



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

**UNDER SECTION 57 OF THE FREEDOM OF INFORMATION ACT 2000**

**Appeal Nos. EA/2010/0042, 0121,  
0123, 0124, 0125, 0187**

**BETWEEN:**

**STEPHEN GEE QC**

**Appellant**

**and**

**THE INFORMATION COMMISSIONER**

**Respondent**

**and**

**THE BRITISH BROADCASTING CORPORATION**

**Additional Party**

**BEFORE**

**DAVID MARKS QC  
TRIBUNAL JUDGE**

**ANDREW WHETNALL**

**DAVE SIVERS**

**Representation:**

The Appellant : In person

For the BBC: David Glen (Counsel)

The Information Commissioner did not appear and was not represented

**Subject Matter:**

Freedom of Information Act 2000 Part XI Schedule 1: Scope of 2000 Act and effect of Act on BBC for purposes "other than those of journalism, art of literature"

**Cases and authorities referred to:**

*BBC v Sugar* [2012] 1 WLR 439

*Ofcom v Morrissey & IC* (GIA/615/2010)

Section 393 Communications Act 2003

## **DECISION**

### **Reasons for Decision**

#### General

1. These consolidated appeals in fact relate to six Decision Notices issued by the Information Commissioner (the Commissioner) in 2009 and 2010. It is unfortunate that the matter has taken quite so long to come before the Tribunal. One reason has been that the parties, as well as the Commissioner, have had to await the decision of the Supreme Court in the leading case of *Sugar v BBC* [2012] 1 WLR 439 which by common consent is of critical importance to the principal issues in these appeals. In the Tribunal's view, the effect and ramifications of that decision go to the heart of these appeals.
2. Although some greater detail about the requests made by the Appellant will be set out below, it is enough to state at this point that they concern what the Tribunal regards in the broadest sense of the expression an editorial complaint brought by the Appellant in respect of a particular edition of a Panorama programme broadcast on the BBC on 12 November 2007. The particular programme was entitled "What Next for Craig?". The programme explained and discussed matters which related to recent developments, in particular, recent scientific developments and research into the treatment of children with Attention Deficit Hyperactivity Disorder (ADHD). Two particular children with that condition were looked at during the programme. Their names were Craig and Yaz. The programme was presented by a journalist used by the BBC in relation to investigative matters, a Shelley Joffe.
3. The Appellant made an immediate complaint to the BBC on the day following the broadcast. He claimed that the programme had sought to address ADHD in a way which was unbalanced and could be detrimental and dangerous to the interests of young children with that condition.
4. The initial response from the BBC was from the department which is responsible for dealing with programme complaints, namely BBC Information. The Appellant in turn responded by claiming that the response he got had merely relied on the information provided by the Panorama programming team: it did not, he claimed, involve any real enquiry into his complaints.
5. In February 2008, the Appellant took his complaint one formal stage further to the BBC's Editorial Complaints Unit (the ECU). He claimed that the programme had breached a number of the BBC's own Editorial Guidelines. He requested that another programme be broadcast in which the errors which he claimed had occurred should be cut out and in which

the arguments he claimed had not been made in the original programme should be explored and further explained.

6. The ECU published its finding after complaints made by the Appellant on 29 January 2009. It found that the particular Editorial Guidelines which were relevant to the Appellant's complaint were those relating to what is called "Accuracy" and "Children". It rejected some of the Appellant's grounds of complaint. However it did accept that the programme was likely to give the impression (which impression represents one of the principal bases of the Appellant's complaints generally) that recent research into ADHD might or did suggest that the use of drugs and, in particular, stimulant drugs, and in particular a drug called Ritalin, to treat children with ADHD was misconceived. In the circumstances the ECU upheld the Appellant's editorial complaint. However, it added that its findings were not to be viewed as affecting the legitimate way in which Panorama had approached the subject matter of the programme, in particular as to the way it had drawn attention to recent scientific studies.
7. A year later, on 4 February 2009, the Appellant made a further appeal against the ECU's decision to the BBC Trust. He requested that his entire editorial complaint and the complaints about the manner of the programme be considered again. He also requested that consideration be given to what the Tribunal in effect can only describe as the editorial consequence of the ECU's finding.
8. Initially, this further appeal was dealt with by the Trust's Editorial Standards Committee (the ESC). It stated that it considered that the Appellant's appeal raised issues which necessitated a consideration of the "Editorial Guidelines relating to accuracy, impartiality, harm and offence, children, accountability, the Ofcom Broadcasting Code and the editorial value of serving the public interest."
9. Before embarking on its investigation into the Appellant's complaint, the ESC and the BBC Trust approached and instructed an Independent Editorial Adviser to investigate the Appellant's complaint and in particular to prepare a report on all relevant issues regarding the programme for submission in turn to the ESC and the BBC Trust. This, however, was not before the Appellant was further provided with a draft of that report for his comments.
10. On 13 January 2010, the ESC published its decision. It found that the original programme was in breach of the BBC's accuracy and impartiality guidelines. It also found that such breaches necessitated the broadcast of a correction and of an apology on BBC1 at the beginning of, or at the conclusion of a subsequent edition of Panorama. The ESC also determined that the original programme was not to be repeated or sold. Any and all material determined to have been in breach of the relevant Guidelines was to be removed from the online contents of the BBC where it had lain and been published since the original broadcast, within 5 days of the published date of the ESC's findings. In addition, the Deputy Director General of the BBC was asked to attend an ESC meeting to discuss all issues

raised in the ESC's decision and to review and discuss what steps were to be taken to ensure that such breach or breaches were not repeated in the future.

11. The Tribunal's hearing of the Appellant's subsequent appeals in connection with his requests for information under the Freedom of Information Act (FOIA) occupied three days. As will be seen, the BBC tendered three witnesses who each gave evidence and were cross-examined as to the various appellate processes and other matters which have been briefly described above. The Tribunal wishes to thank those parties and their representatives for their contribution in both oral form and in writing made in relation to the appeal, and acknowledge the courtesy and care with which those witnesses gave their evidence. The Commissioner played no active part in the hearing of the appeals but the Tribunal is equally grateful for the written contributions and submissions he had made.

#### The Requests

12. The requested information relates in general terms to the scope of the complaints procedure and the way it was conducted throughout. The key issue in the light of the relevant legal principles which are outlined in a subsequent section in this judgment is whether and, if so to what extent, the requested information was what can be called post-transmission editorial scrutiny and review and was held to any material extent for the purposes of journalism.
13. In a series of Decision Notices dated 11 February, 28 June, there being four on that date, and 8 November 2010, the Commissioner found that all the information requested was so held. The Tribunal agrees with the BBC that the Commissioner's reasoning is perhaps most accessibly set out in a particular Decision Notice of 8 November 2010, reference no. FS50327965. That Decision Notice is attached for the sake of convenience as Appendix 1 to this judgment.
14. However, it is also important to reflect on the way in which the Commissioner broke the numerous requests made by the Appellant down into a number of specific sub-categories. Again, the Tribunal agrees with this approach. At the stage the Commissioner undertook this exercise with regard to the first Decision Notice, the Commissioner applied the law as expounded in the *Sugar* litigation by Irwin J in that case prior to the hearing and determination by both the Court of Appeal and by the Supreme Court. The remainder post dated the Court of Appeal judgment. Although, as stated, the law will be set out in a subsequent section of this judgment, it is enough to say that the Court of Appeal's decision on the scope of the Freedom of Information Act 2000 (FOIA) legislation as applicable to the BBC in its journalistic functions was subsequently upheld by the Supreme Court.
15. The Tribunal therefore agrees with the breakdown proposed and adopted by the Commissioner as being a fair reflection of the various requests made by the Appellant which

relate to these appeals as a whole. Again, for the sake of convenience, all the requests in this case and all the Decision Notices, including that dated 8 November 2010 referred to above as contained in Appendix 1, are set out and contained in Appendix 2. As far as the details of the requests are concerned, the same are set out and represented in a schedule helpfully prepared by the BBC with regard to these appeals.

16. The subject matter categories set out by the Commissioner are the following, namely, first, information about the Panorama programme itself and its editing corresponding to request 49 as set out on the schedule, second, information about the expenditure in connection with the said programme being requests 7 and 21, third, information about editorial complaints being requests 1-6, 9-18, 24-29, 36-38, 42, 43, 45-48, fourth, information about the handling of editorial complaints being requests 18-19, 21-23, 28-30, 40-44, 46-48, and finally information about the Appellant's request for information in relation to the Appellant's own and previous editorial complaints and its and their handling being requests 20, 21 and 42.
17. The Tribunal also gratefully adopts a further analysis setting out the essential nature of and scope of each suggested category. As to the first, this in effect represents a request for the original journalistic material used and developed by the programme team. As will be seen later in this judgment, one of the principal contentions made by the Appellant is that any material relating to the original broadcast which was still held by the BBC in July 2010, representing either the material directly generated in relation to the original programme or by virtue of the complaints process, has since become historical and therefore archival in nature.
18. As to the second category and as a prelude to a consideration of the relevant legal issues to be dealt with later, the Tribunal feels it is appropriate to allude specifically to one aspect of the Supreme Court's decision which is otherwise dealt with later at length. In a related case at first instance, namely *BBC v IC* [2009] EWHC 2348 (Admin), the Judge at first instance, namely Irwin J, held that information whether financial production information or relating to programme costs should properly be viewed as constituting information held for the purpose of journalism. At paragraph 87, the learned Judge expressly stated that the operating costs of creating an episode of a programme are closely linked to the designated purpose, i.e. that of journalism. The court therefore confirmed that costs referable to the actual broadcast and such matters as presenters' salaries and budget costs for a programme, even though capable of being regarded as operational matters, nevertheless were sufficient closely connected with the making of editorial and creative choices: see also in *BBC v Sugar* [2012] 1 WLR 439 per Lord Wilson at para 42 (not dissenting on his point).
19. The third and fourth suggested subcategories of requested information, dealing with editorial complaints and the way they are handled, can be viewed together. All the relevant requests in this area dealt with the progress and conduct of the editorial complaints made by the

Appellant. They also addressed the process and content of the internal review and the nature and extent of the internal discussion on the possible editorial repercussions.

20. The final category concerns what can be called three meta-requests for information about the way the Appellant's previous requests for information with regard to editorial complaints as a whole had been handled. The BBC observes and the Tribunal agrees that these appear to be inextricably tied to the editorial complaints process under which they arose.

### The Law

21. FOIA, as is well known, provides for a general right of access to information which is held by a public authority. Section 1(1) makes it perfectly clear that this right of access is applicable only in the case of an application or request made to a public authority. It provides in terms that:

- "(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 the information communicated to him."

22. Section 3 of FOIA defines the term "public authority" in the following way:

- "(1) In this Act "public authority" means -
- (a) subject to section 4(4), anybody which, any other person who, or the holder of any office which –
    - (i) is listed in Schedule 1, or
    - (ii) is designated by order under section 5, or
  - (b) a publicly-owned company as defined by section 6."

23. Section 7(1) provides that the BBC "is a public authority – only in relation to information of a specified description ..." Such information is in terms specifically described as comprising "information held for purposes other than those of journalism, art or literature, as set out in Part VI of Schedule 1 to the Act."

Section 7(1) goes on to provide that in such circumstances "nothing in Part I to V of this Act applies to any other information held by the authority."

24. The Tribunal is content to accept the contention made in these appeals by the BBC that Parliament's decision to limit the extent to which the BBC and indeed other public sector

broadcasting entities were to be subject to FOIA reflected at least two basic principles. The first was a recognition of the need to protect the freedom of expression of the BBC and such other public service broadcasters under Article 10 of the European Convention on Human Rights. Second, reflects the need to ensure that FOIA does not place any or all such broadcasters at some form of disadvantage or unfair advantage against the commercial rivals of the BBC and such other broadcasters. As will be seen these two rationales in effect find expression in the Supreme Court's final decision in the *Sugar* litigation: see e.g. and in particular Lord Walker at para 78.

25. In the *Sugar* case, Mr Sugar (Mr S) wrote to the BBC requesting under FOIA a copy of an internal report commissioned by the BBC in respect of the BBC's coverage of the Middle East. The report was called the Balen Report. The BBC declined to disclose the said Report on the basis that FOIA did not apply to the report. The Commissioner decided that the request was held for the purposes of journalism and that the BBC had correctly applied Schedule 1. This Tribunal reversed the Commissioner's decision. It concluded that the BBC was a public authority in relation to the Report at the time of Mr S's request and that the report was therefore disclosable. In so doing, the Tribunal applied what has been called a predominant purpose test in deciding whether the information was held "for purposes other than" those, e.g. of journalism. The BBC appealed to the High Court.
26. The High Court (see [2010] 1 All E.R. 782, see also the other related decision already referred to at [2009] EWHC 2348 (Admin)) held that on the true construction of Schedule 1, the phrase "held for purposes other than" meant "held for purposes apart from". This meant that the BBC had no obligation to disclose the information which it held to any significant extent for the purpose of journalism, art or literature, whether or not the information was held for other purposes. Consequently, if the information was held for mixed purposes including to a significant extent for purposes held in Schedule 1 or indeed one of them, then the information was not disclosable. Any policy argument in favour of the test of "predominant purpose" could not justify any departure from the clear language of the statute. The decision of the Tribunal was therefore quashed and the effect of the Commissioner's decision was restored.
27. The matter went to the Court of Appeal: see [2010] 1 WLR 2278. Mr S's appeal was dismissed. It was held that although access to information held either by government or other public bodies represented a very important aspect of a modern democratic and free society, it was nonetheless a general right that would yield to the specific public interest in the media being free from the constraints that would arise if what were in effect journalism-related thoughts and investigations and activities, could not be freely conducted within an organisation such as the BBC. This is an echo of the reference to the apparent legislative intent that has already been mentioned. Once it was established that the information sought was genuinely held by the BBC for the purposes of journalism, the combined effect of

section 7(1) and of Part VI of Schedule 1 of FOIA together exempted such information from disclosure even if the information was also held by the BBC for other purposes. There was no question of identifying a dominant purpose under the applicable statutory scheme. The word or term “journalism” had to be given its notional meaning. Whether information was held for the purposes of journalism had to be considered in a relatively narrow way, the latter finding expression in the Court of Appeal judgment itself. The Tribunal had itself set out its own definition of journalism. The Court of Appeal however found that the Tribunal, though setting out a legitimate way of describing the particular aspects of journalism, had nonetheless applied that definition inconsistently.

28. The Tribunal’s own definition was referred to in the judgment of Lord Neuberger MR at para 31. Part of what the Tribunal had called “functional journalism” covered editorial activity involving in turn “the analysis of and review of individual programmes” as well as the provision of “context and background” of such programmes. A further aspect of functional journalism was the maintenance and enhancement of the standards and quality of journalistic activity, particularly with a view to accuracy, balance and completeness which in turn involved “the reviews of the standards and quality of particular areas of programme making”. Paragraph 42 of the Master of the Rolls’ judgment stated that provided there is a genuine journalistic purpose or purposes for which the information is or was held, it should not be subject to the Act. At para 51, he added:

“It would seem somewhat surprising if information not otherwise disclosable became disclosable merely because, as a result of some development, as well as being held for purposes of journalism it was also now held for another, perhaps less significant, purpose.”

29. In the Supreme Court, the Appellant’s appeal was again dismissed: see generally [2012] 1 WLR 439. Although Lord Wilson dissented principally as to the predominant purpose test, the Supreme Court found that having regard for the language and legislative purpose of FOIA, information held by the BBC to any significant degree for the purposes of journalism is not “held for purposes other than those of journalism within the meaning of the Act even if it was held for other possibly more important purposes”. Echoing the determination of the Court of Appeal, the Supreme Court also found that the question whether the information was held for the purposes of journalism should be considered in a relatively narrow way in determining whether information was currently held by the BBC for such purposes. Consideration should be given to whether there remained any sufficiently direct link between the continued holding of the information and the achievement of a journalistic purpose or function. Thus, Lord Phillips at paragraphs 63-65 said that the answer to the definition lay “in adopting a purposive approach” to that definition. Protection, he said, is and was not intended:



“... as is the protection against disclosure of documents protected by legal professional privilege, designed to remove inhibition on the free exchange of information. Were that the case the protection would focus on the purpose for which the information was *obtained* [emphasis in original]. The protection is designed to prevent interference with the performance of the functions of the BBC in broadcasting journalism, art and literature. That is why it focuses on the purpose for which the information is *held* [emphasis in original]. The same is true of the information provided at the Bank of England. The object of the protection is to prevent interference with the performance of the specified functions of the Bank.”

30. At paragraph 67, he added the following, namely:

“However Lord Neuberger MR accepted that archived material would not, as such, fall within the protection afforded by the *definition* [emphasis in original]. I consider that it was right to do so. Disclosure of material that is held only in the archives will not be likely to interfere with or inhibit the BBC’s broadcasting functions. It ought to be susceptible to disclosure under the Act. If possible “information held for the purposes other than those of journalism, art or literature” should be given an interpretation that brings archived material within that phrase. Can this be achieved? I believe that Lord Walker J SC has the answer. He has concluded, as have I, that the protection is aimed at “work in progress” and “BBC’s broadcasting output”. He suggests that the Tribunal should have regard to the directness of the purpose of holding the information and the BBC’s journalistic activities. I agree. The information should only be found to be held for purposes of journalism, art or literature if an immediate object of holding the information is to use it for one of those purposes. If that test is satisfied, the information will fall outside the *definition* [emphasis in original] even if there is also some other purpose for holding the information and even if that is the predominant purpose. If it is not, the information will fall within the *definition* [emphasis in original] and is subject to disclosure in accordance with the provisions Parts I to V of the Act.”

31. As will be seen below, the Appellant has sought in these appeals to rely on the above passage as part of his general contention that the information he seeks could not properly or realistically be viewed as either work in progress or as information or material for which there is an immediate prospect of broadcasting output or use. However, it appears from further passages in the Supreme Court’s judgment that the monitoring and review of journalistic standards, as well as the act of broadcasting, should be interpreted as falling within the categories to be excluded from the scope of FOIA. Moreover the exclusion is absolute rather than dependent on the application of such balancing tests as arise under the various detailed FOIA exemptions, and this is an important means of assuring the freedom of expression which the Court found to be the underlying purpose of the provisions.

32. At paragraphs 74-80 of the Supreme Court's judgment and indeed at paragraphs 83 and 84, Lord Walker in effect sets out its principal conclusions. First, he adopts the view of Lord Neuberger at paragraph 44 of the latter's judgment in the Court of Appeal decision. In effect, there are two categories of information, namely one where information is held for purposes that are "in no way those of journalism", the other being where information is held for the purpose of journalism "even if it is also held for other (possibly more important) purposes": see para 75. At paragraph 78, Lord Walker stresses the "powerful public interest" which he said pulled against the main purposes underlying FOIA in favour of the release of information generally. He added this:

"It is that public service broadcasters, no less than the commercial media, should be free to gather, edit and publish news and comment on current affairs without the inhibition of an obligation to make public disclosure of or about their work in progress. They should also be free of inhibition in monitoring and reviewing their output in order to maintain standards and rectify lapses. A measure of protection might have been available under some of the qualified exemptions in Part II of 2000 Act, in particular those in sections 36 ... 41 ... and 43 ... But Parliament evidently decided that the BBC's important right to freedom of expression warranted a more general and unqualified protection for information held for the purposes of the BBC's journalistic, artistic and literary output. That being the purpose of the immunity, section 7 and Schedule 1, part VI, as they apply to the BBC would have failed to achieve their purpose if the coexistence of other non-journalistic purposes resulted in the loss of immunity."

33. Although Lord Walker recognised that the test applied by the court at first instance and the Court of Appeal was not "without its difficulty", he concluded at paragraph 83 in the following terms, namely:

"In my view the correct approach is for the tribunal, while eschewing the *predominance* of purpose test, to have some regard to the *directness* of the purpose [emphasis in original]. That is not a distinction without a difference. It is not weighing one purpose against another, but considering the proximity between the subject matter of the request and the BBC's journalistic activities and end product". As Irwin J observed in the financial information case [2010] EMLR 121 at para 86 in the context of a critique at what was "operational":

"The cost of cleaning the BBC board room is only remotely linked to the product of the BBC".

34. In other words, Lord Walker also endorsed the view of Lord Neuberger: see in particular the latter's judgment at paragraph 55 that the question of whether information was held for the

purpose of journalism should therefore be considered “in a relatively narrow rather than a relatively wide way”.

35. Lord Brown agreed with the majority in the Supreme Court. However, alone, he went further and reviewed the effect, if any, of an applicant’s Article 10 rights. In brief, he determined that Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms does not create a general right to freedom of information. In any event, he added that it was entirely open to a state to legislate for a balanced and considered exclusion of any request to disclose information held for the purpose of journalism: see in particular paragraphs 94, 98 and following of his speech.
36. As for the degree to which journalism and journalistic information was held, he confirmed, see in particular at paragraph 104, that in the event that information is actually held “to any significant degree” for the purpose of journalism, FOIA did not apply: see also equally, but especially at paragraph 109.
37. As indicated above, Lord Wilson expressed divergent views to those of the other members of the Supreme Court. In general terms, he endorsed what has previously been called the predominant or dominant purpose test. He therefore differed from the conclusions reached by Lord Neuberger in the Court of Appeal. He pointed out at paragraph 57 that he was convinced that had Parliament actively considered the situation where information was held by the BBC for purpose partly of journalism and partly otherwise “it would expressly have provided the information was within the scope of the Act. It was held predominantly for the other purposes.” He added the following, namely:

“... however, the words which in the event Parliament favoured, namely the words of the designation, are in themselves apt to permit such construction; and that, since in my view it is more constant with the Act as a whole than either of the polarities, this court should therefore proceed to endorse it.”

During the hearing of the appeals in this case, the Tribunal indicated that it was content not to employ the word “derogation” with regard to the relevant provisions dealing with journalism, etc applicable to the BBC. In the circumstance, it is quite content to use the same expression as used by Lord Wilson, namely the term “designation.” We also, where appropriate, will use the word “exclusion” to indicate material excluded from the requirements of FOIA by the designation. The key question is therefore whether the information in question is held “directly”, “to any significant degree” or in “sufficient proximity” to the journalistic functions of the BBC. These functions are to be understood as including monitoring, reviewing and correcting programme output, as well as the act of broadcasting. Information which has been archived and no longer needed for broadcasting or review is therefore in general terms subject to FOIA. The test is not that there must be an immediate prospect of broadcasting or, after a complaint as in this case has been partly upheld,

rebroadcasting. Nor is the test to the effect that information is held “predominantly” for the purpose of broadcasting. Journalism may be only one of the purposes to which information relates. (The issue does not arise in this case but information held for the purposes of art or literature are to be treated in the same way as information related to journalism).

The Judgment in *Sugar*

38. The Tribunal pauses here to state that in the light of what is set out above, a number of propositions emerge. First, the designation is not to be treated in the same way as decisions on the applicability or non-applicability of an exemption, whether qualified or not, under FOIA itself. This in turn means that the designation is not to be construed in a way which, as the BBC rightly in the Tribunal's view puts it, might undermine the legislative intention to protect from inhibition the journalistic (or as the case may be the artistic or literary functions) of the BBC. This applies even in a case where the journalism may be of doubtful quality and subject to legitimate challenge. The BBC will be open to challenge and scrutiny in respect of poor journalism, and may well from time to time deserve criticism, but the effect of the Supreme Court's ruling on the construction of the designation is that those wishing to question and challenge, if the issue relates to journalism art or literature, will not have free access to underlying or unpublished material under FOIA. It follows also that the question whether a particular broadcast is good or bad, flawed or unflawed, is not a matter of public interest which falls to be addressed by the Commissioner or this Tribunal, as might have been the case if a request for information fell to be decided under the public interest balancing test typical of many of the exemptions under FOIA. Second, the rejection by the Court of Appeal and by the Supreme Court of any predominant purpose test or similar principle means that in effect the designation is unconditional. These propositions apply even where any journalistic purpose is or might be construed to be subordinate or secondary: see again, *BBC v Sugar* in the Court of Appeal supra per Lord Neuberger especially at paragraph 48.
39. Third, the determination of the Supreme Court in *Sugar*, and in particular in the speech of Lord Brown again, in the Tribunal's clear view and judgment, blocks any argument that the designation should be construed in the light of any form of right to know. Lord Brown refers to the decision of the European Court of Human Rights in *Roche v United Kingdom* (2006) 42 EHRR 30, especially at para 172, where that stance is clearly confirmed. Lord Brown also firmly rejected the argument that three subsequent decisions of the European Court had any material impact on the approach which the Commissioner and the Tribunal, or indeed the courts, should take when addressing the designation: see again paragraphs 94 and 97 of his speech. Lord Brown unequivocally stated that there was no interference in the *Sugar* case itself with Mr S's freedom to receive information. FOIA had not conferred on him any relevant right of access to information: see generally and more recently *Kennedy v*

*IC* [2012] EWCA Civ 317 which confirms that Lord Brown's findings on this issue were part of the ratio of the *Sugar* case as a whole.

40. Fourth, and again in the light of the entire history of the *Sugar* litigation itself as set out in the various High Court, Court of Appeal, House of Lords and Supreme Court decisions, it is again clear to this Tribunal that the concept, if not the definition of journalism and of journalistic activity is reflected in the three-fold classification adopted by each and all of those courts dealing with the *Sugar* case: see e.g. Lord Wilson at [2012] 1 WLR 439 at para 42 who did not dissent on this point.
41. It therefore necessarily follows in the Tribunal's judgment that not only is the assembling, editing and selection of material for publication or broadcasting purposes clearly within that definition, but so is the maintenance and enhancement of output standards (arising, by virtue of quality reviews in terms of accuracy, balance and completeness or any one of those aspects), as well as related aspects including but not limited to the supervision or training of all relevant journalists.
42. The Tribunal therefore entirely accepts the BBC's contention that "information which is held for the purposes of journalism" will necessarily apply to information held in connection with a wide range of activities undertaken by the BBC. Such information would thereby include not only information which could be regarded as informing or sustaining a particular programme or series of programmes, but also information which might shape directly or indirectly or otherwise influence BBC editorial output with regard to existing or future programming projects.
43. Again, in the Tribunal's judgment following on from the above propositions, and again in the light of the determinations in *Sugar*, it sees no real or arguable distinction between the content of the type of information referred to and described in the preceding paragraph on the one hand, and, on the other, information which is held as a consequence of a process of post-broadcast review or editorial analysis. Indeed, in the Tribunal's view, the types of information will often overlap and coincide. In the Court of Appeal at [2010] 1 WLR 2278 at 2313 (especially at paras 65 to 68), and as noted above, Lord Neuberger noted with approval the breakdown as to the kind of journalism covered by the designation and proffered by the Tribunal in that case. He endorsed the third of the elements comprising the Tribunal's definition of journalism, noting that "professional supervision and guidance, and reviews of the standards and qualities of particular areas of programme making" was "a fair description".
44. Fifth, the Tribunal is again entirely satisfied that the central issue is the one alluded to by Lords Brown and Walker, in particular, in the *Sugar* decision in the Supreme Court namely whether there is a sufficiently close link between the holding of the information by the BBC and the achievement of its journalistic purposes and function having regard to the "proximity

between the subject matter of the request and the BBC's journalistic activities and end-product": see [2012] 1 WLR 439 per Lord Brown at 469, para 106, and per Lord Walker at 464, para 83. If there is such a link, the designation will apply even if the information is held for a number of disparate purposes of which journalism might be said to be otherwise subordinated. See again Lord Walker supra at 461 at para 75.

Key arguments by the Appellant as to the content and scope of the designation

45. Although this judgment will revisit in further detail the Appellant's contentions, before doing so and before considering the evidence related to the appeals as a whole, it is appropriate to list and address three particular submissions made by the Appellant which can be said to relate to the issues immediately considered above.
46. The first reflects the contention made by the Appellant that before any consideration is given as to whether the designation applies, there is a prior question that needs to be addressed, namely to ask with regard to each piece of information what purpose is the relevant purpose for the application of the designation. In short, the purpose or purposes for which a particular item of information is held should be judged individually, e.g. by reference to particular BBC employees and/or departments, and not a cumulative basis.
47. The Tribunal has no hesitation in rejecting such an argument. First, it fails to have regard to the plain words and provisions of sections 3 and 7 of FOIA and of the Act itself in all material respects. The Act as a whole, and particularly those provisions, speaks in terms of information being held by or on behalf of a public authority as an entity. There is simply no warrant for engaging in any further subdivision as proposed by the Appellant, e.g. to consider whether a particular individual within the BBC holds or held the information at a particular time for a particular purpose other than journalism, such as a regulatory purpose. The Tribunal is assisted in this interpretation by the clear indication in the Supreme Court's judgment that journalism is to be interpreted as including both the act of producing programmes and the maintenance of journalistic integrity and standards. In this context the Tribunal also sees no justification for drawing a distinction as is suggested between information held by various units or parts of the BBC in the early stages of the investigative process, such as when the complaint was made about the Panorama programme, and information held by the BBC Trust, including reports on those investigations, when the complaint passed further up the complaints ladder.
48. Moreover, the contention flies directly in the face of the various higher court determinations and findings in the *Sugar* case itself: see e.g. [2010] 1 WLR 2278 at 2309 and see also per Irwin J [2010] 1 All E.R. 782 at 800, particularly at paragraphs 83 and following.
49. Second, the Appellant has denied that only one date is relevant to any particular request. In the Tribunal's judgment, there can only be one answer to that contention. Section 1(4) of

FOIA makes it indisputably clear that a public authority must answer a request on the basis of the information “held at the time when the request is received” except in a particular circumstance which is not presently material . There seems, however, to have been a shift in the Appellant’s stance on this, but even if this contention was being made in its original form, then the Tribunal rejects it.

50. However, in FOIA cases, it is not uncommon at all for a public authority both with and without the approval, testing or otherwise, of the Commissioner and/or the Tribunal to deal with a request on the basis that the applicable period is the time spanning the date on which the request was made and the date on which compliance with the request occurs, taking into account the 20 working days otherwise allowed formally by section 10(1) of FOIA itself.
51. The BBC has pointed out in its final submissions that the test set out in the preceding paragraph was one in fact countenanced at para 27 of the Appellant’s original response or reply in respect of one of the relevant appeals, namely Appeal EA/2010/0042. The BBC adds, and the Tribunal agrees, that the basic approach irrespective of that reply and response is one which has to be in line with section 50(1) of FOIA which refers to the need for the Commissioner to assess the legitimacy of a public authority’s compliance in the manner set out in the requirements of Part I of FOIA itself.
52. In light of all the above considerations, the Tribunal rejects the contention made by the Appellant that the legitimacy of any and all Decision Notices in these appeals as issued by the Commissioner needs in effect to be reassessed in some kind of rolling manner or rolling basis, as it was put in argument, even up to and including the date of the judgment in this appeal.
53. The next important point of principle which the Tribunal wishes to address at this phase of its judgment is the contention made by the Appellant that the designation does not apply to information which the BBC was legally bound to disclose as part of the complaints procedure which has been outlined above. More particularly the Appellant contends that the designation was never intended to apply to information which had to be disclosed by the BBC as a public regulator either by law under or by virtue of the complaints procedure within the BBC or otherwise . Information which is sought thus comprises, it is said, such information which is held by the BBC, and in the case of the BBC Trust, such information as is used or maintained or is applicable to the function of adjudicating on a complaint made to it as a public broadcasting regulator. The Appellant argues that Parliament intended that, under the Charter which governs the BBC and its affairs as well as in the legal rules made in relation to or in connection with that Charter, there must be openness and fairness in the complaints process.
54. The BBC responds in the following way. First, it claims that the Appellant’s reliance on the type or types of obligations which he claims are owed by the BBC in respect of information

which the BBC must disclose in its role as what is said to be a public regulator fetters the designation with extraneous and irrelevant matters. The BBC rejects any notion that its complaints procedure is either unfair to complainants or is otherwise insufficiently transparent. In any event, it claims that it is simply not for the Tribunal to adjudicate on that issue and indeed, as a matter of principle, it could be said that it was not in fact asked to do that.

55. As will be shown below, and as already indicated, the Tribunal has heard extensive evidence as to the processes which applied in the case of the Panorama programme and the complaints made by the Appellant. Again, as already indicated, the complaints procedure in this case resulted in the finding that the programme in question had not been, in all the circumstances, properly presented and that due editorial corrections should be made and lessons learnt within the BBC based on the determination eventually made within the BBC following the complaint.
56. However, even if it were the case that the BBC's complaints procedures were either unfair or insufficiently transparent, the Tribunal fully accepts the BBC's contention that FOIA should not, and cannot be used, as some form of mechanism to manufacture an alternative statutory right when to do so would frustrate Parliament's clear and express decision to exclude information held for journalistic purposes as so clearly endorsed by the Supreme Court. In those circumstances, it simply cannot be said, in the Tribunal's view, that it is the purpose of FOIA to cure every unfairness considered to exist within the BBC's complaints procedure.
57. The BBC again, rightly, in the Tribunal's view, points out that there may well be information which a public authority is not required to disclose under FOIA but which it nevertheless chooses to make public or disclose either voluntarily or in some other way. It is impossible to see how those circumstances can be said to intrude upon the defined scope of FOIA itself. There may be other means whereby the BBC could be held legally bound to disclose the requested information under or by virtue of the editorial complaints process. If so, no doubt someone in the Appellant's position could take a set of suitable steps to effect disclosure and enforcement of the BBC's legal obligations were that to be the case. However, in the Tribunal's judgment, this does not mean that there is any parallel statutory right under FOIA.
58. It therefore necessarily follows that the Tribunal cannot and will not make any ruling as to whether, and if so to what extent, the BBC owed any duty to disclose any of the disputed information to the Appellant otherwise than under FOIA.
59. The above considerations go to the very core of the Tribunal's functions in this case. The Tribunal's powers are governed by the provisions of section 58 of FOIA and need not be recited here. As discussed in argument during the appeal, the nature and limits of the



Tribunal's function were considered by the Upper Tribunal in the important case of *Ofcom v Morrissey and IC* (GIA/605/2010). That case considered a statutory prohibition which is of some importance in the context of this case. Section 393 of the Communications Act 2003 imposes a general restriction on the disclosure of information held by Ofcom as a consequence of the exercise of its relevant powers. The BBC is not Ofcom. The BBC generates as the main part of its activity the broadcasting of programmes both on air and on the radio and online. That is simply not a function or a role occupied or held by Ofcom. The restriction imposed on Ofcom is in turn subject to discretion afforded under section 393(2). That prescription allows, but only on a limited basis, Ofcom to disclose information where Ofcom considers that disclosure is necessary or appropriate to ensure the performance of certain of its statutory functions.

60. As is well known, section 44 of FOIA confers an absolute exemption on the disclosure of information under FOIA where the relevant public authority is otherwise prohibited from doing so by or under any enactment.
61. In *Ofcom*, the Commissioner had contended that as part of its supervisory role in relation to section 44, he also had the right and the jurisdiction to review the reasonableness of Ofcom's decision as encapsulated and reflected in section 393(2) of the 2003 Act. Ofcom had in fact decided that it need not disclose underlying data which it had obtained from commercial broadcasters in order properly to perform its regulatory functions under the Act, and in particular section 27 of the 2003 Act.
62. The Tribunal has no hesitation in agreeing with the BBC that there are clear parallels between the Commissioner's approach and argument in *Ofcom* and the Appellant's contention in the present case and appeals, that since the BBC had some form of legal obligation to ensure that it operated with the requisite transparency and fairness, it thereby acted unreasonably and indeed unlawfully. The unreasonableness and/or the unlawfulness took the form, as the Appellant contends, of failing to disclose the information which he now seeks.
63. In *Ofcom* it had also been argued that what was called the principle of procedural exclusivity did not apply. That principle in general terms means that only the supervisory courts in the traditional sense, i.e. under general principles of administrative law, will be competent to decide upon the reasonableness of an agency's or public authority's actions and decisions. Put shortly, it was therefore urged on the Upper Tribunal that it consider all relevant issues in a manner analogous to judicial review proceedings without the need for the complainant in that case to seek separate and thereby unnecessary judicial review proceedings. The Tribunal sees much similarity with the breadth of the Appellant's contentions in this case and the range of matters he expects the Tribunal to consider and adjudicate on.

64. In *Ofcom*, the Upper Tribunal firmly rejected both those main arguments as advanced by the Commissioner. Its conclusions can be shortly stated but they are significant in this Tribunal's view as to the proper approach to be taken in this case. Some have already been alluded to.

First, the Tribunal's functions are prescribed by FOIA and indeed are only prescribed by FOIA and in general terms reflect the statutory function and duty entrusted to and fulfilled by the Commissioner. Second, in the light of the findings of the Upper Tribunal in *Ofcom* there can be said to be no presumption that either the Commissioner or the Tribunal, can determine public law questions of reasonableness of the type which arose in *Ofcom* and therefore by extension of the type which are raised by the Appellant here. Third, and reverting to a point made above, section 393 of the 2003 Act clothes Ofcom with the responsibility of being the competent body to decide on whether the disclosure is appropriate under the particular provisions of section 393(2). Here, without reciting the terms of the Charter in full, clause 24 of the Royal Charter governing the BBC and sections and paragraphs 89 and 90 of the Framework Agreement applicable to the BBC show beyond doubt that it is for the BBC and ultimately the BBC Trust, to set out suitable guidelines in complaint procedures. Moreover, the BBC is charged by virtue of those documents in effect with ensuring that it handles the complaints about standards within the BBC itself, including but not limited to the applicability of the relevant guidelines, particularly with regard to accuracy and impartiality; the investigation of and adjudication upon those complaints and, finally, that insofar as possible, it places any complainant, including but not limited to the Appellant, on an equal footing with the BBC. The Appellant argues that the BBC failed to put him on an equal footing, for example by failing to disclose to him the identity of the person preparing advice to the Trust or, by failing to allow him to attend any meetings between that person and BBC staff, or to attend the meeting of the Trust subcommittee charged with ruling on his complaint. His argument with the BBC can be seen as essentially contesting the adequacy and lawfulness, or consistency with the Charter, of the applicable procedures.

65. This is not a case that the Tribunal can have any remit to adjudicate on. The Tribunal sees the potential practical difficulty of involving the Appellant with regard to the drafting and preparing of the materials addressing his complaint. It can also understand why the BBC believes it adequately discharged the duty in placing the Appellant on an equal footing by giving him an opportunity to comment on the material submitted to the Trust. But it is not the Tribunal's role to rule the complaints procedure's compliance with the Charter. To the extent that the Appellant seeks to use FOIA to remedy what he perceives as an information deficit in respect of that procedure, the Tribunal can only address that issue within, and subject to the terms of the FOIA provisions and in particular the designation, guided in its interpretation in so doing by the Supreme Court.

66. The consequence of the *Ofcom* decision is perhaps no more than a repetition of what has been said about the consequences of the *Sugar* decision. Put shortly, the role of the Commissioner and indeed the Tribunal in this case, is to ensure that the designation has been correctly applied and adopted. That is the limit of the Commissioner's role and the Tribunal respectfully suggests, that of its own. The necessary consequence of the *Ofcom* decision is that the Commissioner was not required by FOIA to look at, let alone examine, the reasonableness of Ofcom's conclusion. By analogy, it is not the function of this Tribunal to look into similar questions with regard to the complaints process conducted within the BBC for which it has initially sole charge.
67. Finally, and with regard to the *Ofcom* decision, as the case demonstrated and perhaps more starkly so in the case of the applicability of section 44, the role of the Commissioner and indeed of the Upper Tribunal in that case is no more than what can be called a verification process under FOIA. The Tribunal sees no difference in principle with the exercise that it is being asked to conduct in this case. All that the courts in the *Sugar* litigation undertook was the consideration of whether the disputed information was within or without the scope of FOIA, albeit that to get to that point the courts, and indeed the Tribunal before it, had to conduct in effect a form of statutory construction. In this regard, the BBC helpfully draws attention to a specific passage in the *Ofcom* decision at paragraph 61 where the Upper Tribunal stated the following, namely:
- “The Commissioner and the tribunal both have expert knowledge of matters concerned with freedom of information – among them, although not relevant to the present case assessing the public interest in disclosure of information. Neither has expertise, however, in the functions entrusted to Ofcom by the 2003 Act.”
68. At this point the Tribunal also feels bound to reject the Appellant's related contention that unlike the BBC, other regulators such as Ofcom do not benefit from any form of designation whether in the terms of designation embodied within FOIA or generally. The Appellant claims that Parliament cannot have intended the designation to be construed such as to provide some form of immunity from disclosure under FOIA which immunity Ofcom and others do not possess.
69. As pointed out above, Ofcom is simply not a journalistic organisation. Even at that point, therefore the analogy breaks down. However, the Upper Tribunal has made clear in the *Ofcom* decision that Ofcom is regulated by an entirely separate and very detailed piece of legislation, namely the 2003 Act. Section 393 as pointed out above mandates it to carry out a statutory duty not to disclose information with regard to a particular business and which it obtains in the exercise of its regulatory and complaints functions under the Act. As has been shown with regard to the above description of the *Ofcom* decision, such information (including information obtained from any commercial broadcaster under investigation for alleged breaches of the Broadcasting Code) is generally not disclosable. The Tribunal

therefore fully agrees with the BBC's contention that it would fly in the face of the designation as addressed and construed in the *Sugar* litigation if FOIA were to be applied in such a way as to place the BBC in a more disadvantageous way than the position occupied by its commercial rivals.

#### The evidence

70. As already stated, the Tribunal has heard from three witnesses who gave evidence on behalf of the BBC. The first is Clive Edwards who is presently Executive Editor and Commissioning Editor for TV current affairs of the BBC. He took over the role from January 2008. He was therefore not directly involved in the making of the particular Panorama programme itself, but he was involved in the complaints process that followed.
71. He confirms in his statement that following the finding made by the ECU in respect of the Appellant's complaint, he and his colleagues in his team considered the finding and its implications. The result was, he said, to ensure that the BBC's editorial standards were maintained. When the Appellant appealed against the finding of the ECU to the ESC, he and his team were engaged in assisting the investigation of the Independent Editorial Adviser. In particular, he was asked to assist with the task that the Adviser was charged to carry out and he was also involved in responding to the Appellant's complaint and commenting on the report prepared by the Adviser. All that was carried out, he said, in accordance with the applicable complaint framework. Even after the ESC's findings, he and his team were engaged in ensuring that an appropriate correction and apology were broadcast and that the programme was withdrawn. In his witness statement, he formally confirmed that the programme itself would not only be used by the Panorama team, but might also be placed in the BBC's library for the purposes of research and possible rebroadcasting either in whole or in part. The material he said would be retained permanently in accordance with what he called a retention schedule. He gave an example with regard to Panorama and the broadcast made in the Panorama series relating to scientology. At paragraph 11 of his statement he stated the following, namely:

"Untransmitted material in relation to a programme would be maintained after broadcast in accordance with business need. In this case, the information relating to the production of the programme was also held following the broadcast in connection with responding to Mr Gee's editorial complaint. Even after the programme was withdrawn as a consequence of the [ESC's] finding, the retention and materials relating to the programme would be important, particularly if there was no adverse finding against much of the underlying materials, as they would also serve as a useful tool for journalists in understanding how breaches of the Editorial Guidelines can happen and might be avoided in the future."

72. Finally, he added in paragraph 12 that material relating to editorial complaints “would be maintained at least until the conclusion of the process and the expiry of the time limit for any potential remedy, but would often be maintained not only as a record but also as a precedent and for the education of journalists, as was the case here.”
73. As indicated earlier in this judgment, the first category of information sought by the Appellant was with regard to the programme itself and its editing. In his statement, Mr Edwards confirms the perhaps obvious point that in compiling a programme, the journalists will collate much information, including emails, videos and documents, amongst many other means of communication and exchange. Such information was held not only by the programme makers themselves, but also would be shared with those engaged in the complaints process.
74. However, it is perhaps with regard to the use of archived or historical material that Mr Edwards’ evidence was important. In cross-examination at the hands of the Appellant, he stressed that the BBC and its programme makers used archives “all the time”. He claimed that all the materials save principally for particular omissions and the areas which had been committed remained “valid”. He said that such materials remain very relevant. They were held for journalistic purposes and that it was “extremely likely” that at some point someone such as the Panorama team itself or another current affairs programme would come back and make another programme about the use of drugs and/or the use of the drug known as Ritalin to which reference has already been made, and/or to the treatment based on such drugs as previously referred to in the original broadcast.
75. The Tribunal accepts Mr Edwards’ evidence and indeed would have no justification at all in challenging it. It seems almost self-evident that if as was claimed by Mr Edwards, Panorama or some other BBC programme maker or a related journalist attached to the BBC were to make similar programmes or more programmes about ADHD or the particular drug or drugs related to that condition, it would be expected that they would have recourse to, or at the very least, refer to the underlying journalistic materials held and retained in respect of the original broadcast as well as the material generated by virtue of the complaints process. The Tribunal accepts this.
76. Mr Edwards said again in cross-examination that, since the only final determination by the BBC Trust was in effect a sin or sins of omission, “everything in the programme could be used again” subject to a suitable measure of balance.
77. Mr Edwards repeatedly refuted the contention made by the Appellant that the relevant material would not be used or be accessed by the BBC in the future. He claimed that on the contrary, as already indicated above in the context of his witness statement, it was very likely that the material would have value as a journalistic resource. The drug, Ritalin remained a controversial subject. It had uses unrelated to ADHD. He said that it remained

a “live issue that one would return to”. Indeed, he claimed when being cross-examined that he had recently received a proposal for a new programme on a topic which related to that drug.

78. Mr Edwards’ evidence also dealt with the dangers of allowing improper and undue interference to occur with regard to the editorial complaints process as a whole. Enough has been said in this judgment already to show that the Appellant was concerned throughout on receiving a continuing disclosure of or insight into that process. He was in effect conducting his own investigation into the way in which the original programme had been made, and gave the impression of wishing to be involved almost as closely as BBC staff in the analysis of his complaint, writing up conclusions on it, and determining the form and content of any and all corrections or apology.
79. Mr Edwards expressly pointed out in his evidence that to allow a complainant to occupy that position would amount to a type of disclosure that would seriously undermine the effectiveness of the process itself. In *Sugar*, in the Supreme Court, and particularly in the speech of Lord Walker (see again paragraph 78 of his speech), there had been a stress on the need to ensure that nothing should inhibit the monitoring and reviewing of the BBC’s output “in order to maintain standards and rectify lapses”. Mr Edwards in effect made the same point. He note that to “rummage through every little bit of everything to do with the conversation, backwards and forwards would seem to me to be ... an inhibition against programme makers co operating fully ...” See also in this vein Lord Brown in *Sugar* supra at para 102.
80. The second witness to give evidence on behalf of the BBC was Fraser Steel. He is presently Head of the ECU. He manages the ECU which forms the second stage in the BBC’s editorial complaints process. In his statement he confirms that the remit of the ECU is to act on behalf of the BBC Executive to investigate allegations of breaches of editorial standards and, where they are found, to ensure the breaches are rectified. There is a complaints framework laid down by the BBC Trust. He also confirms that where the ECU proposes to uphold a complaint or make a finding that a complaint has been resolved, the finding needs to be shared with the programme team to enable the latter to comment on the draft finding and its summary of the finding intended for publication. It is the practice of the ECU to publish summaries of its “upheld and resolved findings”. If a complainant is dissatisfied with an ECU finding, they can appeal to the ESC.
81. In his witness statement he confirms that in the present case, he with a colleague investigated the Appellant’s editorial complaints. This involved reviewing the Panorama programme itself, the information provided by the programme’s team and conducting independent research.

82. The ECU upheld the Appellant's editorial complaint to the extent of agreeing that the programme had wrongly given the impression that a study had found that prescribing medication in the treatment of ADHD on children was ineffective in the longer term, for periods over three years. The ECU considered that that study had actually shown that medication was no more effective than other treatment options for periods over three years, albeit that medication (unlike other treatment approaches) had unintended consequences such as an association with reduced growth. The remainder of the Appellant's complaint was not upheld.
83. Mr Steel then went on to confirm that the ECU's finding was communicated to the Appellant by letter at the end of January 2009. This was followed by the making of representations by the Appellant as to what action should be taken by the BBC to remedy the standards breaches identified. The Appellant argued that there should be a new broadcast by the BBC into which the Appellant himself should have an input as to the content and featuring experts of his choice. This feature has already been alluded to in connection with the evidence given by Mr Edwards.
84. The Tribunal pauses here to note that this last particular fact has not been denied by the Appellant. Mr Steel then goes on in his statement to confirm that throughout the period during which the ECU was investigating the Appellant's editorial complaints, namely between February 2008 and January 2009 and indeed during the period until August 2009 during which period the BBC was considering what action would be appropriate in the light of the ECU's findings, the Appellant made a series of requests for information regarding the BBC's investigation into his editorial complaint. In the words of Mr Steel this was: "over and above the entitlement set out in the Complaints framework". Again, in the words of Mr Steel in some of such cases: "these were effectively requests for real-time disclosure of documents gathered and created while an investigation was ongoing". This reinforces this Tribunal's impression that the Appellant was in effect seeking, if not to usurp, at least to monitor and possibly control the complaints procedure himself, as well as to direct or influence the form of apology and future programme making on the subject.
85. At paragraph 15 of his witness statement, Mr Steel addresses, as did Mr Edwards, in largely similar terms, the need to retain information in such cases. He states:

"The retention of files serves a number of purposes. Firstly, the [ECU] may refer to the records of previous investigations in order to ensure consistency of approach when conducting an investigation into the same or similar subject-matter. Secondly, programme-makers may refer to the [ECU] for information when working on the same or similar subject-matter (and having been alerted, by the BBC's Compliance Manager database or otherwise, to the existence of an adverse finding). Thirdly, schedulers and compliance officers may refer to the ECU for information when planning to re-broadcast the material originally complained of and in order to guard

against repeating the original offence (an increasingly common occurrence as the number of platforms on which BBC content is made available has increased)”.

86. Although the Tribunal found each of the three BBC witnesses were in their own individual ways extremely clear and strong in the giving of their evidence, Mr Steel was particularly robust in his refutations of the contentions put to him by the Appellant in cross-examination.
87. As indicated above he was, in the Tribunal's view, entirely persuasive in his assertion that aspects of the original journalistic material would be highly likely, if not virtually certain, to be caught by the Appellant's repeated requests for what has been called a rolling disclosure of the internal handing of the editorial complaint process, as well as of the discussions, communications and responses caused and produced by that process. As if Mr Steel's evidence alone were not sufficiently telling as to that point, the same point was reinforced by the third witness, Ms O'Brien, in cross-examination and in particular in an answer to a query put to her and raised by the Tribunal.
88. As will be seen and as assessed later in this judgment, one of the principal themes running through the Appellant's case is that the BBC could not and indeed, would not, revisit or reuse or rebroadcast any of the material in the programme since the material, or at least the material part or parts of the material, was unlawful or representative of unlawful behaviour on the part of the BBC. In particular, the Appellant contended that the material was obtained in breach of applicable broadcast regulations relating to the causing of harm to children and secondly, and perhaps more importantly, was reliant on improperly obtained consent or consents from the participants of the programme, coupled with a third element and potentially the most serious of all related to footage taken of the younger individual whose name featured in the programme's title, namely Craig, taken outside a Youth Court allegedly in breach of the provisions of section 49 of the Children and Young Persons Act 1933.
89. These last issues regarding what can be called in general terms issues of unlawfulness will be dealt with below. It is worth noting here however that the point about reporting proceedings in a Youth Court was not raised until a late stage of the proceedings, and was therefore not addressed in the initial complaints investigations, the Commissioner's decisions, the witness statements or the pre hearing submissions of the BBC. The point about compliance with the European Directive on Youth Broadcasting was raised earlier, and the BBC's general response was that the Appellant was giving an unusually wide interpretation of the harms to which the Directive was addressed, noting that it was commonly understood to concern the need to avoid sexually explicit or violent material, whereas the Appellant believed it also put a requirement on broadcasts before the watershed to avoid misleading information concerning the condition of ADHD, the life prospects of those affected by it, and the effectiveness of treatment by drugs.



90. The third and last witness to give evidence on behalf of the BBC was Francesca O'Brien. She is employed as Head of Editorial Standards of the BBC Trust. She has been in that role since April 2007. She manages the Trust unit and team that supports the ESC. She is herself a former BBC producer. She refers in her first and main statement to the Royal Charter which came into effect on 1 January 2007. That Charter guarantees the independence of the BBC and outlines the duties of the Trust and of the BBC Executive. The Trust is given express oversight over the work of the BBC Executive Board. The appropriate Editorial Guidelines are approved by the Trust. Those Guidelines govern, amongst other things, presentation, programme content, staff and complaints. The Trust is the final arbiter in all matters to do with the BBC's compliance with applicable regulatory requirements.
91. An Agreement between the Secretary of State for Culture, Media and Sport and the BBC of July 2006 requires the Trust to publish a framework to deal with complaints of all types including complaints as to content, standard and compliance with all relevant broadcasting codes, e.g. the Ofcom Code.
92. A number of specific paragraphs in that Agreement were addressed during the hearing of the evidence and in submission. In paragraphs 43 and 44 content standards and accuracy and impartiality are expressly addressed. As to the latter, the BBC is bound to do "all it can to ensure that controversial subjects are treated with due accuracy and impartiality". Much the same prescription informs paragraph 44. In paragraph 46 the BBC is charged with respecting and complying with so-called "Relevant Programme Care Standards", being those standards as set out in section 319 of the Communications Act 2003 including provisions whose objectives in round terms are to protect under-18 year olds only and by virtue of subsection (b) to the extent that they do not concern the accuracy or impartiality of the content of any programme included in the UK Public Broadcasting Services.
93. The Tribunal notes the above cited provisions only for the purposes of observing that the protection of those under 18 appears to be viewed subject to the qualification that general considerations of accuracy and/or impartiality are imposed on the BBC in a discrete fashion outside of the Broadcasting Code.
94. In paragraphs 89 and 90, there are detailed provisions concerning the setting of a framework and procedure for handling complaints. The Trust is charged with establishing and maintaining procedures regarding complaints, again, taking into account such other codes and guidelines as the BBC's own guidelines, as well as the Ofcom Code already referred to and the above-mentioned Relevant Programme Care Standards. Of particular importance however are the provisions in paragraph 90 and in particular paragraph 90(2) which says that the Trust must ensure "so far as practicable, the published framework and procedures place a complainant on an equal footing with the BBC, the Trust, the Executive Board ..."

95. At paragraphs 10-19 of her main witness statement, Ms O'Brien sets out in some detail the editorial complaints procedure within the BBC. The Tribunal finds there to be no need to amplify what has already been said about this above, including the earlier part of this judgment. Of particular importance however is another point already made, namely that in the ECU related part of the process, a complainant is given the opportunity after the complainant has received the summary of the complaint to comment on that summary. Again, before making an appeal to the ESC, a complainant is given the opportunity to be informed of the gist of the material on which the ESU relies in respect of his or her complaint.
96. However, Ms O'Brien also points out that the central underlying evidence is "not routinely" disclosed on the basis it would not be appropriate, proportionate or cost effective to do so.
97. She also addresses the role of the Independent Editorial Adviser. The Adviser, to whom reference has already been made in this judgment, conducts their own research and in general terms, their remit is very wide. The material gathered and considered by the Adviser is not provided to the ESC. The Adviser then provides a report to the complainant and to the programme makers. Both parties are then given the opportunity to comment on it.
98. At paragraph 28 of her first statement, Ms O'Brien confirms that even after an adjudication has taken place by the Trust, no material is destroyed. There is a requirement to retain in accordance with the retention policy such material for a period of at least five years. At that point, consideration is given to whether the material has historical or research value. At the time of the Appellant's request, none of the disputed information had been transferred to the BBC's permanent written archives. At paragraph 29, she sets out five reasons why material relating to a decided appeal will continue to be relevant to the BBC's and indeed the Trust's day-to-day role and the overall need to be accessible. First, she says that there is a need to review past appeals because a new complaint concerns the same editorial issues. The BBC and the Trust therefore need to ensure that the ESC is made aware of its past interpretation of editorial standards. Second, she says that the Trust sometimes reviews past appeals because a new complaint concerns the same programme and there is a need to ensure that the ESC is made aware of the earlier decision. Third, she says that sometimes the BBC needs to review past correspondence or appeals in order to check the facts for a letter, public statement or briefing paper. Fourth, she says sometimes the BBC and the Trust need to review past complaints and correspondence for complaints-handling reasons: for example, because they have received a complaint about the way that the Trust Unit has handled an appeal or because there is a decision as to whether to apply the "expedited procedure" to a complainant which is an abbreviated procedure to complainants who repeatedly bring appeals that have no prospects of success. Fifth and finally, she claims that if the BBC's output or a decision is subject to legal action or an Ofcom complaint,

the BBC may also want to review past appeals and correspondence either for consistency reasons or in accordance with any legal disclosure obligations.

99. Even after a publication of a ESC adjudication, there remains the possibility of legal or Ofcom generated proceedings or actions. As already indicated the programme involved children. The Appellant made a particular complaint about the breaches of guidelines on harm and offence to children. Ofcom normally imposes a 90 day time limit in respect of such complaints, but not if complaints are first directed to the broadcaster.
100. The complaint procedure made it clear that the complainant could resort to Ofcom about all issues except impartiality, accuracy, elections and referenda and other commercial issues. It was therefore open to the Appellant to challenge the ESC's decision to Ofcom or, she said, "even to attempt to bring a claim for judicial review of the adjudication". She went on to say that the material relating to the editorial complaint and the ESC's consideration of it "would thus continue to be held for those eventualities" (see para 30).
101. In her second witness statement which is very short, she clarified that evidence by stating that when she had said that it was open to the Appellant to challenge the BBC Trust's ESC's decision, in fact, while it was open to the Appellant to complain to Ofcom in respect of those issues over which Ofcom also had jurisdiction, even after the BBC Trust had already considered and adjudicated upon them, such a complaint would not take the form of a review of the ESC's decision. This was because Ofcom did not have a role of supervisory review over the BBC Trust itself.
102. In general terms, and subject to what is already said in this judgment, there can be said to be three types of information which the Appellant seeks by virtue of his requests. First there is information about the particular programme and its editing. Second, and certainly more relevant to the evidence provided by Ms O'Brien, he seeks information about the editorial complaints process covering not only the manner in which the complaint was handled, but also the nature and outcome of the various processes. Thirdly, admittedly with regard to a portion of the case as to which Ms O'Brien's evidence was not directly relevant, the Appellant seeks information about expenditure committed to or incurred in relation to the original programme.
103. With regard to the first general area regarding the requests made, although it is true that Ms O'Brien was not in any way involved in the original programme, during the course of her evidence, in answer to points put to her by members of the Tribunal, it was clear that elements of the original journalistic material would inevitably have been the subject of the Appellant's continuing requests in the context of what has already been called the rolling disclosure of the internal handling of his complaint.

104. Mention has already been made of the principal allegation made by the Appellant that both the original broadcast and/or any rebroadcast infringed, or would infringe, broadcast regulations and in particular, the Children and Young Person Act 1933. The Tribunal pause her to observe that the ESC would not have considered the Appellant's complaint about the 1933 Act which was only raised at a very late stage before the Tribunal.
105. In the Tribunal's judgment, Ms O'Brien clearly and persuasively explained, as had Mr Steel, that such matters were considered at the beginning of the complaints process as a whole. In the result, despite the opportunity the Appellant enjoyed to present such arguments, they were rejected both by the ECU and by the ESC.
106. The Appellant has made much of the alleged breach or breaches of the 1933 Act and in particular, of section 49. By way of analogy with the issues raised by the Commissioner and addressed in the *O'com* decision in the Upper Tribunal, this Tribunal is neither equipped nor entitled to determine one way or the other whether any such breach or breaches had or have occurred. The BBC has contended, and there is no evidence to the contrary, that neither the participants nor the relevant Youth Court has ever made any complaint or objection to the programme in any way which could be said to justify or make good the Appellant's contentions.
107. In any event, as is clear from the earlier review of the *Sugar* decision already set out in this judgment, the statutory construction formulated and set out by the Court of Appeal and by the Supreme Court does not involve any consideration of the lawfulness of any decision taken by the public authority as distinct from a consideration of the function which that authority is in fact carrying out. The exercise to be carried out is fundamentally different: it involves a determination of whether there is a sufficiently direct link between the BBC's holding of the information and the achievement of its journalistic purpose. The issues before the Tribunal will be set out in further detail below when consideration is made of the Commissioner's submissions in the appeal.
108. In the Tribunal's judgment, Ms O'Brien clearly recognised the reality of what has been said in the preceding paragraph. This is clear from the extracts recited or described above emanating from her first statement. During her oral evidence, when dealing with the question of the freedom to reuse journalistic material, she stressed that that ability and right lay at the core of the BBC's editorial independence. It was also, she said, ultimately a matter for the BBC Executive, albeit under legal advice, to make a decision in any particular case. Account would need to be taken of such matters as the applicable law, if any, and the relevant public interests. She described such situations as being "very hypothetical". She added to say that the BBC would not broadcast an item is something on which "without knowing the facts of the case, it can't reach a decision ..."

109. As for the second main category of information requested by the Appellant and referred to above, Ms O'Brien, as had the other two witnesses, again made it quite clear that the BBC had to maintain both journalistic and editorial material for a certain specified period, being in the main a seven year period. The Tribunal has already noted that the original broadcast in this case dated from November 2007 and was available online until 2009.
110. In the light of all the evidence before it and not simply the unequivocal assertions made by Ms O'Brien, the Tribunal is in no doubt that the information of the type sought and referred to in the second type of information described above provides a valuable tool and resource for research for other programmes and not just those programmes which might be thought to be directly relevant to the original subject matter. It is also abundantly clear to the Tribunal that Ms Jofre, the main presenter in the original programme, had herself produced a previous investigation on ADHD in April 2006. Equally, there can be no doubt that what could be viewed as the raw data for the original programme, e.g. unused footage and working papers, would be likely to be consulted in relation to a future programme or programmes on the same or related topics.
111. In addition, as Ms O'Brien alluded to in her main witness statement, the files or records of the programme and of the attendant complaint would be valuable material in its or their own right in the wider context of considering those types of case that might arise in the future and themselves be capable of challenge or of complaint in some way.
112. Finally, as if the same were not already sufficiently explained above and reflected in the content of Ms O'Brien's evidence, the Tribunal is entirely convinced that a proper invocation of the designation does not rest solely or in any material way on a showing that there will be a rebroadcast of the original programme or that portion of it found to be at fault. The answer to such a contention is made in the immediately preceding paragraph of this judgment. Again, Ms O'Brien made the point in her cross-examination. She said that there might be all kinds of programmes which could be made, such as those about ADHD itself or about the medical development of that condition over the last 20 years.
113. As the BBC points out in its written submissions, any such contention that everything turns on whether an actual rebroadcast would be made flies in the face of common sense. It is tantamount to saying that only good or honest or, as the Appellant might have it, "lawful" journalism can properly be regarded as being the subject matter of journalistic purposes.
114. Again, with regard to the second main category of information requested, namely that held for the purposes of the editorial complaints process, it is sufficient in the Tribunal's judgment to refer back to the third element of journalistic activity originally formulated by the Tribunal in the *Sugar* case and approved in the Court of Appeal, in particular by Lord Neuberger. This concerned what was called the maintenance and enhancement of standards and the quality of journalistic activity with regard to accuracy, balance and completeness. This in

turn might involve the reviews of the standards and quality of particular areas of programme making.

115. There seems no reason in principle why exactly the same consideration should not apply to the information held by all the key participants within the complaints procedure, i.e. the ECU and the ESC. Ms O'Brien described the material compiled and collated during the investigative process as "integral" to the BBC's journalistic purposes. She explained in clear terms that the BBC's standards in effect reflected, if not incorporated, the relevant guidelines. The effect of that inter-relationship was in turn monitored by virtue of the complaints that the BBC received, and as she put it "feeds back into [the BBC's] journalism".
116. She observed that most of the complaints that come before the BBC Trust concern impartiality and accuracy. She gave an example over the use of the word "borders" in relation to the Occupied Territories and Israel instead of a term such as "green lines". She said that "the decision [of] the Trustees will immediately impact" upon the business and activity of the BBC.
117. In particular, in the Tribunal's view and judgment, Ms O'Brien was if anything insistent in her rejection of any suggestion that there was little if any continuing editorial value with regard to the underlying material insofar as non-programme makers were concerned as distinct from those directly involved in the making of programmes. She maintained that in meetings between the Trust and the Executive, the former prepared and held a brief so as to be aware not only of any findings as such, but also of the underlying material.
118. She also rejected any suggestion that once a decision had been published by or on the part of the Trust, the information in question became historical or as the Appellant put it to her, "dead and buried". On more than one occasion she pointed to the fact that resort to and reliance upon the underlying materials continued long after any formal conclusion or finding.

#### The Commissioner's submissions

119. The Commissioner was not present, nor represented at the hearing of these appeals. He, however, filed and served written submissions settled by Counsel.
120. In them, the Commissioner invited the Tribunal to dismiss the appeals. The submissions begin with contentions as to how the designation should be applied and, in particular, what is meant by the expression "journalism, art or literature", coupled with an examination of the legislative objective of the designation. The contents of these passages, are in the Tribunal's view, covered by and reflected in the BBC's contentions already addressed in this judgment with regard to the applicable law, and in particular, with regard to the *Sugar* decision.

121. The Commissioner then poses the question as to what information is to be regarded as being held for the purposes of journalism, art or literature. Again, ample reference is made to the *Sugar* decision, and in particular, to that of the Supreme Court in that case.
122. In the result, the Commissioner makes two consequential submissions. First, he invites the Tribunal to identify the purpose or purposes for which the information was held at the time it was requested or at about that time. He adds that any purpose that is effectively negligible or *de minimis* can be ignored. Secondly, he invites the Tribunal to consider whether there is a sufficiently direct link between at least one of those purposes and, first, the production of the BBC's output to the public and/or, second, those of the BBC's journalistic or creative activities which underpin such a production. He calls this the Direct Link test. This test, he says, should be applied "in a relatively narrow way" bearing in mind that in borderline cases, the underlying purpose of the designation will be to protect the BBC from the risk of interference with or inhibition of its function of producing output for the public, a reflection again of passages in the Supreme Court judgment.
123. Moreover, for the purposes of applying the Direct Link test, the Commissioner invites the Tribunal to revisit the threefold analysis of journalism set out by the Tribunal in the original *Sugar* case and endorsed by the Court of Appeal, in particular, Lord Neuberger (see again paragraphs 105-109 of the Tribunal's decision in *Sugar*). The Commissioner says that there should be added in the fact that "journalism" also includes the act of broadcasting or publishing the relevant material.
124. If at least one of the purposes satisfies this Direct Link test, then the Commissioner claims that the information in question falls outside the designation and FOIA does not apply. Conversely, if no purpose satisfies the Direct Link test, then the information falls within the designation and FOIA does apply.
125. In the event, the Commissioner contends that the disputed information in the present appeals falls outside the designation and thus outside the Act. This is because at the relevant times, at least one of the purposes for which the information as whole was held, fell within the above mentioned third limb of the definition of "journalism", namely: "... the maintenance and enhancement of the standards and quality of journalism (particularly with respect to accuracy, balance and completeness) ..."
126. All the challenged Decision Notices were issued prior to the Supreme Court's judgment in *Sugar*, (on 15 Feb 2012 ). As set out above the first Decision Notice of 10 Feb 2010 would have relied on the decision of Irwin J on 2 Oct 2009. The remainder post dated the Court of Appeal's judgment in *Sugar*. The Commissioner's reasoning remains valid however as the same fundamental approach was adopted in all three rulings .

127. In more general terms the Commissioner observes that much of the Appellant's initial skeleton argument appears to be an attempt to impugn the decisions taken by the BBC's ECU and ESC in relation to the complaint that the Appellant made about the original programme. The Commissioner contends that this is simply not an issue that falls within the Tribunal's jurisdiction or which the Tribunal needs to consider in order to determine the appeals. The question is simply whether or not the disputed information falls within the designation. That involved the two-fold approach set out above, namely consideration of the relevant purpose and secondly, the application of the so-called Direct Link test.
128. The Commissioner adds that it is not for the Tribunal to determine whether any of the disputed information could usefully have been disclosed to the Appellant during the investigation of the Appellant's complaint, so as to serve the interests of openness, transparency and/or fairness. This matter will be revisited in connection with aspects of the Appellant's own submissions below. The Commissioner says that the Supreme Court's judgment provides what he calls authoritative guidance on the proper application of the designation. That guidance should be applied and there is no warrant for introducing any additional gloss such an additional test that asks whether, even if information is held for journalistic purposes, disclosure might serve some other interest.
129. Again, it is not for the Tribunal to determine the merit of the programme itself as a piece of journalism. This is the same point as already referred to, namely, whether the Tribunal is at all concerned with a finding as to whether the programme was a good or a bad programme. Nor would it be for the Tribunal to determine whether an entertainment or cultural programme properly qualified as good art or literature for the purposes of the remainder of the designation. It cannot have been intended, and could not have intended, to assign to the Tribunal the function of determining quality or legitimacy as to the BBC's output. Even bad or worse than bad journalism is still "journalism".
130. The Commissioner then turns to a matter that has been addressed above with regard to preliminary points of principle raised by the Appellant, namely the question of attribution. The Appellant argues that if information is held by employee A for the purpose of journalism, but also held by employee B otherwise and for those purposes, then the information should fall within the designation and within FOIA.
131. The Commissioner contends that any such argument should be rejected. First, it conflates the concept of a document with the concept of information. Information is defined by section 84 of FOIA as meaning "information recorded in any form". An item of information may be taken from one document and recorded in another, while still being the same item of information.
132. Second, FOIA applies to information as opposed to documents. As long as one employee holds a given item of information and holds it in part at least for the purposes of journalism,



then it should follow that the BBC, as a whole, holds that information albeit in part for the purposes of journalism irrespective of whether the information is also held in other documentary form by other employees or indeed other parties for purposes other than journalism.

The Commissioner contends that any other approach or construction of the designation would be, in his words, “extremely cumbersome to apply” since a Tribunal would need to determine all the persons who “hold” any given item and identify all the relevant purposes, and secondly, it would be contrary to the clear legislative objective endorsed by the Supreme Court.

133. The Commissioner gives an illustration. A request is made for notes that a journalist makes whilst on assignment. At the time, employee A holds those notes because that journalist is in the process of producing a documentary that will make use of them. It can therefore be said that that journalist holds the notes for the purposes of journalism. However, employee B also holds a copy of the same notes for an entirely different unrelated reason. Employee B is investigating whether the journalist in question has been making false expense claims. Employee B therefore does not hold information for the purposes of journalism. The result of the Appellant’s argument is, according to the Commissioner, that as a result of employee B’s activities, the notes would fall within the designation and thus within FOIA. However, given employee A’s purpose, that result would clearly be contrary to the legislative objective for the designation. The Tribunal finds that example compelling and persuasive. The Tribunal feels bound to add and observe that the disputed information in this case fill nine heavy ring-binders and amounts to thousands of pages. It would be impossibly burdensome, and would require detailed and disproportionate further inquiries, to determine the precise purpose for which each document was held by the several individuals at various times who may have been in possession of each document, if indeed that exercise were required, which the Tribunal has found not to be the appropriate exercise in a proper approach to these appeals.
134. Finally, the Commissioner endorses the BBC’s arguments with regard to Article 10 of the European Convention on Human Rights. The Commissioner agrees that the Supreme Court’s judgment in *Sugar* means that there is no room for such an argument. On the authority of the Supreme Court’s decision, there is no independent or additional right of access to the disputed information under Article 10. Article 10 is not engaged, and access rights under FOIA can be construed solely in accordance with domestic law. The Commissioner also makes reference to the subsequent Court of Appeal authority that since *Sugar* has held that this aspect of *Sugar* is itself binding: see *Kennedy v Charity Commission* supra per Etherton LJ at paras 36 and 55.

The Appellant's submissions

135. The Tribunal will address what it regards as the material part of the Appellant's overall submissions, particularly those set out in the closing submissions provided pursuant to directions issued by the Tribunal at the conclusion of the oral hearing. They amount to 79 pages. It should be pointed out for the sake of completeness too that the Appellant provided several witness statements. They were read by the Tribunal. It was felt that while some were material to the questions the Appellant raised concerning the quality and accuracy of the programme, they added nothing to the facts on which the Tribunal must make its decision. In any event the Appellant was not cross-examined on any aspect of his evidence provided in those witness statements.
136. The Appellant had previously provided submissions by way of an opening skeleton argument which is 57 pages in length. He expressly invited the Tribunal to read both sets of submissions together. The Tribunal has done so. Again however, with the greatest respect to the Appellant, the Tribunal finds that there is much repetition and, much more importantly in the light of the remit which the Tribunal sees itself as fulfilling, much that is simply not relevant to the real issues in the appeal. In this respect the Tribunal is satisfied that the task it has to undertake is the twin approach articulated by the Commissioner reflecting the contention of the BBC involving as they do first the consideration of the relevant purposes and secondly, a consideration whether there is a sufficiently direct link.
137. However, although the Tribunal has already expressed its judgment and views on a number of key issues in reflecting on matters of principle advanced by the Appellant, it proposes in general terms at least to address some of the key aspects of the two sets of submissions before turning to what it considers as the principal heads of complaint.
138. It will preface consideration of the main areas advanced by the Appellant by stating that much of what the Appellant provides in his written submissions, particularly in his opening skeleton is about the original broadcast which was scrutinised throughout the investigative process. Much is also said about failings attributable to the ECU adjudication and matters concerning that process. In particular it is alleged that the ECU did not set out evidence on the risks of harm to children, see e.g. para 44. That in turn is said to be inconsistent with the obligation of the BBC to comply with the relevant provisions set out more particularly in the Framework Agreement.
139. Similar criticisms are levelled against the ESC. In particular, the Appellant contends that the ESC did not address all of the complaint or complaints that had been formulated by the Appellant and which were put before the ESC: see in particular paragraph 76 of his opening skeleton. The ESC also did not, in the Appellant's view, apply the relevant broadcasting standards.

140. The Appellant also claims that the BBC failed to investigate or obtain evidence on the exposure of children to harm (see e.g. para 91) and similar criticisms are made of the ESC and its reasoning (see e.g. para 92 and following).
141. Much is also said in the opening skeleton about the effect of section 49 of the 1933 Act but this has already been dealt with in this judgment.
142. Towards the end of his opening skeleton argument, the Appellant lays great stress on what he says is a material relationship between the BBC, occupying a position of public trust on the one hand, and on the other, a proper application of the designation. Again, the Tribunal has addressed this at various points earlier in this judgment. Having regard to what has already been said, the Tribunal again, with respect to the Appellant, finds itself in some difficulty in distilling any clear propositions which can usefully be reviewed as such and as being directly addressed in some way to the two-stage process set out above as articulated by the Commissioner and adopted by this Tribunal.
143. Nevertheless, the Tribunal perceives five main strands to the Appellant's contentions.
144. First, he points to what he believes to be the unlawful, flawed or unethical nature of the original programme itself. This in turn leads him to two propositions: first that the designation cannot have been designed and should not be interpreted as protecting unlawful journalism and broadcasting, and secondly that the original journalistic material at least is now "unusable". The difficulty the Tribunal finds with the first contention is, as already stated, that the allegation of criminality in respect of reporting the proceedings of the Youth Court has not been made before a criminal court, and has not been tried. It is not for this Tribunal to try the issue. It cannot presume the BBC or the programme makers to be guilty of a criminal offence or make the allegation of criminality the foundation of its judgment. Even supposing that a criminal offence had been committed, and the Tribunal stresses that it is not in a position to make that conclusion, the Tribunal doubts that it would follow that journalistic material relating to the matter would be disclosable. The Tribunal has dealt earlier with the second contention (that the material is now unusable) but repeats its view that it is entirely satisfied that this contention is simply not maintainable in the light of the evidence it has received nor, and more importantly, in light of the functions with the Tribunal regards itself as being charged with carrying out.
145. Second, the Appellant takes issue with the propriety and rigour with which all stages of his complaint were addressed and dealt with by the BBC as a whole. This too has been dealt with. Nonetheless, the short answer again as indicated above in the Tribunal's view is that this Tribunal is simply not entitled, nor equipped, to engage in the type of monitoring exercise the Appellant in effect invites it to conduct. However, and in no way resiling from the said expression of the Tribunal's stance and finding, given the wider experience of the Tribunal's panel members in complaints procedures operated in various parts of the public

sector, it is not persuaded that the BBC complaints procedure can be said to display any, let alone any exceptional lack of transparency. The opportunity to see and comment on materials placed before the Trust before it takes a decision alone represents an example of openness which would not be replicated in many other areas, and the extensive access to drafts and internal meetings and documents sought by the Appellant could perhaps be seen as somewhat unusual. The explanations given by the BBC's third witness, Ms O'Brien, of the usual practice concerning attendance of complainants at meetings were reasoned and appropriate. It is not exceptional for complaints procedures to fall short of affording the opportunity of a public hearing, especially where the direct interests, financial or reputational, of the complainant are not engaged.

146. Third, the Appellant invites the Tribunal to construe the otherwise unqualified terms of the designation in such a way as to rectify any procedural unfairness in relation to the way a specific aspect of journalism has been addressed in this case by the public authority itself. Again, as indicated above, on more than one occasion in this judgment, there is simply no justification either by virtue of FOIA or by virtue of the Supreme Court's decision in *Sugar* or indeed in any other way to assert that the BBC's exposure to the relevant legal and regulatory requirements in any way bears upon the applicability of the designation. The Appellant in particular claims that the BBC seeks to widen the designation by reference to policy considerations. In the Tribunal's judgment, this is simply the same and equally flawed argument. If anything, the position is reversed. It is the Appellant who is importing extraneous and irrelevant considerations into what would otherwise be a clear application of the designation.
147. Fourth, the Appellant places particular emphasis in his final and "consolidated" request of July 2010. He claims that the information requested could not therefore at all be regarded as being held for journalistic purposes. In the Tribunal's judgment, this completely misstates the position. It is enough simply to refer again to the three BBC witnesses' evidence on this issue. The fact that no new information was being generated adds nothing to the point.
148. In any event, the same theme falls foul of the basic realities. The evidence in these appeals clearly shows that there is no sensible distinction either as suggested or at all between information held in relation to subjects which the BBC is frequently covering (eg Middle Eastern affairs ) and information which is held after a broadcast is made in connection with what the Appellant ,in the Tribunal's view, misleadingly characterised as a "one-off" or exceptional topic. In other words, it is completely unrealistic to regard the situation in this case as being one where there is no work in progress: cf *Sugar* supra at [2012] 1 WLR 439 at para 112 per Lord Mance. The Supreme Court at various points referred to the need to have a library maintained for current reference as opposed to material stored against some

“unforeseen need to revisit past events”: see per Lord Mance at para 112. See also Lord Philips at para 67 and Lord Brown at para 106.

149. This same theme again echoes points already made in this judgment. If the Appellant's views were correct, so-called one-off projects would be totally exposed to a FOIA request, and any complaint, whether justified or not, could open up a route to journalistic materials as well as to the heart of the internal controls over balance, accuracy and fairness. On any footing, that would represent violence being done to the central purpose of the provisions to protect journalism from inhibition or interference and to the principles set out by the Supreme Court and would represent the very type of threat or occurrence which was warned against in no uncertain terms particularly by Lord Walker at para 78.
150. As the BBC has pointed out, even if a broadcast as such were not to be transmitted in whole or in part, all three witnesses produced by the BBC pointed to the continuing need for all BBC staff, particularly journalists, to refer to such material if only for the purposes of maintaining proper editorial standards.
151. In the present case, Mr Edwards in particular pointed out there was no current plan, at least at the date of the appeal hearing, to consider and make another programme on either ADHD or Ritalin. This is on account of the Appellant's own complaint. In the Tribunal's judgment this factor again demonstrates the serious consequences of interference with journalistic functions. This factor has been identified in other cases: see e.g. *Kaschke v Gray* [2010] EWHC 1977 (QB) (“chilling” effect of legal proceedings related to journalism).
152. Fifth and finally, the Appellant seeks to draw a line between the management of his complaint and the manner of its review on the one hand, and the BBC's future output on the other. The two, he says, are totally unrelated.
153. Yet again, the BBC's witnesses provided a conclusive rejection to any such suggestion. As expressed by Ms O'Brien, the first of these elements and its content, e.g. all relevant decisions relating to the investigation, are “deeply entwined” with the relevant investigation process as a whole. She and the other witnesses made it abundantly clear to the Tribunal, and the Tribunal so finds, that the ability to access and rely on such information is vital to a consideration at the very least as to how editorial complaints are handled.
154. The BBC also points out that there is a basic inconsistency in the Appellant's own posture. He wants what can be described as nothing less than a full recounting of how the BBC handled this complaint. It has already been observed that he would ideally like to seek a rebroadcasting of the original programme with the right on his part to participate and, if necessary, import experts. On any view, and indeed by his own admission, he seeks this so that he can analyse and reassess the BBC's editorial review. The Tribunal is bound to say that if that is not the clearest manifestation of journalistic activity, it is difficult to see what is.

155. There are a number of other points which are made in the course of the Appellant's closing submissions. As indicated above, not all of them are worthy of any comment. However, the BBC points to a number of isolated items which are perhaps worthy of a view, but not on the basis that they form any viable basis for contesting the Tribunal's final conclusions.
156. First, it is suggested that there has been a change of attitude by the BBC on the issue of whether the information requested was held by the BBC Trust for the purposes of journalism. The BBC has always maintained that it was so held and so submitted. The Tribunal is entirely satisfied the BBC is correct and indeed this does not more than reflect the fact that the Tribunal directed that provided proper notice has been given, all arguments should be considered as at that stage.
157. At various points, the Appellant has claimed that the witnesses were not best placed to give evidence on the matters in these appeals. The Tribunal feels that this point was not really pressed, but if it were a matter of serious contention, it rejects any such submission. Each of the witnesses were cross-examined at length, in some cases, severely so. The Tribunal hopes and expects that the Appellant felt that he had every opportunity to put his points to the witnesses even though in retrospect, many of the exchanges had little if anything to do with the real issues in the appeal. In particular, Mr Edwards, being a Commissioning Editor for TV Current Affairs was particularly well placed, in the Tribunal's firm view, to acquaint the Tribunal with a proper overview of the purposes for which the information was held.
158. At one specific point in his closing submissions, the Appellant claims that the BBC relied on the ESC finding as some form of "acquittal". For the reasons given in connection with the *Oftcom* decision in the Upper Tribunal, the Tribunal is simply not prepared to enter into any argument that turns on what could be called the admissibility of the ESC's finding one way or the other. The fact remains from what it has seen, the Appellant's complaint was not wholly upheld by the ESC.
159. At various points in his closing written submissions, the Appellant claims that there are wider issues which should have been raised in respect of the BBC's journalism which the ESC did not identify as being relevant. This had been touched on even in this last section of the judgment. This is not a matter on which the Tribunal seeks to be engaged for the reasons already stated. What is clear, if nothing else, is that at all times the Appellant has disagreed with the terms and ambit of the BBC's review into its journalism, but for the reasons already stated, the Tribunal regards that as being immaterial to the true issue in these appeals.

Conclusion

160. For all the above reasons, the Tribunal unanimously dismisses the Appellant's appeals in all of the appeals before it.

Signed:

**David Marks QC**  
**Judge**

Dated: 20 November 2012



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

**UNDER SECTION 57 OF THE FREEDOM OF INFORMATION ACT 2000**

**Appeal Nos. EA/2010/0042, 0121, 0123,**

**0124, 0125, 0187**

**BETWEEN:**

**STEPHEN GEE QC**

**Appellant**

**And**

**THE INFORMATION COMMISSIONER**

**Respondent**

**And**

**THE BRITISH BROADCASTING CORPORATION**

**Additional Party**

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**APPENDIX 1**



## Freedom of Information Act 2000 (Section 50)

### Decision Notice

**Date: 8 November 2010**

**Public Authority:** British Broadcasting Corporation  
(the BBC)  
**Address:** 2252 White City  
201 Wood Lane  
London  
W12 7TS

### Summary

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The complainant requested a considerable amount of information about the BBC's Panorama programme. He made one new request for information and also requested the same information that was subject to the Commissioner's previous Decision Notices FS50237250, FS50265735, FS50265739, FS50266075 and FS50316361.

The BBC stated that the requested information fell outside the scope of the Act because it is information held for the purposes of art, journalism or literature. The Commissioner's decision is that the BBC correctly determined that the requested information is genuinely held for the purposes of journalism. Therefore the BBC was not obliged to comply with Parts I to V of the Act.

### The Commissioner's Role

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1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

### Background

2. The complainant has explained that the BBC broadcast an edition of 'Panorama' ('What's Next For Craig?') on 12 November 2007. The

programme concerned the use of stimulant medication to treat children with attention-deficit hyperactivity disorder (ADHD).

3. The complainant submitted complaints to the BBC about the content of the programme on the basis that it was misleading and in breach of editorial standards and the Ofcom broadcasting code. The complaint was investigated by the BBC's Editorial Complaints Unit, and the complainant subsequently appealed part of the findings to the BBC Trust's Editorial Standards Committee. He also subsequently submitted a series of requests for information about the BBC's handling of his complaint, including records and correspondence exchanged or obtained in the course of considering the complaints, and the actions and processes of the Editorial Complaints Unit and Editorial Standards Committee.
4. The result of the BBC Trust's Editorial Standards Committee was that it partially upheld the complaint and its findings were issued in February 2010 and can be found at the following link:  
[http://www.bbc.co.uk/bbctrust/assets/files/pdf/appeals/esc\\_bulletins/2010/panorama.pdf](http://www.bbc.co.uk/bbctrust/assets/files/pdf/appeals/esc_bulletins/2010/panorama.pdf)
5. The BBC was also required to broadcast a correction and apology on BBC1 at the beginning or end of a Panorama Programme. This was undertaken on 8 March 2010.
6. The complainant has made a new request for the same information that had been considered in five previous cases:
  - FS50237250;
  - FS50265735;
  - FS50265739;
  - FS50266075; and
  - FS50316361.

These Decision Notices found that the information was held for the purposes of 'art, journalism and literature' and that it fell outside the provisions of Parts I to V of the Act. At the date of this Decision Notice these five cases are being considered by the First Tier Tribunal (Information Rights).<sup>1</sup>

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<sup>1</sup> Tribunal Case Reference: EA/2010/0042 (which has been consolidated with EA/2010/0121, EA/2010/0123, EA/2010/0124 and EA/2010/0125).

## The Request

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7. On 7 July 2010 the complainant requested the following information to be provided in accordance with the Act:

*"...Also, without in any way derogating from this position, I am repeating each request for information which is the subject of each of the 5 appeals. This is a formal request to the BBC for the information..."*

8. The material parts of requests for information that are subject to the five appeals can be found in Appendices A – E of this Notice (redacted where appropriate). The Commissioner has maintained the separation between the complaints that he considered, but renumbered the elements of the requests to ensure ease of reference for the remainder of the Notice. The Commissioner in his five earlier investigations found that all of those requests were for information held for 'the purposes of art, journalism and literature' and therefore the BBC was not required to comply with Parts I to V of the Act. There are 41 requests which are referred to as Requests 1 to 41 in this Notice.

9. On 9 July 2010 the complainant also requested more information from the public authority (this request will be referred to as 'Request 42' in this Notice). He asked for:

*"Please produce to me that the emails, correspondence, records notes, unshown [stat] film clips, financial records and all other documents relating to or connected with (1) the preparation for or the making of the broadcast or (2) the defence by Panorama of the complaints made to the ECU and the ESC. These include [Individual R redacted]'s notes and emails relating to interviewing Craig and his family for the broadcast."*

10. On 3 August 2010 the public authority issued its response. It explained that it maintained its position in respect of the information which is subject of the five appeals and that it believed that some of the information requested in request 42 was within the scope of the requests under appeal. For the remainder, it explained that it believed that the information requested was not subject to Parts I to V of the Act because it was held for the purposes of 'journalism, art or literature.' It explained that Part VI of Schedule 1 to FOIA provides that information held by the BBC and the other public service broadcasters is only covered by the Act if it is held for 'purposes other than those of journalism, art or literature'. It concluded that the BBC was not required to supply information held for the purposes of creating the

BBC's output or information that supports and is closely associated with these creative activities. It therefore would not provide any information in response to requests 1 to 42.

## **The Investigation**

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### **Scope of the case**

11. On 7 August 2010 the complainant contacted the Commissioner to complain about the way his requests for information had been handled. The complainant specifically asked the Commissioner to consider the following points:
  1. He was making a formal application for the Commissioner to consider the requests dated 7 and 9 July 2010;
  2. That the burden of proof should be on the BBC to justify their response;
  3. That the information was not held at the relevant time for the purposes of 'art, literature or journalism'. This is because in his view it is historical archive information held for other purposes; and
  4. His intention was to appeal the Commissioner's Decision Notice and that he believed that this would enable it to be considered alongside the other appeals and would simplify those appeals.

### **Chronology**

12. On 13 September 2010 the Commissioner wrote to the public authority and the complainant to explain that this case was eligible and would be allocated to a case officer.
13. On 14 September 2010 the Commissioner wrote to the public authority to gather sufficient evidence to inform his decision on whether the information was held for the purpose of journalism. He received a response on 7 October 2010.

## Analysis

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### Substantive Procedural Matters

#### *Jurisdiction*

14. Section 3 of the Act states:

*"3. – (1) In this Act "public authority" means –  
(b).... any body...which –  
(i) is listed in Schedule 1....."*

15. The entry in relation to the BBC at Schedule 1, Part VI reads:

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

16. Section 7 of the Act states:

*"7. – (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".*

17. This means that the BBC is a public authority for the purposes of the Act but only has to deal with requests for information which is not held for the purposes of journalism, art or literature. The term 'derogated' is used to describe information that falls outside the Act, i.e. information that **is** held by the BBC for the purposes of journalism, art or literature.

18. The House of Lords in the case of *Sugar v BBC*<sup>2</sup> confirmed that the Commissioner has jurisdiction to issue a decision notice in respect of any request made to the BBC regardless of whether or not the information is derogated. Where the information is derogated, the Commissioner considers that the BBC has no obligations to comply with Parts I to V in respect of that information.

19. The Commissioner will first determine whether the requests are for information held for the purposes of journalism, art or literature and if therefore the BBC is required to comply with Parts I to V in respect of the requests.

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<sup>2</sup> *Sugar v BBC* [2009] UKHL 9

## Derogation

20. The scope of the derogation has been considered by the Court of Appeal in the case *Sugar v British Broadcasting Corporation and another* [2010] EWCA Civ 715. The leading judgment was made by Lord Neuberger of Abbotsbury MR who stated that:

*' .....: once it is established that the information sought is held by the BBC for the purposes of journalism, it is effectively exempt from production under FOIA, even if the information is also held by the BBC for other purposes.'* (para 44)...*provided there is a genuine journalistic purpose for which the information is held, it should not be subject to FOIA (para 46)'*

21. The Commissioner believes that the test is to establish if the information is held for a genuine journalistic, artistic or literary purpose. If the information is not, then it is not derogated.
22. With regard to establishing the purpose for which the information was held Lord Neuberger of Abbotsbury MR (at paragraph 55) drew a distinction between information which had an effect on the purposes of journalism, art or literature and information that was actually being held for one of those purposes. Based on this judgment the Commissioner considers that for information to be held for a derogated purpose it is not sufficient for the information to simply have an impact on the BBC's journalistic, artistic or literary output. The BBC must be using the information in order to create that output, in performing one of the activities covered by journalism, art or literature.
23. The Court of Appeal adopted the Information Tribunal's definition of journalism in *Sugar v IC and the BBC* [EA/2005/0035] at paragraphs 107 to 109 which set out that journalism comprised of the following three elements:

*"107. The first is the collecting or gathering, writing and verifying of materials for publication.*

*108. The second is editorial. This involves the exercise of judgement on issues such as:*

*\* the selection, prioritisation and timing of matters for broadcast or publication;*

*\* the analysis of, and review of individual programmes; and*

*\* the provision of context and background to such programmes.*

*109. The third element is the enhancement of the standards and quality of journalism (particularly with respect to accuracy, balance and completeness). This may involve the training and development of individual journalists, the mentoring of less experienced journalists by more experienced colleague, professional supervision and guidance, and reviews of the standards and quality of particular areas of programme making."*

24. In considering whether the information is held for the purposes of journalism the Commissioner has considered the following factors;
- The purpose for which the information was created;
  - The relationship between the information and the programmes content which covers all types of output that the BBC produces; and
  - The users of the information.
25. There are 42 requests for information in this case. The complainant has argued why in his view the information requested cannot be said to be held for the purposes of 'art, journalism and literature' and had asked that the Commissioner pay particular attention to the passage of time.
26. To ensure clarity, the Commissioner has decided that it is appropriate to subdivide the 42 requests into the following five categories (he has used the notation p. where part of the request relates to one category and part to another):
1. Information about editorial complaints ([1], [2], [3], [4], [7], [8], [9], [10], [11], [12], [13], [14], [15], [17], [19], [20], [21], [22], [23], [p. 25], [28], [30], [35], [36], [37], [38], [39], [40], [p 41] and [p 42]);
  2. Information about complaints handling procedures ([16], [18], [24], [26], [27], [29], [31], [34] and [p 41]);
  3. Information about the programme itself and its editing [p 42];
  4. Information about the complainant's information requests in relation to the programme content ([p. 25], [32] and [33]); and
  5. Information about expenditure in connection with the programme ([5] and [6]).

27. He will consider for each category whether the requested information is genuinely held for the purposes of journalism below.

**Category one: Information about editorial complaints**

28. The Commissioner has adopted the definition of journalism that was advocated in Tribunal decision EA/2005/0035 and which is mentioned in paragraph 23 above. The Commissioner's view is that information about editorial complaints falls within the third element of that definition. This is because it constitutes a review of the standards and quality of particular areas of programme making to enhance standards. This follows his five previous decisions noted above.
29. The BBC has provided further arguments that explain the concern it has about releasing information in respect of ongoing editorial complaints. The main points were that:
- (1) It considers editorial complaints to be one mechanism by which it supports its programme content, through continuous review of audience reaction and to ensure that future production can be informed from their results;
  - (2) It believed that the limitation of the Act was designed to protect public broadcasters' freedom of expression and that the maintenance of its editorial independence is crucial to allow it to fulfil its function of imparting information and explaining its ideas on all matters of public interest;
  - (3) The release of information of this sort would threaten its independence as it would erode the private space and this may lead to individuals attempt to influence its output. It explained that it needed to consider its past performance while considering how to create and improve its programmes; and
  - (4) The release of the information about audience feedback would damage independence because it would impede the programme maker's ability to weigh all feedback and come to journalistic judgement on future content.
30. The complainant has argued that, now that the result of the complaint has been decided, he believes that it cannot be said that the BBC still holds the information for the purposes of journalism. This is because the information is now historic and he places reliance on paragraph 58 of the Court of Appeal judgment where the Master of the Rolls said:



**[58]** *As the tribunal rightly observed, information held at one point for purposes of journalism may, at some later point, cease (either temporarily or permanently) to be held for that purpose. In the case of journalism, above all news journalism, information "held for purposes . . . of journalism" may soon stop being held for that purpose and be held, instead, for historical or archival purposes. The BBC, and the Commissioner and the tribunal, will no doubt carefully consider whether this applies to the information, which originated as purely journalistic-related material.'*

31. The Commissioner therefore needs to determine whether the information was genuinely held for the purposes of journalism on 7 and 9 July 2010. It is not material whether the information is also held for other purposes too, provided that it is genuinely held for the purposes of journalism.
32. The BBC has presented detailed arguments about why it believes that the Commissioner should determine that the information remains held genuinely for the purpose of journalism, despite the result of the complaint being decided and the complaints process therefore being exhausted. They are:
  - (1) The effect of editorial complaints transcends the time when they are considered. The material continues to be held for editorial purposes, may influence its editorial direction and inform future content;
  - (2) The outcome (and information relating to the complaint) plays a significant role in helping inform the editorial decisions going forward, which could involve a complaint or programme about similar or identical matters in the future. The information plays a significant role in the content and connects to improving the quality of journalistic output;
  - (3) The BBC may require the same information in the event that it receives an analogous complaint about expert evidence and/or must make complex editorial decisions in the future;
  - (4) The BBC may also need to revisit the matter in the event that there was a further complaint regarding the correction that was broadcast on 8 March 2010;
  - (5) The BBC evidenced that information about Partially Upheld complaints is retained permanently, which evidences the importance that it places on complying with its Editorial

standards. It explained that it was kept permanently to ensure that the BBC is in a position to not make the same mistakes again;

- (6) It explained that the relevant information has not been physically placed in its archive;
  - (7) In any event had information been archived, it should not be regarded as dormant. This is because the information is held permanently in order to inform journalistic content and it proved that 91% of requests for archive material came from production divisions who created content;
  - (8) It believes it is essential that programme information is retained, such as footage, journalist notes, contracts and broadcasts, to be used as a ready resource for future publications; and
  - (9) In its view the physical location of the material in this case does not change the analysis that the information remains held for the purposes of journalism.
33. The Commissioner has carefully considered the arguments of both sides when deciding whether Parts I to V of the Act apply in respect of the information. In doing so has considered the three stage test outlined in paragraph 24 above. He finds that:
- (i) The information was created for the purpose of considering the editorial complaint. He is content that it was created in order to consider the strength of the BBC's journalistic content;
  - (ii) The Commissioner is satisfied that there is a direct relationship between the information requested in respect of editorial complaints and the content of the programme that the complaint is about. In addition, the Commissioner is satisfied that the information relating to the editorial complaint is still being held so the BBC can use it to monitor and manage the quality and standards of its journalistic output; and
  - (iii) He is satisfied that the information about the Editorial complaints will continue to be used by those who monitor and manage the quality, standards and impartiality of its journalistic output. It is also likely to be used by those who create future BBC output.

34. The Commissioner is satisfied that for this category of information the BBC continues to genuinely hold the information for the purposes of journalism. As explained above evidence gathered to consider editorial complaints and their results is information created as part of the management and enhancement of the standards and quality of journalism. It also used by those involved in the production of future output. These fall within the second and third paragraph of the Tribunal's definition of what 'journalism' means.
35. He therefore finds that the relevant information was held for the purpose of journalism and so the BBC was not obliged to comply with Parts I to V of the Act.

### **Category two – information about complaints handling procedures**

36. This category concerns information on the BBC's procedures and protocols for handling editorial complaints and subsequent appeals. As outlined at paragraphs 28 to 35, the Commissioner considers that information relating to complaints about BBC content is not subject to Parts I to V of the Act. The Commissioner believes that the requested procedures and protocols outline the processes followed by the BBC when considering complaints about programme content. The consideration of complaints is part of the process of managing the quality and standards of journalism. The Commissioner understands that the protocols constitute an integral tool used to guide and regulate the process of investigating editorial complaints. He accepts that this information is used in the process to enable the enhancement of the standards and quality of journalism and therefore it is held for these purposes (so falls within the third paragraph of the definition of journalism in paragraph 23 above). The Commissioner therefore considers that the information covered by this category is genuinely held for the purposes of journalism.
37. At the date of the request the relevant information was held for the purpose of journalism and so the BBC was not obliged to comply with Parts I to V of the Act.

### **Category three - information about the programme itself and its editing**

38. The Commissioner is satisfied that the choice about what material to broadcast and what material to leave out of a programme amounts directly to being information about editing.
39. The Commissioner believes that this information satisfies the definition of journalism in both paragraphs 107 (the collecting, gathering, writing

and verifying of materials for publication) and 108 (editorial, the selection, prioritisation and timing of matters for broadcast journalism) of the Information Tribunal judgment cited in paragraph 23 above. He believes that unused content is retained for reference by those involved in the creation of future broadcasts and it is held directly for journalistic purposes.

40. As the relevant information was genuinely held at the date of the request for the purpose of journalism, the BBC was not obliged to comply with Parts I to V of the Act.

#### **Category four – information about the complainant’s information requests in relation to the programme content**

41. As noted above, since the broadcast of a particular ‘Panorama’ programme the complainant has submitted complaints to the BBC about inaccuracies in the broadcast and has made related requests for information to the BBC. The Commissioner considers that subsequent requests for information about the handling of a complaint about broadcast content are also requests for information which is held for the purposes of journalism.
42. As noted above, in the Commissioner’s view the consideration of complaints about programme content is one of the mechanisms that the BBC uses to manage the quality of its journalistic output. It therefore follows that information that is generated when dealing with particular complaints is in effect information generated as part of that management process. The Commissioner considers that even after the complaint handling has been concluded, the information requested is still genuinely held for the purposes of journalism as it is retained so that those involved in the management of standards can refer to it.
43. As the relevant information was held (at the date of the request) for the purpose of journalism, the BBC was not obliged to comply with Parts I to V of the Act.

#### **Category five - information about expenditure in connection with the programme**

44. This category concerns information about programme costs incurred by the BBC in the making of the ‘Panorama’ programme ‘What Next For Craig?’ The requested information is details of all payments made to named individuals associated with the programme, and all expenses and payments in connection with the programme.

45. In light of submissions made by the BBC, the Commissioner appreciates that the creation of programmes or a series of programmes involves the consideration of many factors. One of which is who the subjects of programmes should be and whether or not to pay those people a fee or cover their expenses. At the time of the request the programme and the apology had been broadcast. The records of the related costs will have been created for the purpose of managing the production and associated costs of the programme. Furthermore they will likely have been retained for use by programme makers to inform decisions on the content and production costs of future programmes of a similar nature, particularly when there is a revision of process in order to accord with the Editorial Standards Committee recommendations. The Commissioner is satisfied that such decisions form a material and genuine part of the editorial aspect of journalism and that therefore the information requested is derogated.
46. The Commissioner has been mindful of paragraph 55 of Lord Neuberger of Abbotsbury MR judgment in *Sugar v British Broadcasting Corporation and another* [2010] EWCA Civ 715 which reads:
- '[55] In my view, whatever meaning is given to "journalism" I would not be sympathetic to the notion that information about, for instance, advertising revenue, property ownership or outgoings, financial debt, and the like would normally be "held for purposes . . . of journalism". No doubt there can be said to be a link between such information and journalism: the more that is spent on wages, rent or interest payments, the less there is for programmes. However, on that basis, literally every piece of information held by the BBC could be said to be held for the purposes of journalism. In my view, save on particular facts, such information, although it may well affect journalism-related issues and decisions, would not normally be "held for purposes . . . of journalism". The question whether information is held for the purposes of journalism should thus be considered in a relatively narrow, rather than a relatively wide, way.'*
47. The Commissioner believes that information that relates to the costs and expenses in producing specific programmes is distinct from the general financial information that was mentioned in the paragraph above. The Commissioner considers that, for the reasons given above, the information requested is genuinely held for the purposes of journalism and the BBC was not obliged to comply with Parts I to V of the Act.

## **The Decision**

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48. The Commissioner's decision is that the requests are for information held for the purposes of journalism the BBC was not obliged to comply with Part I to V of the Act in this case.

## **Steps Required**

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49. The Commissioner requires no steps to be taken.

## Right of Appeal

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50. Either party has the right to appeal against this Decision Notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)  
GRC & GRP Tribunals,  
PO Box 9300,  
Arnhem House,  
31, Waterloo Way,  
LEICESTER,  
LE1 8DJ

Tel: 0845 600 0877

Fax: 0116 249 4253

Email: [informationtribunal@tribunals.gsi.gov.uk](mailto:informationtribunal@tribunals.gsi.gov.uk).

Website: [www.informationtribunal.gov.uk](http://www.informationtribunal.gov.uk)

If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.

Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

**Dated the 8<sup>th</sup> day of November 2010**

**Signed .....**

**Jo Pedder  
Group Manager**

**Information Commissioner's Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF**

## **Annex A – requests considered in FS50237250**

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On 8 February 2009 the complainant wrote to the BBC to request the following information (BBC reference RFI20090317) and the items that are subject to the Appeal are outlined below:

- [1] What communications were there within the Editorial Complaints Unit (the "ECU") concerning or relating to the complaints made by [the complainant], and/or the supportive material from [Individual A redacted], ("the Complaints" ) concerning or relating to "What's Next for Craig?" broadcasted by Panorama on BBC 1 on 12<sup>th</sup> November 2007 ("the Broadcast")? Please produce all emails, drafts, notes and documents concerning communication within the ECU concerning or relating to the Complaints.
- [2] What communications did the ECU have with anyone outside the ECU concerning or relating to the Complaints? Name the individuals, give the dates and set out what communications took place. Please produce all emails, drafts, notes and documents concerning communication by the ECU with anyone outside the ECU concerning or relating to the Complaints.
- [3] What communications did the ECU have with or from [Individual B redacted] or [Individual C redacted] in connection with or in relation to the Complaints? Please produce all emails, drafts, notes and documents concerning such communications.
- [4] Did the ECU communicate with Panorama or receive communication from Panorama concerning or relating to the Complaints? What communications were there when and with whom? Please produce all emails, drafts, notes, and documents concerning or relating to such communications.
- [5] Have payments been made by the BBC in connection with the Broadcast to or for the benefit of or at the request of [Individual D redacted], [Individual E redacted], or Craig or his family? What payments have been made? Please produce all emails, drafts, notes and documents concerning or relating to such payments.
- [6] What expenses were incurred and what payments were made by the BBC in connection with the Broadcast? What were they for and to whom were payments made and in what amounts? Please produce all emails, drafts, notes and documents concerning such expenses or payments.



- [7] Did [Individual F redacted] have any communications with or from anyone relating to or connection with the Complaints or the request by [the complainant] that there should be a new broadcast? What communications did she have with whom? Please produce all emails, drafts, notes and documents concerning such communications.
- [8] What complaints other than the Complaints, were received by the BBC after the Broadcast which related to the Broadcast, and what responses were made to those complaints? Please produce all emails, drafts, notes and documents concerning such communications. Were there any communications within the BBC about any of those complaints and if so what communications? Please produce all emails, drafts, notes and documents concerning such communications.
- [9] Panorama purported to inform the ECU that [Individual G redacted] had changed his mind. What communications were there to and from Panorama, or within the ECU concerning this alleged change of mind on the part of [Individual G redacted]? Please produce all emails, drafts, notes and documents concerning the alleged change of mind.
- [10] What enquires were conducted by the ECU into the Complaints and with what results? Please produce all emails, drafts, notes and documents concerning the enquiries.
- [11] What draft documents were produced by anyone in the ECU relating to or connected with the Complaints? Please produce all emails, drafts, notes and documents concerning the production of drafts.
- [12] Has the Director-General of the BBC or his office had any communications with anyone in connection with or in relation to the Complaints or the Broadcast or the request by [the complainant] that there should be a new broadcast? Please produce all emails, drafts, notes and documents concerning such communications.
- [13] Following the Broadcast have there been any communications to or from the journalist responsible for the Broadcast relating to or connected with the Complaints or the Broadcast or the request by [the complainant] that there should be a new broadcast? Please produce all emails, drafts, notes and documents concerning such communications.
- [14] Did the ECU consider whether to carry out inquiries into the cases of Craig and [Individual E redacted] featured in the Broadcast? Please produce all emails, drafts, notes and documents concerning this aspect of the Complaints and how this aspect was dealt with by the ECU.

- [15] The report of [Individual B redacted] and [Individual C redacted] issued with the letter dated 29<sup>th</sup> January 2009 describes itself as amended on 16<sup>th</sup> July 2008. What amendment or amendments were made to this report before it was finalised when and why? Please produce all emails, drafts, notes and documents concerning or relating to the production of this report and its amendments.
- [16] Please state why it took the ECU from mid April 2008 until 29<sup>th</sup> January 2009, a period of over 9 months, to produce the letter dated 29<sup>th</sup> January 2009. Please give the exact chronology of what was being done by the ECU over this period. Please produce all emails, drafts, notes and documents concerning or relating to why it took the ECU over 9 months to produce the letter.

### **Annex B – requests considered in FS50265735**

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The Commissioner's investigation in FS50265735 considered the first two requests that were originally submitted on 6 May 2009:

- [17] What has the ECU [Editorial Complaints Unit] been doing since 29<sup>th</sup> January 2009 in connection with deciding what should be the consequences of its decision that the Panorama broadcast "What's next for Craig" (BBC 1, 12<sup>th</sup> November 2007) ("the Broadcast") was inaccurate? What communications have there been with whom and when? Produce all emails or other documents relating to such communications. Produce all internal notes emails or other documents.
- [18] What communications have there been within or with or by (1) the Editorial Complaints Unit or (2) the BBC Trust or (3) the BBC (including but not limited to Panorama or its editors, the Director General or his office, or [Individual F redacted]), about what should be the consequences of the decision by the ECU that the Broadcast was inaccurate? Produce all emails or other documents relating to such communications."

### **Annex C – requests considered in FS50265739**

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The Commissioner's investigation in FS50265739 considered the requests that were originally submitted on 3 June 2009 which are noted below:

#### **"Schedule 1 – the "independent editorial adviser"**

[19] The "independent editorial adviser":

- (i) who this is and his curriculum vitae;
- (ii) his e mail and telephone number;
- (iii) on the basis of what information relating to the appointee he was selected and appointed as the independent editorial adviser;
- (iv) all emails, notes and other documents, including all internal emails, relating to considering and making his selection and appointment;
- (v) all information relating to any connections which he has or may have had with Panorama;
- (vi) all information relating to any connections which he has or may have had with the BBC or anyone else involved in or connected with the Panorama Broadcast ("What's Next for Craig?" on 12<sup>th</sup> November 2007), or this appeal.

[20] I would be grateful for any instructions given to or communications with the "independent editorial adviser" in relation to this investigation.

[21] I would also be grateful for all information obtained by the "independent editorial adviser" in relation to the investigation, my complaints and/or the appeal.

[22] I would like to see all communications or correspondence from Panorama which are held by the adviser in connection with my complaints, the investigation or the appeal.

### **Schedule II – The Committee**

[23] The names of those on the Committee dealing with the appeal.

[24] In relation to each member:

- (i) all information relating to any connections which he has or has had with Panorama;
- (ii) all information relating to any connections which he has or has had with the BBC or anyone else involved in or connected with the Panorama Broadcast ("What's Next for Craig?" on 12<sup>th</sup> November 2007), or this appeal."

## **Annex D – requests considered in FS50266075**

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On 22 July 2009 the complainant wrote to the BBC to request the following information:

- [25] "I would also be very grateful if you could inform whether since the date of the last request under the FOIA covering this, there have been any communications, drafts, correspondence or other documents or conversations generated by my complaint or the "appeal" to the BBC Trust concerning "What's Next for Craig?" or my requests for information? Please provide these to me. This is a further request for information under the FOIA."

On 26 July 2009 the complainant wrote to the BBC to request the following information:

- [26] Please list each stage in the ECU process from when the case was first referred to the ECU up to the date of the request, stating what happened in that stage, giving the dates, and stating any explanation of why it took that length of time.
- [27] When does the ECU intend to produce its decision? Please state who has that intention and on what it is based.
- [28] What does the Chairman of the ESC remember about the oral or written communication(s) made to him about the case by [Individual H redacted]? What was stated, when and by whom? Was anyone else present? What documents or information was given to the Chairman? Please answer this for all communications including communications about the independent editorial advisor and her appointment.
- [29] Is it the practice of any members of the ESC to have "private" conversations or communications with [Individual H redacted] or others at the BBC about ongoing cases or "appeals", which are not disclosed or not disclosed in full to the complainant?"

On 31 July 2009 the complainant wrote to the BBC to request the following information:

- [30] "Please furnish the following:

Excluding the Excluded Information, please update the Requestor by providing him with any documents or information held by the deputy Director-General of the BBC concerning or relating to the appeal or its future conduct or the complaints which form the subject matter of the

"appeal" to the BBC Trust, including any discussions or communications he has had with [Individual I redacted]."

## **Annex E – request considered in FS50316361**

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On 9 October 2009 the complainant wrote to the BBC to request the following information:

[31] I would be very grateful if you could help me with the "protocols agreed between Management and the Trust" referred to by [Individual I redacted] in his email to [Individual J redacted]. Which part(s) of which protocol(s) are referred to by [Individual I redacted]. Please may I see them?"

On 21 October 2009 the complainant wrote to the BBC to request the following information:

"I had asked for:

[32] Have there been any communications within the BBC concerning the requests for disclosure made by Mr Steven Gee QC in the period from Friday 25<sup>th</sup> April to 2<sup>nd</sup> May 2008, to the ECU (commencing with his email dated 25<sup>th</sup> April 2008 to [Individual K redacted]), [Individual F redacted] (his email dated 29<sup>th</sup> April 2008 to her) and the Chairman of the BBC Trust relating to the Broadcast (see email dated 25<sup>th</sup> April 2008 and response from [Individual J redacted] dated 29<sup>th</sup> April 2008)? What communications have there been with whom and when? Produce all emails or other documents relating to such communications.'

[33] Please produce the correspondence between [Individual I redacted] and [Individual F redacted] about my request for Disclosure. Her reply to me refused my request on the basis that it was a request for "background" material. Was she informed by someone that the Panorama materials sought by me including their defence, were "background" material. Why did she call the Panorama materials including their defence, "background" materials? Please produce the correspondence."

Also on 21 October 2009 the complainant wrote to the BBC to request the following information:

[34] "An investigation made by the ECU is required to be carried out "independently". What rules protocols directives or other documents lay down this requirement? Please produce them."

On 26 October 2009 the complainant wrote to the BBC to request the following information:

[35] "Please provide me with the correspondence, notes and other documents including emails dating from (including for the avoidance of doubt after) 2<sup>nd</sup> October 2009 relating to or connected with (1) the questions raised by [the complainant] concerning the independence or lack of independence of [Individual I redacted] in connection with the complaints made concerning the broadcast "What's Next For Craig?" (Panorama BBC 1 on 12<sup>th</sup> November 2007), or (2) the requests for information made by [the complainant] since 2<sup>nd</sup> October 2009 concerning those questions.

Please limit the scope of search to documents (including emails) held by [Individual L redacted], [Individual H redacted], and [Individual M redacted] at the BBC Trust, and [Individuals N - Q redacted], [Individual I redacted] and the FOI section (which has been dealing with outstanding requests for information)."

Also on 26 October 2009 the complainant wrote to the BBC to request the following information:

"I would be most grateful if you would produce to me:

[36] the correspondence including notes of conversations (stat) and emails between the BBC Trust and the advisor it has appointed in respect of my "appeal";

[37] draft reports which relate to or are connected with my "appeal" prepared by the advisor,

[38] the materials and other documents sent to the advisor or received from or by her which relate to or are connected with my "appeal",

[39] the materials and other documents held by the advisor which relate to or are connected with my "appeal",

[40] correspondence including emails and other documents or materials received by or sent by the BBC Trust which relate to or are connected with my "appeal"."

On 28 October 2009 the complainant wrote to the BBC to request the following information:

[41] "Please tell me what was the further "action point agreed with BBC News" and provide details of the agreement to which you refer and

how it was reached. Please produce all documents relating to the negotiations, discussions and agreement.

## **Legal Annex - Relevant Statutory Provisions**

**Section 1(1)** states that –

“Any person making a request for information to the 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 the information communicated to him.

**Section 3(1)** states that –

“in this Act “public authority” means –

(a) subject to section 4(4), any body which, any other person who, or the holder of any office which –

- (i) is listed in Schedule 1, or
- (ii) is designated by order under section 5, or

(b) a publicly-owned company as defined by section 6”

**Section 3(2)** states that –

“For the purposes of this Act, information is held by a public authority if –

(a) it is held by the authority, otherwise than on behalf of another person, or

(b) it is held by another person on behalf of the authority.”

**Section 7(1)** states that –

“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.”

**Schedule 1, Part VI** reads:

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



IN THE MATTER OF AN APPEAL TO THE FIRST-TIER TRIBUNAL (INFORMATION RIGHTS)  
UNDER SECTION 57 OF THE FREEDOM OF INFORMATION ACT 2000

Appeal Nos. EA/2010/0042, 0121, 0123,  
0124, 0125, 0187

BETWEEN:

STEPHEN GEE QC

Appellant

And

THE INFORMATION COMMISSIONER

Respondent

And

THE BRITISH BROADCASTING CORPORATION

Additional Party

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**APPENDIX 2**



	APPEAL NO.	DECISION NOTICE	REQUEST CONTENT
1.	EA/2010/0042	FS50265735	<p>What has the ECU been doing since 29th January 2009 in connection with deciding what should be the consequences of its decision that the Panorama broadcast 'What's next for Craig' (BBC 1, 12th November 2007) ('the Broadcast') was inaccurate? What communications have there been with whom and when? Produce all emails or other documents relating to such communications. Produce all internal notes emails or other documents.</p> <p>What communication have there been within or with or by (1) the Editorial Complaints Unit or (2) the BBC Trust or (3) the BBC (including but not limited to Panorama or its editors, the Director General or his office or Helen Boaden), about what should be the consequences of the decision by the ECU that the Broadcast was inaccurate? Produce all emails or other documents relating to such communications."</p>
2.	EA/2010/0121	FS50237250	<p>What communications were there within the Editorial Complaints Unit (the "ECU") concerning or relating to the complaints made by Mr Steven Gee Q.C, and/or the supportive material from Professor Anne Teeter Ellison of Chadd, ("the Complaints" ) concerning or relating to "What's Next for Craig?" broadcasted by Panorama on BBC 1 on 12th November 2007 ("the Broadcast")? Please produce all emails, drafts, notes and documents concerning communication within the ECU concerning or relating to the Complaints.</p> <p>What communications did the ECU have with anyone outside the ECU concerning or relating to the Complaints? Name the individuals, give the dates and set out what communications took place. Please produce all emails, drafts, notes and documents concerning communication by the ECU with anyone outside the ECU concerning or relating to the Complaints.</p> <p>What communications did the ECU have with or from Professor Fraser or Dr Mensah in connection with or in relation to the Complaints? Please produce all emails, drafts, notes and documents concerning such communications.</p> <p>Did the ECU communicate with Panorama or receive communication from Panorama concerning or relating to the Complaints? What communications were there when and with whom? Please produce all emails, drafts, notes, and documents concerning or relating to such communications.</p> <p>Have payments been made by the BBC in connection with the Broadcast to or for the benefit of or at the</p>

			<p>request of Dr Tamimi, Yaz, or Craig or his family? What payments have been made? Please produce all emails, drafts, notes and documents concerning or relating to such payments.</p>
			<p>What expenses were incurred and what payments were made by the BBC in connection with the Broadcast? What were they for and to whom were payments made and in what amounts? Please produce all emails, drafts, notes and documents concerning such expenses or payments.</p>
			<p>Did Helen Bowden (sic) have any communications with or from anyone relating to or connection with the Complaints or the request by Mr Steven Gee QC that there should be a new broadcast? What communications did she have with whom? Please produce all emails, drafts, notes and documents concerning such communications.</p>
			<p>What complaints other than the Complaints, were received by the BBC after the Broadcast which related to the Broadcast, and what responses were made to those complaints? Please produce all emails, drafts, notes and documents concerning such communications. Were there any communications within the BBC about any of those complaints and if so what communications? Please produce all emails, drafts, notes and documents concerning such communications.</p>
			<p>Panorama purported to inform the ECU that Professor Jim Swanson had changed his mind. What communications were there to and from Panorama, or within the ECU concerning this alleged change of mind on the part of Professor Swanson? Please produce all emails, drafts, notes and documents concerning the alleged change of mind.</p>
			<p>What enquiries were conducted by the ECU into the Complaints and with what results? Please produce all emails, drafts, notes and documents concerning the enquiries.</p>
			<p>What draft documents were produced by anyone in the ECU relating to or connected with the Complaints? Please produce all emails, drafts, notes and documents concerning the production of drafts.</p>
			<p>Has the Director-General of the BBC or his office had any communications with anyone in connection with or in relation to the Complaints or the Broadcast or the request by Mr Steven Gee QC that there should be a new broadcast? Please produce all emails, drafts, notes and documents concerning such communications.</p>
			<p>Following the Broadcast have there been any communications to or from the journalist responsible for the Broadcast relating to or connected with the Complaints or the Broadcast or the request by Mr</p>

			<p>Steven Gee QC that there should be a new broadcast? Please produce all emails, drafts, notes and documents concerning such communications.</p> <p>Did the ECU consider whether to carry out inquiries into the cases of Craig and Yaz featured in the Broadcast? Please produce all emails, drafts, notes and documents concerning this aspect of the Complaints and how this aspect was dealt with by the ECU.</p> <p>The report of Professor Fraser and Dr Mensah issued with the letter dated 29th January 2009 describes itself as amended on 16th July 2008. What amendment or amendments were made to this report before it was finalised when and why? Please produce all emails, drafts, notes and documents concerning or relating to the production of this report and its amendments.</p> <p>Please state why it took the ECU from mid April 2008 until 29th January 2009, a period of over 9 months, to produce the letter dated 29th January 2009. Please give the exact chronology of what was being done by the ECU over this period. Please produce all emails, drafts, notes and documents concerning or relating to why it took the ECU over 9 months to produce the letter."</p>
3.	EA/2010/0123	FS50316361	<p>The "protocols agreed between Management and the Trust" referred to in an e-mail between Fraser Steel, Head of Editorial Complaints, and Victoria Finney, of the BBC Trust Unit.</p> <p>Any correspondence between Fraser Steel and Helen Boaden, Director of BBC News, concerning the Appellant's previous request for disclosure of information evidencing communications to the ECU, Helen Boaden or the Chairman of the BBC Trust, concerning the programme between 25 April and 2 May 2008.</p> <p>Any correspondence which might tend to show why, in her response to one of the Appellant's previous requests for disclosure of information, which was refused, Helen Boaden had referred to Panorama materials concerning the programme, including what the Appellant described as their "defence", as "background materials".</p> <p>Any "rules protocols directives or other documents" which lay down the requirement that an investigation made by the ECU is required to be carried out "independently".</p> <p>Correspondence, notes and other documents including emails dating from (including for the avoidance of doubt after) 2nd October 2009 relating to or connected with (1) the questions raised by Mr Steven Gee QC concerning the independence or lack of independence of Fraser Steel in connection with the complaints made</p>

			<p>concerning the broadcast "What's Next For Craig?" (Panorama BBC 1 on 12th November 2007, or (2) the requests for information made by Mr Steven Gee QC since 2nd October 2009 concerning those questions. Please limit the scope of search to documents (including emails) held by Fran O'Brien, Bruce Vander, and Sir Michael Lyons at the BBC Trust, and Mark Byford, Tom Sleigh, James Horton, Caroline Thomson, Fraser Steel and the FOI section (which has been dealing with outstanding requests for information).</p> <p>The correspondence including notes of conversations and emails between the BBC Trust and the advisor it has appointed in respect of my "appeal".</p> <p>Reports which relate to or are connected with my "appeal" prepared by the advisor.</p> <p>The materials and other documents sent to the advisor or received from or by her which relate to or are connected with my "appeal".</p> <p>The materials and other documents held by the advisor which relate to or are connected with my "appeal".</p> <p>Correspondence including emails and other documents or materials received by or sent by the BBC Trust which relate to or are connected with my "appeal".</p> <p>All documents relating to the negotiations, discussions and agreement concerning the further "action point agreed with BBC News" following the ECU's finding upholding the Appellant's editorial complaint.</p>
<p>4.</p>	<p>EA/2010/0124</p>	<p>FS50265739</p>	<p>The independent editorial adviser: who this is and his curriculum vitae.</p> <p>The independent editorial adviser: his email and telephone number.</p> <p>The independent editorial adviser: on the basis of what information relating to the appointee he was selected and appointed as the independent editorial adviser.</p> <p>The independent editorial adviser: all emails, notes and other documents, including all internal emails, relating to considering and making his selection and appointment.</p> <p>The independent editorial adviser: all information relating to any connections which he has or may have had with Panorama.</p> <p>The independent editorial adviser: all information relating to any connections which he has or may have had with the BBC or anyone else involved in or connected with the Panorama Broadcast ("What's Next for Craig?" on 12th November 2007), or this appeal.</p> <p>Any instructions given to or communications with the "independent editorial adviser" in relation to this investigation.</p> <p>All information obtained by the "independent editorial adviser" in relation to the investigation, my complaints</p>

			<p>and/or the appeal.</p> <p>All communications or correspondence from Panorama which are held by the adviser in connection with my complaints, the investigation or the appeal.</p> <p>The names of those on the Committee dealing with the appeal.</p> <p>In relation to each member [of the Editorial Standards Committee dealing with the appeal]: all information relating to any connections which he has or has had with Panorama.</p> <p>In relation to each member [of the Editorial Standards Committee dealing with the appeal]: all information relating to any connections which he has or has had with the BBC or anyone else involved in or connected with the Panorama Broadcast ("What's Next for Craig?" on 12th November 2007), or this appeal."</p>
5.	EA/2010/0125	FS50266075	<p>Any communications, drafts, correspondence or other documents or conversations generated by my complaint or the "appeal" to the BBC Trust concerning "What Next for Craig?" or my requests for information? since the date of the Appellant's last request for the same information.</p> <p>Please list each stage in the ECU process from when the case was first referred to the ECU up to the date of the request, stating what happened in that stage, giving the dates, and stating any explanation of why it took that length of time.</p> <p>When does the ECU intend to produce its decision? Please state who has that intention and on what it is based.</p> <p>What does the Chairman of the ESC remember about the oral or written communication(s) made to him about the case by Mr Vander? What was stated, when and by whom? Was anyone else present? What documents or information was given to the Chairman? Please answer this for all communications including communications about the independent editorial advisor and her appointment.</p> <p>Is it the practice of any members of the ESC to have "private" conversations or communications with Mr Vander or others at the BBC about ongoing cases or "appeals", which are not disclosed or not disclosed in full to the complainant?"</p> <p>Excluding the Excluded Information, please update the Requestor by providing him with any documents or information held by the deputy Director-General of the BBC concerning or relating to the appeal or its future conduct or the complaints which form the subject matter of the "appeal" to the BBC Trust, including any discussions or communications he has had with Fraser Steel. Please answer this request by asking the deputy</p>

			Director-General and his PA to identify and disclose what he has.
6.	EA/2010/0187	FS50327965	Repeat of each request for information which is the subject of each of the 5 appeals.
			Emails, correspondence, records notes, unshown film clips, financial records and all other documents relating to or connected with (1) the preparation for or the making of the broadcast or (2) the defence by Panorama of the complaints made to the ECU and the ESC. These include notes and e-mails relating to interviewing Craig and his family for broadcast.