:

“3(1) In this Act “public authority” means –

(b) ... any body ... which –

(i) is listed in Schedule 1 ...”.

The entry in relation to the BBC in Schedule 1, Part VI reads as follows, namely:

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

6. For the sake of completeness, reference should also be made to section 7 of FOIA which states that:

“(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.”

7. In this appeal, the BBC had argued prior to the Decision Notice that the construction of sections 3, 7 and Schedule 1 meant that the BBC was not a public authority where it held the information for the purposes of journalism, art or literature. It followed that the Commissioner would have no jurisdiction to issue a decision notice.

8. In *Sugar v BBC* [2009] UKHL 9 and by a majority of 3 to 2, the House of Lords Lord found in favour of the Appellant, Mr Sugar. It concluded that the Commissioner did have jurisdiction to issue decision notices regardless of whether the information that had been requested was derogated, to use the term employed above: see in particular the speech of Lord Hope at paragraphs 54 and 55. It followed that where the requested information was derogated, the Commissioner took the view in the light of House of Lords decision that the BBC had no obligations to comply with Parts V to VI of FOIA in respect of that information.

9. The *Sugar* litigation continued finding itself in effect restored before Irwin J in two decisions which need to be examined carefully.

10. The two decisions in question are first *BBC v Information Commissioner* [2009] EWHC 2348 (Admin) reported at (2010) EMLR 6 and *BBC v Sugar and Information Commissioner* [2009] EWHC 2349 (Admin) which effectively deal with the same subject matter, namely a consideration of whether the so-called predominant purpose test was correct.

11. The former decision concerned a request for an internal report into the BBC's news reporting of the Middle East, and a second concerned request for various items of financial information relating to the BBC's broadcast output. In both decisions, the learned Judge took the view that there were only two possible readings of the test in Schedule 1, Part VI with regard to the phrase "held for purposes other than". In his view, that phrase could mean only either "held for purposes apart from or in addition to", or alternatively, "held for purposes apart from and not including". He stated that the second reading was preferable. He took the view that the predominant purpose, though desirable, simply did not represent the law. In practical terms, it meant that the BBC had no obligation to disclose information held to any significant extent for the purposes of journalism, art or literature, whether or not the information was also held for other purposes. If the information was held for mixed purposes, including to any significant extent for the purposes listed in the Schedule, or one of them, then the information would not be disclosable. In both cases, he regarded the decisions of the Tribunal with regard to the two sets of information sought as behaving been made in error; see in particular the former of the two decisions at paragraph 65 which is framed in similar terms to the equivalent passages in the second decision.

The present Appeal

12. Here, in round terms, in his Grounds of Appeal, the Appellant has maintained two principal arguments. The first is based on a claim that it is in the public interest that the information that the Appellant has requested should be made available. The second ground is that the decision, or indeed both decisions of Irwin J in the *Sugar* and *BBC* cases cannot "legally be relied on" in relation to the present Decision Notice as not being in accordance with Directive 2003/4/EC which it is claimed has direct effect.

13. The Commissioner has countered these Grounds of Appeal by contending that both are misconceived. The first is misconceived because there is, in the words of the Commissioner's reply, "No "public interest exemption" in FOIA". In paragraph 25 of the said Reply, the Commissioner goes on as follows:-

"In the event that the Tribunal were to find that, contrary to the Commissioner's finding, the Requested Information was not held for the purposes of journalism, art or literature then, as explained at paragraph 12 above, this does not mean that disclosure will necessarily follow: it would mean that the Requested Information is subject to Parts I to V of FOIA. In such circumstances, the BBC might, where appropriate, seek to rely on any of the exemptions set out in Part II of FOIA. In so far as any exemption relied upon is a "qualified exemption", the Requested Information will only be exempt from disclosure if the public interest in maintaining the exemption outweighs the public interest in disclosure. It is only at that stage that the Tribunal will be required to consider the "public interest test" in section 2(2)(b) of FOIA" (emphasis in original).

Paragraph 12 makes much the same point in maintaining that a finding that information is not held for the purposes of journalism, etc would not mean a disclosure would necessarily follow. It would simply mean that the information in question was subject to Parts I to V of FOIA.

14. The second stated Ground of Appeal was met by the Commissioner with the argument that the Appellant had failed to demonstrate that the requirements needed for the Directive 2003/2/EC to have direct effect have been or had been satisfied. The said Directive finds expression in English law by virtue of the Environmental Information Regulations 2004, SI 2004/3391. In effect, this is a rerunning of the first point, i.e. as to whether or not the BBC fell within or without the meaning of a public authority contained in the relevant Articles of the directive as

transposed into English law. A similar argument was made in respect of the Aarhus Convention. The Regulations are in play given the subject matter of the seminar and the report which, as is indicated above, related to reporting on climate change.

15. Initially, the Commissioner made a distinct and separate application to dismiss summarily the appeal. This was countered by the Appellant who said that much would turn upon the findings of the Court of Appeal which is shortly bound to hear and/or determine an appeal from Irwin J's two decisions.

16. In late January 2010, this Tribunal notified the parties that the Tribunal was minded to strike out the appeal but that the same would have to await written reasons from the Appellant as to why the appeal should not be struck out with final submissions in reply by the Commissioner. The Tribunal is duly grateful for the parties having reacted promptly and fully to the directions which the Tribunal has made. The Appellant claimed that the present appeal might be affected by the appeal in question and the instant appeal should therefore be stayed.

17. The Commissioner responded by saying that not only were two other appeals presently pending before this Tribunal concerning requests for information made to the BBC, but account should also be taken of the submissions made in relation to both or one of those appeals by the BBC itself, taking issue in effect with the formulation of the proper test said to apply by Irwin J. On any basis, it appears clear in the words of the Commissioner that the Court of Appeal will be considering the "proper construction of the designation of the BBC in Schedule 1, Part VI" of FOIA. The Commissioner went on to say, however, as is already perhaps clear from his Reply, that this would not have any bearing on the two specified grounds raised by the Appellant in the present Notice of Appeal. However, account was taken of the fact that the Appellant is a lay appellant and not legally trained or, it seems, necessarily

supported by specialist legal advice. In the circumstances, and on further reflection, the Commissioner also claimed that a stay should apply.

18. The Tribunal is not minded to accede to either the application to dismiss summarily the appeal or what is now in effect an agreed application to stay the appeal. The *Sugar* decisions before Irwin J make it quite clear that it is the duty of the Tribunal to inspect the information on a confidential basis. Indeed, it is a fundamental principle of Tribunal law and practice that such be the case. It is enough for these purposes to refer to the two decisions of Irwin J to see that he too considers whether he should, despite argument to the contrary at one stage, inspect the information which was in dispute.
19. It is self evident that in an ordinary appeal this Tribunal can, and indeed very often should, review any finding on fact on which the Decision Notice was based: see generally section 58(2) of FOIA. For this purpose, it is irrelevant whether that exercise is in effect a *de novo* review or in effect a consideration of the reasonableness of the earlier fact-finding exercise. Moreover, it is extremely common for this Tribunal to conduct a full review of the merits of the decision of the Commissioner. A typical instance would be where the appeal concerns whether or not a public authority is to be upheld in its contention that it holds no information in answering the terms of a request. Section 58 confirms the existence of the jurisdiction vested in the Tribunal that if, on any review of fact, the Tribunal considers that the original Notice was not in accordance with the law, or that any discretion has been exercised improperly by the Commissioner, then it can either allow the appeal or substitute any other Notice it thinks appropriate.
20. Section 50 of FOIA sets out the primary obligation of the Commissioner, namely, to consider whether a request for information has been dealt with in accordance with the requirements of Part I of

FOIA. The Tribunal is charged with ensuring that the obligation has been properly discharged. To do so may involve, as here, a reconsideration of assessing the nature and scope of the information sought to be disclosed. In the Tribunal's judgement, it cannot be said that pending that exercise, this appeal stands no realistic chance of success

21. Given the Commissioner's acceptance of the fact that a stay should be sought as distinct from a summary dismissal, there is no need further to refer to the relevant provisions regarding a strike out in the recently instituted Tribunal Procedure (First-Tier Tribunal) (General Regulatory Chamber) Rules 2009. An application for a stay would fall under the case management powers dealt with by Rule 5 and any specific determination clearly depends upon the facts and circumstances pertaining in the given case.
22. It follows that the Tribunal is firmly of the view that, in this case, a stay will not achieve any advancement of the resolution of this matter and in the circumstances is not appropriate.

David M Marks QC
Tribunal Judge

11 February 2010