



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

Appeal Reference: EA/2021/0065P

**Determined, by consent, on written evidence and submissions.
Considered on the papers on 2 September 2021**

Before
Judge Stephen Cragg Q.C.

Tribunal Members
Ms Alison Lowton
Ms Naomi Matthews

Between

Martin Williams

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 265 and a closed bundle.

THE REQUEST AND RESPONSE

4. On 2 January 2021, the Appellant wrote to the BBC and requested information as follows:

Request 1

"I wish to make an FOI request regarding a complaint or complaints regarding an episode of Frankie Boyle's New World Order on BBC 2 on August 12, 2020. The issue regarded objections to "kill whitey" references. This was not upheld.

My request is as follows.

1. How many complaints were there on this.
2. Copies of all complaints relating to this matter.
3. Copies of all responses made to the complaints by the BBC.
4. Copies of any papers, minutes, emails and correspondence, including digital communications to and from the BBC not covered by the above in relation to the complaints about this show."

Request 2

"I wish to request information under FOI regarding The Trial of Alex Salmond aired on BBC 2 on August 17. According to the fortnightly report this related to two complaints about "bias against Alex Salmond" at Stage 2 and was not upheld

My request is as follows.

1. At the time the BBC said they had received 939 Stage 1 complaints from viewers. Why is it that the later fortnightly report only talks about receiving two at Stage 2. What happened to the other complaints?
2. How many complaints were there in total about this programme.
3. Can you furnish copies of all the complaints taken forward in Stage 2 relating to this matter.
4. Can you furnish all responses made to these complaints by the BBC.
5. Copies of any papers, minutes, emails and correspondence, including digital communications to and from the BBC not covered by the above in relation to the complaints about this programme."

Request 3

"I wish to request information under FOI regarding The Andrew Marr Show on BBC One on October 4. According to the fortnightly report this related to 144 complaints about "bias both for and against Boris Johnson" at Stage 1.

My request is as follows.

1. What was the outcome of the complaints.
2. How many complaints were there in total about this programme.
3. How many complaints were taken to Stage 2.
4. Can you furnish copies of all the complaints taken forward in Stage 2 relating to this matter or
5. Furnish the complaints made at Stage 1.
6. Copies of the responses made to these complaints by the BBC.
7. Copies of any papers, minutes, emails and correspondence, including digital communications to and from the BBC not covered by the above in relation to the complaints about this programme.”

Request 4

“I wish to request information under FOI regarding Frankie Boyle's New World Order on BBC Two on September 10. According to the fortnightly report this related to 1305 complaints about "offensive humour" at Stage 1. My request is as follows.

1. What was the full reasoned outcome from the BBC of the complaints.
2. How many complaints were there in total about this programme.
3. How many complaints were taken to Stage 2.
4. Can you furnish copies of all the complaints taken forward in Stage 2 relating to this matter or
5. Furnish the complaints made at Stage 1
6. Provide a complete synopsis of the complaints made under Stage 1
7. Copies of the responses made to the complaints by the BBC.
8. Copies of any papers, minutes, emails and correspondence, including digital communications to and from the BBC not covered by the above in relation to the complaints about this programme.”

5. The BBC replied on 21 January 2021 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’.
6. On 23 January 2021 the Appellant contacted the Commissioner to complain and, in particular, to challenge the operation of the derogation in this case.

THE LAW

7. It is worthwhile explaining the legal provisions relied upon by the BBC at this point.
8. 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’.

9. 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.
10. 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 complaints information linked to a programme, as in this case.

COMMISSIONER’S DECISION NOTICE

11. The Commissioner concluded in her decision notice of 18 February 2021 as follows:-

15. The Supreme Court explained that “journalism” primarily means the BBC’s “output on news and current affairs”, including sport, and that “journalism, art or literature” covers the whole of the BBC’s output to the public (Lord Walker at paragraph 70). Therefore, in order for the information to be derogated and so fall outside FOIA, there should be a sufficiently direct link between the purpose(s) for which the information is held and the production of the BBC’s output and/or the BBC’s journalistic or creative activities involved in producing such output.

16. The Commissioner adopts a similar definition for the other elements of the derogation, in that the information must be used in the production, editorial management and maintenance of standards of those art forms.

17. The complainant argued that it is “unacceptable for a public body committed to transparency” not to provide the information requested and that “the lack of transparency over complaints contravenes Article 56(3) of the BBC Charter”.

18. The complainant also argued that the information requested was to show complaints made by the public about its actions are of public interest. The complainant believed that “details of complaints, in any case, do not relate to material that is directly related to the BBC’s creative output, in other words, programme making”.

19. As explained above, information about complaints that the BBC receives,

including the number of complaints, is derogated information. This type of information is associated with the BBC's output because the BBC will use information generated by the number and type of complaints it receives to make editorial decisions about its output.

20. The Commissioner is satisfied, based on the very well established precedent set in the numerous other decisions she has made in cases involving the BBC, that, if held at all, the information requested by the complainant would be held for the purposes of journalism, art or literature.

THE APPEAL

12. In his appeal dated 3 March 2021 the Appellant contends that the information he seeks is not covered by the derogation. He summarises his appeal as follows:-

That there should be a change in thinking over the previous court decision that has allowed the BBC to block FOI requests as a matter of routine, hiding under the exemption that it the information was "held for the purposes of journalism, art or literature". This exemption was put in place about the BBC's output to prevent it from being commercially disadvantage. But it is being interpreted to block any release of information because pretty much everything requested would come under that catch-all banner. I cannot believe that the courts would have believed that it is acceptable that under IPSO newspapers that are privately owned are far more accountable over complaints from the public than the BBC which the taxpayer owns. In this case private companies are at a clear disadvantage. Clearly that cannot be right. A public owned body has to be accountable to explain if they have received complaints why they reached the decisions they have in an open and transparent way. How can there be a commercial disadvantage to that?

I have explained more fully the logic in statements already submitted. FOI rules explicitly cover "information about how the BBC is managed and run". How it runs its interactions over public complaints, must surely be covered by that.

It is clearly farcical that you hear more about what the BBC says about complaints from those that make the complaint than you do from the BBC, whose statements are often restricted on a matter of a few words, when they decide to reject.

13. The Appellant refers to documents where he has argued his case more fully. For example, in an email dated 22 February 2021 he states:-

The idea of Freedom of Information was not to block information that should be rightly in the public domain, but to free it up.
The BBC clearly knows that it has a duty in respect to complaints, otherwise there would be no reference to its complaints whatsoever in the public domain, as it

would feel that it did not have to provide information covered by the FoI Act that was held for ‘purposes other than those of journalism, art or literature’.

The purpose of my FoIs was that the BBC was unwilling to clearly explain what the complaints were and how they dealt with them, in other words, what their response to the complaints was. They do for a small number, but not for all.

What I am doing is challenging the interpretation of the Act, insofar as it conflicts with the BBC's legal duty to transparency over complaints, which is the crux of this matter.

May I strongly suggest that the Act as it is being interpreted is at odds with the legal duties laid out in the BBC Charter and Broadcasting Act, and under the terms laid out by the Ofcom Broadcasting Code.

14. In her response to the appeal the Commissioner notes that the BBC had explained in reply to the request for information on 21 January 2021 that the requested information relates to editorial complaints which themselves:-

...form part of the on-going review of the standards and quality of particular areas of programme making with a view to further enhancing these standards; the complaints themselves and the information associated with them plays a significant role in helping to inform editorial discussion and decisions going forward... information relating to editorial complaints is used to inform future content and improve the quality of journalistic output; this is an important part of the BBC's process of creating and improving programmes.

15. In that same letter the BBC also noted that ‘the BBC makes a huge range of information available about our programmes and content on bbc.co.uk. In particular the BBC Complaints website contains details of complaints outcomes, responses and volumes in accordance with the regulators requirements and in the interest of being open and accountable’.

DISCUSSION

16. We do understand the Appellant's arguments that it is not immediately obvious that information about complaints 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, 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 complaints information.

17. 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, then that was sufficient.

18. In response to his request, the BBC explained to the Appellant why one of the purposes for holding information about complaints was for the purpose of journalism (see above paragraph 14) and we accept, as did the Commissioner the reasoning from the BBC why that is so. Given the terms of the legislation and the interpretation of it by the Supreme Court in *Sugar*, it is our conclusion that the information sought by the Appellant is covered by the 'derogation' because the information is used at an operational, editorial and commissioning level in relation to journalistic purposes
19. It is undeniable that there may be a public interest in the disclosure of information about complaints made to 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.
20. The Appellant is entitled to his view that the FOIA should not be interpreted in the way it has been by the Supreme Court, but as a first tier tribunal we are required to apply the law as interpreted by the senior courts.

CONCLUSION

21. For these reasons this appeal is dismissed.

Stephen Cragg QC

Judge of the First-tier Tribunal

Date: 27 September 2021.

Promulgation Date: 29 September 2021.

