



**First-tier Tribunal
(General Regulatory Chamber)
Information Rights
Decision notice IC-41058-F2Z1**

Appeal Reference: EA/2021/0006

**CONSIDERED ON THE PAPERS
On 5 July 2021**

Before

JUDGE CHRIS HUGHES

TRIBUNAL MEMBERS

KATE GRIMLEY EVANS & STEPHEN SHAW

Between

RICHARD PAINTER

Appellant

and

INFORMATION COMMISSIONER

First Respondent

Cases

Sugar v BBC [2012] UKSC 4

**Hope and Glory Public House Ltd, R v City of Westminster Magistrates Court &
Ors [2011] EWCA Civ 31**

DECISION

The appeal is dismissed.

REASONS

1. The BBC is an unusual public body. It is, like almost all public bodies, subject to the Freedom of Information Act (FOIA) duty to disclose information when

requested, but only in a very restricted way. The issue in this appeal is whether the information is within the scope of the FOIA.

2. Mr Painter wrote to the BBC seeking information: -

"I wish to know the latest data regarding the "Own It" app developed and distributed by the BBC:

b) How much did the development of this app cost? (Please include ALL internal and external costs)

b) How many times has this been downloaded? (Not just viewed)

c) Which directorate or executive dept. authorised its development and the expenditure?"

3. The BBC supplied information in respect of (c) and declined to provide any information in respect of (a) and (b) on the basis that such information fell out with its obligations under FOIA. Mr Painter appealed to the Information Commissioner (IC) who formed a preliminary view that there was no obligation to disclose. Mr Painter disputed this – responding to the IC: -

"1. My enquiry has NOTHING to do with the BBCs "output" as defined. It has nothing to do with their journalism, broadcasting, broadcast TV or radio or web content or programming etc.

2. The BBC has spent public funds developing an app which is NOT in any way supporting their output – it does not relate to what they broadcast in any medium or form.

3. Instead this app, "Own it", is for use by and between third parties to moderate or check their texting and social media "conversations" and messages.

4. These conversations or interactions are between 3rd parties who have downloaded the BBC developed app BUT NOT with the BBC in any way.

5. This app is entirely outside the BBCs remit as a broadcaster. It does not complement or support or connect to any of their output."

4. The IC maintained her position and issued a decision notice finding that there was no obligation to disclose. She set out in detail the legal basis for concluding that the material within parts a and b of the request was not susceptible to disclosure under FOIA including analysing the development of the legal interpretation of the provision in FOIA dealing with the BBC, the relationship between the development costs and download figures of the App to editorial decision-making and commissioning with respect to the App and

therefore why such information fell within the derogation from disclosure. Mr Painter has appealed to this tribunal.

The statutory framework

5. FOIA provides a general right of access for information: -

1 General right of access to information held by public authorities.

(1) Any person making a request for information to a public authority is entitled –

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him.

6. Schedule 1 to FOIA provides a list of public authorities, however the entry for the BBC contains an important clause restricting the application of FOIA to the BBC, “the derogation”: -

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

7. The Supreme Court in *Sugar* considered the meaning of this term. Lord Wilson gave the leading judgement: -

“...let me reflect on the meaning, in the context of the Act, of the words “journalism”, “art” and “literature”. I suggest that the key to it lies in the omnibus word “output”. Article 5 of the BBC’s Royal Charter (Cm 6925), presented to Parliament in October 2006, provides, at para (1), that the BBC’s main activities should be the promotion of its six Public Purposes, specified in article 4, “through the provision of output which consists of information, education and entertainment” supplied by means of television, radio, online and similar services; and the Charter provides, at article 5(2), that the BBC may carry out other activities, subordinate to its main activities, provided that they promote the Public Purposes. In his letter to Mr Sugar dated 24 October 2005 the Commissioner, echoing the word in the Charter, wrote that he interpreted the three words in the designation broadly so as to include all types of the BBC’s “output”. In this respect I discern no dissent from his view in any of the three subsequent decisions in these proceedings; and in my opinion he was right. I would be surprised if any later set of facts was to yield a conclusion that something which the BBC put out, or considered putting out, to the public or to a section of the public did not fall within the rubric either of journalism or of art or of literature. 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.”

8. The six Public Purposes in the Royal Charter are; -

Sustaining citizenship and civil society

*Promoting education and learning
Stimulating creativity and cultural excellence
Representing the UK, its nations, regions and communities
Bringing the UK to the world and the world to the UK
In promoting its other purposes, helping to deliver to the public the benefit of emerging communications technologies and services and, in addition, taking a leading role in the switchover to digital television.*

9. Lord Wilson in the decision specifically endorsed the proposition that the words “journalism, art and literature” embraced the material the BBC produced: -

“I would be surprised if any later set of facts was to yield a conclusion that something which the BBC put out, or considered putting out, to the public or to a section of the public did not fall within the rubric either of journalism or of art or of literature”

10. The BBC has produced an app for young people. It is part of the BBC’s output. It does not need to be “broadcast”, although it is distributed to anyone who wants to receive it. It falls squarely within a number of the public purposes identified by Lord Wilson, notably sustaining citizenship, promoting education and delivering to the public the benefit of emerging communications technologies.

11. Mr Painter has grounded His appeal on the basis that *this app is NOT related to the content emitted by the BBC as a public service broadcaster* however that is not the relevant test as explained in *Sugar*.

12. The Court of Appeal in *Hope and Glory* indicated that in an appeal against the decision of a regulator the burden lies with the Appellant to show that the regulator was wrong and some weight (depending on the quality of the reasoning and the evidence) should be given to the conclusions of the regulator. In this case the Information Commissioner has provided a careful and complete decision notice which fully supports her conclusion and Mr Painter has not advanced any grounds of substance to cause the tribunal to have any doubt as to the correctness of that decision.

13. The appeal is dismissed.

Signed Hughes

Judge of the First-tier Tribunal
Date: 8 July 2021