

**Information Tribunal**

**Appeals Numbers: EA/2006/0011  
and EA 2006/0013**

**Freedom of Information Act 2000 (FOIA)**

**Heard at Procession House, London EC4**

**Decision Promulgated**

**8 January 2007**

**BEFORE**

**INFORMATION TRIBUNAL DEPUTY CHAIRMAN**

**Andrew Bartlett QC**

**And**

**LAY MEMBERS**

**Gareth Jones**

**Anne Chafer**

**Between**

**(1) GUARDIAN NEWSPAPERS LIMITED**

**(2) HEATHER BROOKE**

**Appellants**

**and**

**INFORMATION COMMISSIONER**

**Respondent**

**and**

**BRITISH BROADCASTING CORPORATION**

**Additional Party**

**Representation:**

**For the First Appellant:**

**Hugh Tomlinson QC**

**The Second Appellant:**

**in person**

**For the Commissioner:**

**Timothy Pitt-Payne**

**For the BBC:**

**Monica Carrs-Frisk QC and Kate Gallafent**

**Decision**

The Tribunal allows the appeals and substitutes the following decision notices in place of the two decision notices dated 15 February 2006 (for ease of reference we have combined the two notices):

**FREEDOM OF INFORMATION ACT 2000 (SECTIONS 50 and 58)**

**Information Tribunal**

**Appeals Numbers: EA/2006/0011  
and EA 2006/0013**

**SUBSTITUTED DECISION NOTICES**

**Dated 4 January 2007**

**Public authority: British Broadcasting Corporation**

**Address of Public authority: MC3C6  
Media Centre  
201 Wood Lane  
London W12 7TQ**

**Names of Complainants: Guardian Newspapers Limited**

**Heather Brooke**

**The Substituted Decision**

For the reasons set out in the Tribunal's determination, the substituted decision is that the BBC did not deal with the complainants' requests in accordance with the requirements of Part I of the Freedom of Information Act 2000 in that the BBC failed to disclose to the complainants the minutes of the BBC Governors' meeting of 28 January 2004.

**Action Required**

Subject to any further order by the Tribunal, the BBC shall provide a copy of the said minutes to each complainant within 28 days from today.

Dated this 4th day of January 2007

Signed

Deputy Chairman, Information Tribunal

## **Reasons for Decision**

### **Introduction**

1. A Government dossier was published in September 2002 entitled IRAQ'S WEAPONS OF MASS DESTRUCTION. In March 2003 the United Kingdom went to war against Iraq. In May 2003 Mr Andrew Gilligan during a BBC broadcast made criticisms of the accuracy and truthfulness of the dossier which in some respects went beyond what his source, Dr David Kelly, had told him. In July 2003 Dr Kelly took his own life. Lord Hutton's "Report of the Inquiry into the Circumstances Surrounding the Death of Dr David Kelly CMG", published on 28 January 2004, made certain criticisms of the BBC in relation to the report by Andrew Gilligan.
2. Later the same day the Governors of the BBC met to consider the Hutton Report. The Chairman and the Director General of the BBC resigned.
3. This appeal is concerned with whether the BBC must release the minutes of the Governors' meeting pursuant to the Freedom of Information Act 2000 ("FOIA" or "the Act").
4. We are not directly concerned with the September dossier, the Iraq war, Mr Gilligan's remarks, the conduct of the BBC, or Lord Hutton's report: for our purposes those matters are general background to the appeal and we express no view on them. Nor are we concerned with whether the resignations were an appropriate or inappropriate response to the Hutton report. The only matter for our decision is the withholding or release of the Governors' minutes.
5. Our consideration is under the following headings:

§§6-7	The requests for information
§§8-9	The complaints to the Information Commissioner
§§10-23	The appeals to the Tribunal
§§24-29	The questions for the Tribunal
§§30-50	Evidence
§§51-64	"Reasonable opinion" on the likelihood of inhibition: the law

§§65-80	“Reasonable opinion” on the likelihood of inhibition in the present case
§§81-92	Balance of public interest: the law
§§93-124	Balance of public interest in the present case
§§125-126	Redaction
§§127-128	Other documents requested
§§129-132	Conclusion and remedy

#### The requests for information

6. In February 2005 Heather Brooke, who is a campaigner for open government and a freelance writer, requested of the BBC “*all minutes from meetings held by the BBC’s Board of Governors during the time period January 16-31, 2004*”. In March 2005 Matt Wells of The Guardian requested “*complete copies of the agenda and minutes of the special board of governors meeting of 28 January, 2004*”.
7. The BBC declined the requests, contending that disclosure would inhibit the free and frank exchange of views for the purposes of deliberation, and citing FOIA s 36(2)(b)(ii). The BBC’s reasoning was set out in two letters of 17 March 2005 and a further letter of 20 May 2005.

#### The complaints to the Information Commissioner

8. Ms Brooke and The Guardian complained to the Information Commissioner. He issued a Decision Notice in both cases on 15 February 2006. He agreed with the BBC that the s 36 exemption applied, and decided “*the public interest in maintaining this exemption currently overrides the public interest in disclosing the requested information*”.
9. The text of the Decision Notices, including the Statement of Reasons, is available on the Commissioner’s website [www.ico.gov.uk](http://www.ico.gov.uk) under references FS50070769 and FS50073129.

The appeals to the Tribunal

10. The Guardian and Ms Brooke appealed to the Tribunal under FOIA s 57(1) against the Decision Notices. The BBC was joined as a party to the appeals at its own request. We heard evidence and legal argument at a hearing on 20 December 2006.
11. At the hearing before us there was some debate over the precise nature of the Tribunal's jurisdiction and the approach that we ought to adopt. Mr Tomlinson QC for The Guardian submitted that the Tribunal had full powers to allow an appeal if the Commissioner was wrong in fact or law or exercised his discretion wrongly. Mr Pitt-Payne for the Commissioner accepted that the Tribunal was not limited to the principles of judicial review applicable in the Administrative Court, and could consider the merits of the Commissioner's decision and substitute its own view if it considered that the Commissioner's decision was wrong. He said the Tribunal was not confined to a consideration of the material that was before the Commissioner and could take account of all the material before it. More restrictively, Ms Carss-Frisk QC for the BBC submitted that on an appeal the Tribunal's task was to see whether the Commissioner acted in accordance with the law rather than to form a fresh view. She drew an analogy with the jurisdiction of the Court of Appeal and said the Tribunal did not start with a blank sheet, but should review whether the Commissioner gave due consideration to all the material before him, and should only review findings of fact if there was good reason to do so. Counsel variously made reference to *Hogan v Information Commissioner* EA/2005/0026 and 0030 at paragraphs 37-61 (especially paragraph 55), *Quinn v Information Commissioner* EA/2006/0010 at paragraphs 23-27 and *DTI v Information Commissioner* EA/2006/0007 at paragraphs 34 and 54.
12. Section 58 states:
  - (1) *If on an appeal under section 57 the Tribunal considers-*
    - (a) that the notice against which the appeal is brought is not in accordance with the law, or
    - (b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,

*the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner; and in any other case the Tribunal shall dismiss the appeal.*
- (2) *On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.*

13. Subject to certain exceptions, the procedural rules by which the Tribunal is bound require us to allow parties to give evidence, to call witnesses, and to put questions to witnesses, and we have power to receive in evidence any document or information notwithstanding that it would be inadmissible in a court of law: see rules 24 and 27 of the Information Tribunal (Enforcement Appeals) Rules 2005.
14. In light of this material we consider the following observations are justified concerning the nature of the Tribunal's appellate jurisdiction:

(1) The Tribunal's task is not a judicial review of the Commissioner's decision on the principles that would be followed by the Administrative Court in carrying out a judicial review of a decision by a public authority (contrast the jurisdiction relating to national security certificates under s 60(3), which is expressly on a judicial review basis). The statutory jurisdiction under s 58 is substantially wider.

(2) The Tribunal does not start with a blank sheet. The starting point is the Commissioner's notice. But analogy with the Court of Appeal is not apt. The Court of Appeal only hears fresh evidence in special circumstances. By contrast, subject to limited exceptions, the Tribunal is required to receive relevant evidence, documents and information from the parties to the appeal, and the material is not limited to that which was available to the Commissioner.

(3) In considering whether the Commissioner's notice is in accordance with the law, the Tribunal must consider whether (in the present context) the provisions of FOIA have been correctly applied. The Tribunal is not bound by the Commissioner's views or findings but will arrive at its own view. In doing so it will give such weight to the Commissioner's views and findings as it thinks fit in the particular circumstances.

(4) In some cases the correct application of the provisions of the Act will depend upon the findings of fact. Where facts are in dispute, the Tribunal may review any finding of fact by the Commissioner. The Tribunal will reach its conclusions on the factual issues upon the whole of the material which is properly before it on the appeal. Having decided the factual issues, the Tribunal must consider the correct application of the provisions of the Act to the facts as found. It is therefore possible that in some cases the Tribunal will consider that the Commissioner's notice is not in accordance with the law, not because of any error of legal reasoning in the notice, but because the Tribunal, having received evidence at the appeal hearing, makes findings of fact which are different from those made by the Commissioner.

(5) In some cases the dispute on appeal will be on the public interest test in s 2(2)(b), namely, whether the public interest in maintaining a qualified exemption outweighs the public interest in disclosing the information. Adjudging the balance of public interest involves a question of mixed law and fact, not the exercise of discretion by the Commissioner. If, based either on the Commissioner's original findings of fact or on findings made by the Tribunal on fresh evidence, the Tribunal comes to a different conclusion from the Commissioner concerning the balance of public interest, that will involve a finding that the Commissioner's notice was not in accordance with the law and should be corrected.

(6) The combination of the power to review findings of fact and the duty under the rules to receive evidence on the appeal does not predetermine the extent of the Tribunal's review of the facts. This will depend upon the circumstances of the case. If in a particular case no fresh evidence is adduced, or the Tribunal considers that the fresh evidence is not of material significance, the Tribunal will proceed on the basis of the facts found by the Commissioner.

(7) While it is not necessary for the purposes of the present case to consider the situation where the notice involved an exercise of discretion by the Commissioner, we incline to the view that in such a case the Tribunal must form its own view on how the discretion ought to have been exercised. Review of the merits of the Commissioner's exercise of discretion is assisted by the presence of lay members on the Tribunal. Again, the Tribunal's decision may be affected by findings of fact which differ from those made by the Commissioner.

15. We would add that the Tribunal's duty is likely to require an analysis of what is said in the Commissioner's notice. Such analysis needs to be done judiciously. There is a delicate balance to be struck. On the one hand, it is the language used in the notice which reveals and embodies the Commissioner's factual findings, reasoning and conclusions. It therefore requires close attention. On the other hand, we do not think it will usually be appropriate to subject the language used by the Commissioner to as minute or technical an analysis as might be given on appeal to a judgment of the High Court. Where the overall intent is clear, the Tribunal should interpret the notice accordingly, disregarding any minor errors or infelicities of expression or reasoning which do not affect the substance of the matter. We do not think it is possible to define more precisely the degree of analysis which is appropriate, because the circumstances, and therefore the requirements, of different cases are so diverse.

16. We think it right, although no arguments were addressed to us on the topic, to add some brief comments on the curious wording of s58(1) in regard to possible outcomes:

*the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner; and in any other case the Tribunal shall dismiss the appeal.*

17. The curiosity is in the use of the word “or”, which appears to make the substitution of a new notice an alternative to allowing the appeal<sup>1</sup>.

18. In *R v Federal Steam Navigation Co Ltd* [1973] 1 WLR 1373, CA, Lawton LJ (giving the judgment of the Court) said at 1376:

‘The word "or" in statutes has caused many difficulties of construction, difficulties which could have been avoided had greater care been taken with the drafting. The word "or" can be used in a conjunctive sense but when it is, greater clarity can be obtained by the use of other words. For example, had the draftsman intended "or" in section 1(1) [of the Oil in Navigable Waters Act 1955, referring to “owner or master”] to be construed conjunctively he could have achieved the same result by the use of the phrase "the owner and master or either of them." The ordinary and natural meaning of "or" is disjunctive: see *In re Diplock* [1941] Ch 253, in which Sir Wilfred Greene MR said, at p 260: "The word 'or' is prima facie, and in the absence of some restraining context, to be read as disjunctive. ...”

19. The wording of s 58(1), read disjunctively, can accommodate without undue strain the possible outcomes of appeals by public authorities against decision notices or enforcement notices. In such cases the Tribunal might allow the appeal by declaring the notice to be not in accordance with the law, or might substitute a notice requiring rather less to be done by the public authority, or might dismiss the appeal (thereby leaving the notice in force). In such cases the reference to allowing the appeal is a reference to allowing it in full, and the reference to substituting a notice may be read as making provision for a partial success of the appeal.

20. There is more difficulty when an applicant for information is appealing against a decision made in favour of the public authority. In such a case allowing the appeal entails stating what information must be released, which is the same thing as substituting such notice as could have been served by the Commissioner. It makes no sense to read the word “or” in a disjunctive sense and to view these as alternative outcomes.

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<sup>1</sup> An oddity previously noted in *Mitchell v Information Commissioner* EA/2005/0002, paragraph 45.

21. The most likely source for the phraseology of FOIA ss 57-58 is ss 48-49 of the Data Protection Act 1998. Under that Act appeals are brought only by the data controller in respect of notices served on the data controller by the Commissioner. Data subjects do not bring appeals under ss 48-49 of the 1998 Act. We can only think that by a drafting error this wording was adopted for FOIA without being adjusted to provide in clear and appropriate terms for appeals by applicants for information.

22. In the circumstances we can only make sense of s 58(1) by interpreting the word “or” disjunctively in the context of appeals by public authorities and conjunctively in the context of appeals by applicants for information. In other words, we construe the subsection as if it read:

*the Tribunal shall allow the appeal and/or substitute such other notice as could have been served by the Commissioner; and in any other case the Tribunal shall dismiss the appeal.*

23. In our judgment the Tribunal has power, in the case of an appeal by an applicant for information, to allow the appeal and substitute such notice as could have been served by the Commissioner.

#### The Questions for the Tribunal

24. It was not in dispute that the Governors’ minutes were held by the BBC for purposes other than those of journalism, art or literature, and accordingly that the relevant provisions of the Act applied. The questions for our decision arise under section 36 of the Act, which is a qualified exemption concerned with prejudice to the effective conduct of public affairs.

25. The material part of s 36(2) provides:

*Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act-*

...

*(b) would, or would be likely to, inhibit-*

...

*(ii) the free and frank exchange of views for the purposes of deliberation, ...*

26. It was not in dispute that, pursuant to ministerial authorisation, the BBC itself was the qualified person for the purposes of the section. The BBC's authorisation for this purpose was given by a letter from the Secretary of State for Culture, Media and Sport dated 23 December 2004 pursuant to s 36(5)(o)(ii). We were surprised to see from the BBC's letter of 6 January 2005 that the BBC regarded this authorisation as entitling them to delegate the decision to any individual governor, and that no objection to this was taken by the DCMS in the latter's letter of 12 January 2005. We did not hear detailed argument on this point, but we incline to the view that authorisation of an individual officer can only be made by the Minister, pursuant to s 36(5)(o)(iii). If an authorisation given to the public authority itself under s 36(5)(o)(ii) entitled it to delegate the task of the qualified person to an individual of its choice, sub-section (5)(o)(iii) would be otiose. Our provisional view is that, where there is an authorisation of the authority itself as the qualified person under s 36(5)(o)(ii), the opinion must be the opinion of the authority's primary decision-making organ, being, in the case of the BBC, the Board of Governors. Since in the present case the decision to claim the exemption was made by the Governors collectively we need not consider the point further.

27. The s 36 exemption is qualified because the material part of s 2(2) provides:

*In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) [ie, the right to have the information communicated] does not apply if or to the extent that-*

...

*(b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.*

28. The arguments therefore focused on-

(a) whether the opinion of the BBC was reasonable, and

(b) if it was, whether the public interest in maintaining the exemption outweighed the public interest in disclosing the information.

29. There were subsidiary issues to do with the agenda for the Governors' meeting, and whether the Minutes should be released in a redacted form.

### Evidence

30. We have already referred to the BBC's letters and the Commissioner's decision notices, which set out respectively the BBC's and the Commissioner's views.
31. In addition, both we and the Commissioner were given strictly confidential access to the minutes themselves (28 January 2004), and to the minutes of the further meeting (of 22-23 February 2005) at which the Governors took the decision to claim exemption under section 36 in response to the FOI requests. The latter minutes were provided to us by the BBC only after some prompting from us during the hearing.
32. We received witness statements and sworn oral evidence from Mr Matt Wells of The Guardian, from Mr Greg Dyke, who resigned as Director General of the BBC following the Hutton report, and from Mr Jaron Lewis, a solicitor employed by the BBC.
33. Mr Wells' statement usefully identified for us some of the public interests favouring release of the Governors' minutes. We shall refer to these in our discussion of the balance of public interest.
34. Mr Wells also exhibited to his statement a long list of press articles relating to the affair. Lord Wilberforce said in *British Steel Corp v Granada Television Ltd* 1981] AC 1096 at 1168: "*There is a wide difference between what is interesting to the public and what it is in the public interest to make known*". We did not find that the list of articles assisted us, since in the selection no distinction was made between matters which were in the interests of the public to know and matters which were merely interesting to the public (ie, which the public would like to know about, and which sell newspapers, but which under s 2(2) are not relevant).
35. In his statement Mr Wells made reference to there having been many published accounts speculating on what occurred at the Governors' meeting of 28 January 2004, but the evidence did not show that the Governors' deliberations were already in the public domain. In cross-examination he was not able to point to any particular published account as being based on first hand knowledge from anyone present at the meeting after Mr Dyke had left it.
36. The meeting of 28 January 2004 started at 5pm. Mr Dyke was present at the meeting for only a comparatively short time. It continued until after midnight. During the course of the evening he was informed that he would have to resign or be dismissed. The following day he decided to resign. He exhibited to his statement chapter 1 of his book "Inside Story", which dealt with the events of 27-29 January 2004, as seen from his perspective.

37. Mr Dyke in his evidence questioned the view that the release of the minutes of that meeting would prejudice the free and frank exchange of views for the purpose of deliberation in the future. He said in his statement:

*“(1) The Board of Governors consists of individuals of the highest standing who have reached high positions in other walks of life. In my role as Director General I worked closely with many BBC Governors. In my experience they are not the type of individuals who would be inhibited from expressing their views by fear that those views might be made public in the future.*

*(2) In my role as Director General I was fully aware that the BBC was going to be subject to the Freedom of Information Act and that documents which I created would probably be available for public inspection at some future date. I am sure that the members of the Board of Governors also know that the Act applies to the BBC ... I cannot believe that any BBC Governor or executive would express views at a Governors’ meeting on the assumption that these would never see the light of day.*

*(3) In any event, anyone involved in important and historic decisions such as those [that] were made in response to the Hutton Report would know that their deliberations would be matters of interest and importance which would, inevitably, be studied by others who were seeking to understand and analyse what had happened.”*

38. In his oral evidence Mr Dyke made clear that he was not suggesting that all Governors’ minutes should routinely be made public, but stressed that the events were unique in the history of the BBC and he considered that the public had a right to know why the decisions were taken.
39. Ms Carss-Frisk argued that Mr Dyke’s “apparent personal difficulty in understanding the Governors’ decision” was not relevant, and characterised his view of the personal characteristics of BBC Governors and of the unlikelihood of their being inhibited as “speculation” and “personal opinions”.
40. We regard this submission as unrealistic. We consider Mr Dyke’s evidence to be important. He was the only witness from whom we heard who had practical experience of how the Governors worked. He was Director General for four years. His experience of the Governors during those four years put him in a very good position to convey to us a realistic appreciation of the Governors’ likely degree of susceptibility to being inhibited from free and frank expression of their views.

41. It is not necessary for us to rule on whether his evidence was rightly to be regarded as opinion evidence. We were entitled to receive it pursuant to rule 27, and no objection was made to our doing so.<sup>2</sup>
42. We caution ourselves that because of his personal involvement and his resignation he has a strong personal interest in wanting to know what was said at the Governors' meeting. But it was not suggested to him in cross-examination that this personal interest coloured his evidence unduly, and in cross-examination no direct challenge was made to his experience and assessment of the Governors as not being the type of individuals who would be inhibited from expressing their views by the fear that those views might later be made public.
43. Mr Jaron Lewis told us in his statement that the Governors received legal advice on the potential effect of s 36 before approving the minutes of the 28 January 2004 meeting. That was clearly a prudent step.
44. The advice was protected from disclosure by legal privilege, which the BBC chose not to waive. Competent advice would have warned the Governors that there was at least some possibility of disclosure pursuant to FOIA because no absolute exemption was applicable and disclosure would depend on a weighing of the balance of public interest. It is reasonable to infer that the minutes were written up in their final form with the possibility of disclosure in mind, even if the possibility was considered to be remote.
45. Mr Lewis also referred to the Governors' meeting of 22-23 February 2005, when they took the decision to claim the section 36 exemption for the minutes of the post-Hutton meeting. He said that seven of the Governors present had also attended the post-Hutton meeting "*and would have been able to take into account whether they would have expressed themselves in a more guarded manner if they had expected their views to be disseminated more widely*" [our emphasis]. He did not say that any of them in fact took that into account or that any of them in fact expressed any view on whether they would feel inhibited in the future if the post-Hutton minutes were disclosed.
46. He said that those who had been Governors present at the post-Hutton meeting, but who were no longer Governors, were given the opportunity to comment on the

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<sup>2</sup> Even if the Tribunal were bound by the strict legal rules of admissibility, which we are not, we could have received his evidence pursuant to Civil Evidence Act 1972 s 3(2). Where a person is called as a witness in civil proceedings, a statement of opinion by him on any relevant matter on which he is not qualified to give expert evidence, if made as a way of conveying relevant facts personally perceived by him, is admissible as evidence of what he perceived. Had he been cross-examined on his view of the Governors, he would have had opportunity to give instances of relevant facts personally perceived by him, demonstrating the Governors' robustness.

handling of the minutes, and that the views of those who responded were passed on to the Board, such that the Governors "would have been able to consider them" [our emphasis]. He did not say whether those views were in fact considered, or what those views were.

47. The BBC has said different things at different times concerning what happened on 29 January 2004. In order to clarify the matter Mr Lewis produced a letter dated 19 December 2006 which set out his instructions in relation to the meeting of the Governors on 29 January 2004. In short, there was a brief gathering of the Governors on that day, which took about 10 minutes, at which the public statement of apology to be given by Lord Ryder, the acting Chairman, was read, but no minutes were kept.
48. In oral evidence he said that he was unable to give further information, as he was not present at the Governors' meetings.
49. Without objection, Ms Brooke during her oral submissions gave us additional information about her experience of the workings of freedom of information, both in the UK and the USA, and Ms Carrs-Frisk gave us some statistics informing us that during the first 18 months of FOIA from January 2005 to June 2006 the BBC dealt with 1,373 requests for information and relied on s 36 in relation to 19 items of information. Only five complaints had been made about the BBC to the Commissioner, three of which related to the Governors' meeting after Hutton.
50. In response to a point raised by Ms Brooke, Mr Pitt-Payne provided to us a copy of the Memorandum of Understanding between the Secretary of State for Constitutional Affairs (on behalf of Government Departments) and the Commissioner on co-operation in relation to FOIA ss 50-51. We were surprised to note from this document that it is the Commissioner's practice in some cases to issue to the public authority for comment a preliminary, non-statutory decision notice without also copying it to the applicant for comment. That seems to us to be a practice likely to give rise in the minds of applicants to concerns about the independence and impartiality of the Commissioner. However, since that practice was not followed in the present case, we say nothing further about it.

"Reasonable opinion" on the likelihood of inhibition: the law

51. The BBC's stated aim on its website is to be as open as possible. It now has a publication scheme under which Governors' minutes are published, subject to such redactions as are considered necessary. The inclusion of Governors' minutes in the publication scheme does not affect the present issue. The focus of s 36(2) is on "disclosure of the information" [our emphasis]. The exemption is therefore not

concerned with disclosure of Governors' minutes as a class, but with the likelihood of inhibition resulting from the disclosure of the particular minutes requested.

52. Moreover the nature of the disclosure must be taken into account. Disclosure under FOIA is effectively an unlimited disclosure to the public as a whole, without conditions. (See *Hogan v Information Commissioner* EA/2005/0026 and 0030 at paragraph 31.)
53. The exemption requires a degree of likelihood that the free and frank exchange of views for the purposes of deliberation will be inhibited by such disclosure. We interpret the phrase "*would or would be likely to*" in the same sense as in *Hogan v Information Commissioner* EA/2005/0026 and 0030 at paragraphs 34-35, derived from *R (on the application of Lord) v Secretary of State for the Home Office* [2003] EWHC 2073 (Admin) per Munby J at paragraphs 99-100. It means that inhibition would probably occur (ie, on the balance of probabilities, the chance being greater than 50%) or that there would be a "very significant and weighty chance" that it would occur. A "real risk" is not enough; the degree of risk must be such that there "may very well be" such inhibition, even if the risk falls short of being more probable than not.
54. The first condition for the application of the exemption is not the Commissioner's or the Tribunal's opinion on the likelihood of inhibition, but the qualified person's "*reasonable opinion*". If the opinion is reasonable, the Commissioner should not under s 36 substitute his own view for that of the qualified person. Nor should the Tribunal.
55. There was no agreement before us on the sense in which the qualified person's opinion is required by s 36(ii)(b) to be reasonable. Ms Carss-Frisk submitted that the manner in which the opinion was arrived at was not relevant, and the question for the Commissioner was whether objectively the opinion was within a range of reasonable opinions. Mr Tomlinson agreed that the question was an objective one, concerned only with the substance of the opinion and not the process by which it was formed, but disagreed with the reference to a range of opinions. He submitted that the question for the Commissioner was simply whether the BBC's conclusion was reasonable or not. Mr Pitt-Payne submitted that both substance and process were relevant, and that the opinion needed to be both objectively reasonable and reasonably formed: if the qualified person reached an opinion which could reasonably be held, but in doing so disregarded relevant matters or took into account irrelevant matters, that would not be a reasonable opinion within the meaning of s 36(ii)(b).
56. No one sought to refer us to Hansard in support of their submissions or to persuade us that reference to Hansard would be permissible, whether under the rule in *Pepper*

*v Hart* [1993] AC 593 or otherwise. We have therefore taken no account of Lord Falconer's statement in Committee in the House of Lords that the Commissioner's review of the qualified person's decision would be conducted on a judicial review basis<sup>3</sup>.

57. We were shown the Commissioner's Awareness Guidance No 25 relating to s 36, which stated:

*The Information Commissioner considers a reasonable opinion to be one which lies within the bounds of reasonableness or range of reasonable opinions and can be verified by evidence. Any opinion which is not outrageous, or manifestly absurd or made with no evidence, or made on the basis of irrelevant factors or without consideration of all relevant factors, will satisfy such a test. The Commissioner may well take a different view of what would have been the best decision in the circumstances, but this is immaterial where the qualified person's opinion lies within the bounds of reasonableness.*

58. We cannot endorse the second sentence of this extract from the Guidance. We understand it to be derived from decided cases on judicial review. An opinion may be objectively unreasonable without being subject to any of the particular defects mentioned in that sentence. Mr Pitt-Payne urged us to read the first and second sentences together. Doing so does not remedy the situation; if anything, it makes it worse, by making the meaning of the first sentence looser than it would otherwise be. We consider that the second sentence is incorrect and should be disregarded.

59. Mr Pitt-Payne further urged caution in the interpretation of the first sentence, properly reminding us that it was only guidance, and not to be interpreted as if it were a statute. Ms Carss-Frisk submitted, in particular, that verification of the opinion by evidence should not be regarded as an essential requirement, because in some cases there may be no direct evidence that one could have. With that we agree. The nature of the requisite opinion is that it is (a) a judgment (b) about what might happen in the future. As to (a), the materials which are or ought to be available for assisting in the making the judgment will vary from case to case. As to (b), in the nature of things direct evidence of the future is not available; conclusions about the future, so far as they are based on evidence, can only be derived by inference from the present or the past.

60. On the wording of s 36(2) we have no doubt that in order to satisfy the statutory wording the substance of the opinion must be objectively reasonable. We do not

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<sup>3</sup> 24 October 2000, *Hansard*, HL, Vol 618, cols 305 and 306

favour substituting for the phrase "*reasonable opinion*" some different explanatory phrase, such as "an opinion within the range of reasonable opinions". The present context is not like the valuation of a building or other asset, where a range of reasonable values may be given by competent valuers acting carefully. The qualified person must take a view on whether there either is or is not the requisite degree of likelihood of inhibition. We do, however, acknowledge the thought that lies behind the reference to a range of reasonable opinions, which is that on such matters there may (depending on the particular facts) be room for conflicting opinions, both of which are reasonable.

61. We find it much more difficult to be sure from the statutory wording to what extent, if at all, the opinion must in addition be reasonably arrived at.
62. On the plain words, it could be said that no more is required than that the qualified person's conclusion is a reasonable one. On that view, the process by which the opinion was reached could be looked at as evidence tending to support or undermine the objective reasonableness of the opinion, but no further. Errors in the process would not of themselves vitiate the opinion. Provided the conclusion was reasonable, it would not matter how it had been arrived at.
63. Against this, can it really be said that the intention of Parliament was that an opinion reached, for example, by the toss of a coin, or on the basis of unreasoned prejudice, or without consideration of relevant matters, should qualify as "*the reasonable opinion of a qualified person*" under s 36 merely because the conclusion happened to be objectively reasonable?
64. On this point we consider that the Commissioner is right, and that in order to satisfy the sub-section the opinion must be both reasonable in substance and reasonably arrived at. We derive this conclusion from the scheme of the Act and the tenor of s 36, which is that the general right of access to information granted by s 1 of the Act is only excluded in defined circumstances and on substantial grounds. The provision that the exemption is only engaged where a qualified person is of the reasonable opinion required by s 36 is a protection which relies on the good faith and proper exercise of judgment of that person. That protection would be reduced if the qualified person were not required by law to give proper rational consideration to the formation of the opinion, taking into account only relevant matters and ignoring irrelevant matters. In consideration of the special status which the Act affords to the opinion of qualified persons, they should be expected at least to direct their minds appropriately to the right matters and disregard irrelevant matters. Moreover, precisely because the opinion is essentially a judgment call on what might happen in the future, on which people may disagree, if the process were not taken into account, in many cases the

reasonableness of the opinion would be effectively unchallengeable; we cannot think that that was the Parliamentary intention.

“Reasonable opinion” on the likelihood of inhibition in the present case

65. Having indicated our view of the relevant law, we now consider the Commissioner’s notice (the text of which was substantially the same in both cases). In these cases he issued a short formal notice with an accompanying statement of reasons, which was referred to in the formal notice. We take the two together as constituting in each case the Decision Notice issued under s 50 of the Act.

66. In addition to the relevant minutes themselves the Commissioner had before him the BBC’s letters which said:

*“If the information requested were required to be disclosed, the conduct of and minuting of future discussions considering matters of appropriate gravity would be fundamentally undermined” [17 March 2005]*

*“... the principle [means ‘principal’] reason for withholding the minutes was that both the discussions and the minuting of those discussions would have been inhibited had the Governors not believed that they would be kept confidential. Disclosing the minutes would reveal the deliberations of the Governors over the departure of the Chairman and the Director General. A discussion about the simultaneous resignation of the two senior representatives of a large high-profile organisation must surely be capable of being conducted on a confidential basis. The prospect of disclosure of this information would lead to insufficient records being created and less candid and robust discussions.” [20 May 2005]*

67. It should be noted that the BBC’s view was not merely that there was a very significant and weighty chance that the free and frank exchange of views would be inhibited, but that it would indeed be inhibited.

68. The Commissioner’s notice dealt briefly with the reasonableness of the BBC’s opinion. His Statement of Reasons said:

*“A reasonable opinion can be defined as one that, given the circumstances of the case, could be said to fall within a range of acceptable responses and be considered neither outrageous nor absurd. The Commissioner is satisfied that the opinion of the qualified person that the information should not be released was a reasonable one in the circumstances.”*

69. The wording of the first sentence of this extract partly reflects the Commissioner's published guidance, about which we have already indicated our concerns. It also seems to us that the Commissioner has here slightly muddled the waters by conflating two separate matters. At the first stage, the relevant opinion of the qualified person for the purpose of s 36(2) was not an opinion on whether the information should be released, but was an opinion as to the likelihood of the free and frank exchange of views for the purposes of deliberation being inhibited. At the second stage required by s 2(2)(b) of the Act, the BBC took the view that the balance of public interest was in favour of maintaining the exemption. The Commissioner has here combined those two aspects into one. We deduce from the notice read as a whole that the Commissioner applied his mind to the question whether the BBC's opinion on the likelihood of inhibition was reasonable, and that he considered that it was, on the basis that (a) he accepted the reasonableness of the points made by the BBC and (b) he considered that the BBC's opinion could be said to fall within a 'range of acceptable responses' and be considered 'neither outrageous nor absurd'. In the circumstances we do not consider it to be self-evident that the Commissioner, in judging the reasonableness of the BBC's opinion under s36(2), applied the right test.
70. If the only question for our consideration were whether, regarded objectively, the BBC's conclusion under s 36 was reasonable, we would have no difficulty in accepting its reasonableness. The Act itself contemplates that disclosure in one instance might inhibit the free and frank exchange of views for the purposes of deliberation in future instances. The Act therefore recognises the possibility that, contrary to the views of those who campaign for greater freedom of information, if certain deliberations of public officials are to be opened up to public scrutiny, there could be a resulting deterioration in the quality of decision-making. There was a substantial overlap between the Governors present at the original meeting of 28 January 2004 and the Governors who took the decision under s 36 in February 2005. If the Governors of the BBC state that there is a likelihood of inhibition in the circumstances of a particular case, it is difficult to say that their view is objectively unreasonable.
71. However, if we are right to accept the Commissioner's submission that the process of decision-making is relevant to reasonableness within the meaning of s 36(2), the question is a more open one.
72. The criticisms of the reasonableness of the BBC's opinion advanced by Mr Tomlinson on behalf of The Guardian were in reality all criticisms of the process by which it was reached, rather than of the conclusion itself. Mr Tomlinson indicated that he relied on these criticisms in the event that we accepted the Commissioner's submission on the

relevance of process in addition to substance. We therefore now address his criticisms.

73. He submitted that the BBC seemed to have proceeded on the basis that disclosure of the minutes would mean that all future discussions would have to be disclosed. We do not agree. The BBC's letters indicated that the Governors regarded the circumstances as exceptional and had in mind matters of comparable gravity that might arise in the future. Mr Tomlinson categorised the general effect on the conduct and minuting of future discussions as an irrelevant consideration, but we disagree, and regard its relevance as obvious.
74. He submitted that the BBC focused mainly on the past, in stressing that both the discussions of 28 January 2004 and the minuting of those discussions would have been inhibited had the Governors not believed that they would be kept confidential. This was answered by Mr Pitt-Payne's submission that it was relevant to consider whether behaviour would have been affected at that meeting: if it would have been affected, then it was reasonable to infer that there would be an effect on comparable meetings in the future. (The Commissioner's notice made this point expressly, as part of the consideration of the balance of public interest.)
75. Mr Tomlinson also contended that the BBC ought to have taken into account that, as he put it, there had already been substantial disclosure of the information in Chapter 1 of Mr Dyke's autobiography. But the evidence before us did not demonstrate that there had been substantial disclosure. Mr Dyke's participation in the meeting was of relatively short duration, and the published reports of the deliberations were not shown to be anything more than speculation.
76. Mr Tomlinson and Ms Brooke criticised the BBC for not taking into account the timing of the information requests, which were made more than a year after the meeting and at a time when the matters discussed at the meeting were (so far as appears from the evidence) no longer the subject of deliberations within the BBC. It seems to us that this point has more force in relation to the balance of public interest and is of only marginal significance on the question of reasonableness.
77. Ms Brooke observed that insufficient thought appeared to have been given to the specifics of why these particularly important minutes should or should not be published. This criticism seems to us also to have a certain amount of force, but again is more relevant to the balance of public interest than to the reasonableness of the opinion about the likelihood of deliberations being inhibited.
78. Mr Tomlinson further submitted that the BBC's opinion was mere assertion, not based on evidence as to the effect on the free and frank exchange of views. We consider

there is considerable force in this criticism. The material before us did not show that any Governor actually said that disclosure of the minutes of 28 January 2004 would, or would be likely to, inhibit the free and frank exchange of views in future deliberations. Nevertheless, the Governors did give consideration to the exemption at their meeting in February 2005, and we are unable to regard the absence of specific evidence as necessarily invalidating the judgment that was made, which related to the future and was therefore necessarily hypothetical.

79. In the result, while we have reservations about the quality of the process by which the BBC reached its conclusion under s 36, we do not find ourselves able to say that the BBC's opinion as to the likelihood of future inhibition was not a reasonable opinion, and we accept the Commissioner's conclusion that it was reasonable. Accordingly we find that the contents of the minutes of the BBC Governors' meeting of 28 January 2004 constituted exempt information.

80. If, however, a higher Court were to agree with us that the process by which the opinion was arrived at must be taken into account in assessing the reasonableness of the opinion of a qualified person under s 36(2), and were to lay down also (contrary to our view) that the proper consideration of specific relevant evidence was an essential feature of the process, on that footing we would regard the opinion as unreasonable.

Balance of public interest: the law

81. Both appellants contended in their Notices of Appeal that there was a presumption in favour of disclosure. On that topic Mr Pitt-Payne made the following submissions, with which we agree in full:

82. (1) In one sense the scheme of the Act as a whole involves a presumption in favour of disclosure. The duty to confirm or deny (section 1(1)(a)) and the duty to disclose information (section 1(1)(b)) are both expressed in general terms. Unless there is any relevant exemption under the Act then those duties will operate. The "default setting" in the Act is in favour of disclosure: information held by public authorities must be disclosed on request unless the Act permits it to be withheld.

83. (2) In order for a qualified exemption to operate so as to exclude the duty to disclose in section 1(1)(b), the public interest in maintaining the exemption must outweigh the public interest in disclosing the information: see section 2(2)(b). Hence if the public interest on both sides is equally balanced then the exemption will not exclude the duty to disclose, and (absent any other relevant exemption) the information must be disclosed. In this sense there is a presumption in favour of disclosure in cases where the qualified exemptions are engaged. It is, however, a presumption that will only operate in cases where the respective public interests are equally balanced.

84. (3) There is no provision in FOIA comparable to regulation 12(2) of the Environmental Information Regulations 2004, which expressly requires public authorities to apply a presumption in favour of disclosure when considering the exceptions to the general duty to disclose environmental information under those Regulations.
85. (4) It is however true to say that there is an assumption built in to FOIA, that the disclosure of information by public authorities on request is in itself of value and in the public interest, in order to promote transparency and accountability in relation to the activities of public authorities. What this means is that there is always likely to be some public interest in favour of disclosure of information under the Act. The strength of that interest, and the strength of the competing interest in maintaining any relevant exemption, must be assessed on a case by case basis: section 2(2)(b) requires the balance to be considered “in all the circumstances of the case”.
86. To this exposition we would add two further references. The short title of the Act describes it as an Act to make provision for the disclosure of information held by public authorities. In pursuance of this objective, the Act contains provisions concerning the duty of public authorities to adopt and maintain schemes for the publication of information; in particular, s 19(3) requires a public authority, in adopting or reviewing a publication scheme, to have regard to “*the public interest in allowing public access to information held by the authority*”. These references support Mr Pitt-Payne’s submission that there is an assumption built in to FOIA, that the disclosure of information by public authorities on request is in itself of value and in the public interest. We consider that the Commissioner was right to say in his Awareness Guidance No 3 that FOIA was designed to shift the balance in favour of greater openness.
87. In our judgment the following further considerations are material to the application of the public interest test (selected and adapted from those set out in *Hogan v Information Commissioner* EA/2005/0026 and 0030 at paragraphs 54-61):
- (1) The lower the likelihood is shown to be, that the free and frank exchange of views would be inhibited, the lower is the chance that the balance of public interest will favour maintaining the exemption.
  - (2) Since the public interest in maintaining the exemption must be assessed in all the circumstances of the case, the public authority is not permitted to maintain a blanket refusal in relation to the type of information sought. The authority may have a general policy that the public interest is likely to be in favour of maintaining the exemption in respect of a specific type of information, but any such policy must be flexibly applied, with genuine consideration being given to the circumstances of the particular request.

(3) The passage of time since the creation of the information may have an important bearing on the balancing exercise. As a general rule, the public interest in maintaining an exemption diminishes over time.

(4) In considering factors that militate against disclosure, the focus should be on the particular interest which the exemption is designed to protect, in this case the effective conduct of public affairs through the free and frank exchange of views by public officials for the purposes of deliberation.

(5) While the public interest considerations in the exemption from disclosure are narrowly conceived, the public interest considerations in favour of disclosure are broad-ranging and operate at different levels of abstraction from the subject matter of the exemption. Disclosure of information serves the general public interest in the promotion of better government through transparency, accountability, public debate, better public understanding of decisions, and informed and meaningful participation by the public in the democratic process.

88. The application of the public interest test to the s 36(2) exemption involves a particular conundrum. Since under s 36(2) the existence of the exemption depends upon the reasonable opinion of the qualified person it is not for the Commissioner or the Tribunal to form an independent view on the likelihood of inhibition under s 36(2)(b), or indeed of prejudice under s 36(2)(a) or (c). But when it comes to weighing the balance of public interest under s 2(2)(b), it is impossible to make the required judgment without forming a view on the likelihood of inhibition or prejudice.

89. Mr Tomlinson submitted that the Commissioner in forming his judgment on public interest, while entitled to take into account that Parliament had set a fairly low hurdle for the engagement of the exemption, was entirely free to make his own judgment under s2(2)(b). In that respect the balancing exercise was the same in relation to the exemption in s 36(2) as it was in relation to the other qualified exemptions in the Act. Mr Pitt-Payne similarly submitted that the Commissioner was entitled, and indeed required, under s2(2)(b) to consider the merits of the qualified person's opinion.<sup>4</sup>

90. Ms Carss-Frisk submitted that this could not be right. The Commissioner, having found that the qualified person's view was reasonable, must proceed, she said, from the basis that the qualified person's opinion was correct. If the Commissioner were entitled to say under s2(2)(b) that, contrary to the qualified person's opinion, there was no likelihood of inhibition, the deference which s 36(2) gives to the qualified

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<sup>4</sup> Counsel did not rely on the statement by Lord Falconer at *Hansard*, HL, Vol 619, col 836-837 (November 22, 2000), and we have not taken it into account.

person's opinion would disappear and the Parliamentary intent of s 36 would be undermined.

91. We consider that the degree of deference identified in Ms Carss-Frisk's submission is over-stated and that the correct analysis lies between the competing submissions. In this regard we think it is important to note the limits of the reasonable person's opinion required by s 36(2). The opinion is that disclosure of the information would, or would be likely to, inhibit the free and frank exchange of views for the purposes of deliberation. That means that the qualified person has made a judgment about the degree of *likelihood*<sup>5</sup> that such inhibition will occur. It does not necessarily imply any particular view as to the *severity or extent* of such inhibition or the *frequency* with which it will or may occur, save that it will not be so trivial, minor or occasional as to be insignificant.
92. In our judgment the right approach, consistent with the language and scheme of the Act is this: the Commissioner, having accepted the reasonableness of the qualified person's opinion that disclosure of the information would, or would be likely to, inhibit the free and frank exchange of views for the purposes of deliberation, must give weight to that opinion as an important piece of evidence in his assessment of the balance of public interest. However, in order to form the balancing judgment required by s 2(2)(b), the Commissioner is entitled, and will need, to form his own view on the severity, extent and frequency with which inhibition of the free and frank exchange of views for the purposes of deliberation will or may occur..

#### Balance of public interest in the present case

93. The Commissioner's notice acknowledged that the response of the BBC to Lord Hutton's report into the circumstances surrounding the death of Dr David Kelly was a matter of public interest about which the public had a right to be informed. He noted that some information relating to the outcomes of the meeting was in the public domain.
94. He considered very carefully the minutes of the meeting of 28 January 2004. He found that those attending the meeting believed their discussion to be confidential, and that, if they had expected their views to be made formally available beyond the confines of the meeting, they would either not have said some of what they said, or would have expressed their views in a more guarded manner. He considered that release of the information would be likely to have the effect of inhibiting discussion at future meetings where matters of comparable significance were under discussion.

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<sup>5</sup> In the sense explained in paragraph 53 above.

95. Within the Statement of Reasons he said that, in order for information to be released, the arguments in favour of disclosing the information must outweigh those in favour of withholding it. That indicates that, contrary to the requirements of the Act, his starting point was one of non-disclosure because of the exemption. In similar vein, after referring to the need for confidentiality so that participants in the meeting of 28 January 2004 could express themselves candidly, he said:

*“The Commissioner has considered whether, even allowing for that, the public interest in this matter is sufficiently strong to justify him overriding confidentiality and recommending release.”*

96. He concluded that the balance of public interest favoured non-disclosure, so that Governors would not be inhibited in future discussions of important and sensitive matters.

97. Mr Tomlinson took issue with the Commissioner’s reversal of the statutory test.

98. Mr Pitt-Payne and Ms Carrs-Frisk submitted that the reversal made no practical difference, since it would only be in a case where the public interests on each side were equally balanced that the precise wording of the statutory test would be decisive. We do not accept the purist logic of that conclusion. It seems to us that in reality (as shown by the reference to justifying the overriding of confidentiality) the reversal of the test coloured the Commissioner’s approach and hence affected his judgment of the balance of public interest. We note that the BBC’s letter of 20 May 2005 contained the same error of approach as was subsequently made by the Commissioner.

99. Before us the balance of evidence was quite different from that which was available to the Commissioner. We have already referred to Mr Dyke’s important evidence of his experience of the Governors. Mr Tomlinson’s submission that BBC Governors were unlikely to be “shrinking violets”, who would be inhibited from doing their duty by the thought that their deliberations might at some point become public, provoked no effective contradiction from Mr Pitt-Payne or Ms Carrs-Frisk. The BBC provided no witness evidence from any Governor, or indeed from anyone, to assist us in relation to the likelihood, severity, extent or frequency of any such inhibition.

100. The minutes of 28 January 2004 were headed “Confidential”, but we are not convinced that those who attended the meeting necessarily believed that their views would be kept from public view for a long period. The Governors would have been aware that the Act applied to the BBC, and that their deliberations might become public at some future date unless there were sufficiently strong reasons for maintaining an exemption under the Act.

101. In considering where the public interest lies, we give weight to the BBC's opinion that disclosure of the information would inhibit the free and frank exchange of views for the purposes of deliberation.
102. However, in order to weigh the balance of public interest, we have to form a view on the severity, extent and frequency with which such inhibition would or might occur, and in our view the evidence from the BBC on that aspect was unimpressive.
103. We have given very close attention to the relevant section of the confidential minutes of the meeting of 22-23 February 2005, at which the Governors approved the claiming of the exemption under section 36. Our assessment is that the contents of those minutes provide only meagre support for the BBC's position.
104. We record that the BBC clearly did not have a policy of blanket refusal in relation to the type of information sought. However, as we have previously indicated, there is in our view some force in Ms Brooke's criticism that the BBC appeared to have given insufficient attention to relevant considerations. Having taken into account the contents of the confidential minutes in addition to the material that Ms Brooke was able to see, we are left with an impression that the BBC had a greater concern with the maintenance of secrecy than with the specifics of why these particularly important minutes should or should not be published.
105. We have already observed that the passage of time since the creation of the information may have an important bearing on the balancing exercise, and that in the present case the requests were made more than a year after the meeting and at a time when the matters discussed at the meeting were (so far as the evidence goes) no longer the subject of deliberations within the BBC.<sup>6</sup>
106. We infer, for the reasons indicated in our discussion of Mr Lewis's evidence, that the minutes were written up in their final form with the possibility of disclosure in mind. Moreover, his evidence did not reveal the actual views of any past or present Governor on whether disclosure would inhibit future deliberations.
107. It was further argued that the keeping of proper minutes was itself part of the process of carrying out proper deliberations, and that disclosure in this case might tend to discourage the keeping of proper minutes in the future. We regard that contention with considerable scepticism. For purposes of effective administration a responsible public body ought to keep suitable minutes of important meetings, whether or not the minutes may be disclosed to the public at a future date. The BBC

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<sup>6</sup> We would here emphasize that the relevant time at which the balance of public interest has to be judged is the time when the request is considered by the public authority. This is because the question for the Commissioner is whether the public authority dealt with the request in accordance with the requirements of Part I of the Act.

failed to keep minutes of the meeting on 29 January 2004, at which the Governors considered, and presumably approved, the text of the statement to be issued by Lord Ryder. If a public body does not follow satisfactory practices in keeping records of meetings, we are not inclined to think that the prospect of disclosure will make that situation significantly worse.

108. Ms Carrs-Frisk relied on the Commissioner's views, stated in his decision, that

*"The matters under discussion at the meeting were ones of great sensitivity, relating to figures prominent in public life carrying out tasks of considerable public importance. The requirements of the meeting were such that, in order to achieve an appropriate outcome, it was necessary to refer to those individuals and their actions frankly. This was only possible because it was understood that any such references were made in confidence."*

And

*"Appropriate decisions are less likely to be made in situations where those involved feel unable to fully speak their minds."*

109. She urged on us the sensitivity of the material in this very unusual case. The BBC's letter of 20 May 2005 described the situation on 28 January 2004 as "*a crisis of the utmost seriousness*". She submitted rhetorically, if material of this high level of sensitivity was to be disclosed, then what prospect was there of anything being protected from disclosure? She suggested that disclosure of this material would have a chilling effect on future deliberations.

110. We were unpersuaded by this, particularly in light of the evidence of Mr Dyke, whose position was under consideration at the meeting, and from our consideration of the minutes themselves. Importance and sensitivity are not the same thing. We agree that the subject-matter of the meeting of 28 January 2004 was of the very highest importance to the functioning of the BBC. In this and other respects the meeting was of a very exceptional character. But, informed by the evidence now before us, we consider that the Commissioner markedly overstated the degree of sensitivity. Within hours after the meeting was over, the outcome, in particular that the Governors considered it right to part company with Mr Dyke, was known both inside and outside the BBC and was in the public domain. On 1 February 2004 Mr Dyke appeared on BBC's "Breakfast with Frost" and explained that he had told the Governors that he needed their confidence in order to continue in post, but he did not receive it, and they suggested that he leave.

111. We can conceive that deliberations on many subjects of discussion could have a much greater requirement for a period of secrecy in the interests of the proper and effective management of the BBC as a public service broadcaster, such as, for example, details of commercial plans or negotiations, proposals for cuts in services or in staff numbers, or consideration of allegations of serious misconduct by individuals.
112. While we fully accept that such secrecy may be required for some matters of particular sensitivity, Ms Brooke made the countervailing point that decision-making, particularly on matters of importance, could be improved by greater transparency, because that provided an incentive to decision-makers to ensure that their decisions were soundly based on appropriate evidence and on public rather than private interests, and would be able to stand up to public scrutiny.
113. It does not seem to us that the likelihood of inhibition of future discussions, resulting from disclosure of the minutes of 28 January 2004, would be particularly high, or that any such inhibition would be particularly severe or frequent. The more sensitive the future material at the time of an information request, the greater the prospect that the public interest represented by the exemption will be held to outweigh the public interest in disclosure of that particular material. Future cases arising under s 36 can be considered on their own merits, in light of their own particular circumstances.
114. Thus, when we focus on the particular interest which the exemption is designed to protect - in this case the effective conduct of public affairs through the free and frank exchange of views by public officials for the purposes of deliberation - it seems to us that the case for maintaining the exemption in the highly unusual circumstances of the present case is not particularly strong.
115. We mention for completeness that Mr Tomlinson relied on the remarks of Lord Upjohn in *Conway v Rimmer* [1968] AC 910 at 994A and of Lord Keith in *Burmah Oil Co Ltd v Bank of England* [1980] AC 1090 at 1133. Respectively:

*"I cannot believe that any Minister or any high level military or civil servant would feel in the least degree inhibited in expressing his honest views in the course of his duty on some subject, such as even the personal qualifications and delinquencies of some colleague, by the thought that his observations might one day see the light of day."*

*"The notion that any competent and conscientious public servant would be inhibited at all in the candour of his writings by consideration of the off-chance that they might have to be produced in a litigation is in my opinion*

*grotesque. To represent that the possibility of it might significantly impair the public service is even more so."*

We observe that FOIA itself recognises the possibility of free and frank deliberations being inhibited by disclosure, and we do not consider that these judicial remarks, made in the very different context of public interest immunity from disclosure in litigation, are of particular assistance or relevance in the context of the judgment which FOIA requires, save as (at the most) a reminder that assertions of inhibition should perhaps not be too readily accepted.

116. Mr Tomlinson emphasized that he was asking us to decide in favour of disclosure because of the particular facts of the case, and was not asking us to decide either that Governors' minutes should be routinely disclosed in full or that every time an important matter was discussed confidentiality should not apply.

117. Ms Carss-Frisk suggested that, if minutes of deliberations of high importance were disclosed, the effect would be that minutes of deliberations at a lesser level of importance would also have to be disclosed, which might be inappropriate. We do not consider that this argument is correct. On matters of lesser importance the public interests in disclosure may perhaps be less strong. Such other cases will depend on their particular circumstances, not on the decision made in the present case.

118. We have already noted the policy of the Act, based on the notion that, in general, disclosure of information serves the general public interest in the promotion of better government through transparency, accountability, public debate, better public understanding of decisions, and informed and meaningful participation by the public in the democratic process.

119. Mr Wells stated in his evidence that the reasons for the Governors' decisions on 28 January 2004 were crucial to the debate on standards of journalism and the independence of the BBC. The information requests were made in the context of investigations into what took place as a result of the publication of the Hutton report, which was in turn itself relevant to controversy concerning the war in Iraq. Within the BBC there was something of a rebellion in protest against the Governors' decision, and there were widespread concerns about the BBC's independence. He referred to speculation (which may have been mis-judged or ill-informed) over whether government pressure was exerted on the Governors. Given that the BBC was a public service broadcaster, funded by a levy on the public, the Corporation had a responsibility to account to the public for its conduct. None of these points was challenged in cross-examination, and we accept them.

120. Given the role of the Governors in regulating the BBC as trustees of the public interest, there is in our view a strong public interest in information about the workings of the Governors, and all the more so in the particular context identified by Mr Wells.
121. Mr Pitt-Payne on behalf of the Commissioner expressly said that he did not take issue with the following public interest factors set out in The Guardian's grounds of appeal:
- (a) The general important of the promotion of accountability and transparency by public authorities for decisions taken by them.
  - (b) The importance of the public being fully and properly informed as to the grounds for the BBC's decisions and actions taken in response to the Hutton report. The Hutton report had raised fundamental issues concerning the role of journalists and broadcasters, particularly in relation to the reporting of Dr David Kelly's allegations that the government had misled the public about the Iraq war. The public has a right to know how a public service broadcaster reacted to and dealt with the criticisms made.
  - (c) The importance of the public being able to debate the issues concerning the BBC's response to the Hutton report on the basis of accurate information relating to the meeting by key individuals.
  - (d) The importance of the public being able to scrutinise the decision making process of important public officials, the Governors of the BBC, dealing with a unique and difficult series of fundamental decisions relating to the operation of the BBC and its relationship with the Government. The decisions made included the accepting of the resignation of the Chairman and Director-General of the BBC.
122. Ms Carrs-Frisk accepted this list only with reservations. She submitted that it would be wrong to classify the situation as unique, since comparable matters could arise in the future. Her main disagreement was in her contention that the public interest was chiefly in the outcome of the meeting, which was well known, and that the public did not have a particularly strong interest in being informed of the Governors' deliberations and decision-making process. We are unable to accept that submission. In our judgment there was and is a strong public interest in knowing what process led to the known outcome.
123. The public owes a considerable debt of gratitude to those distinguished people who are willing to take on onerous responsibilities in public service, such as

the governorship of the BBC. No one has suggested that publication of the Governors' deliberations would make it more difficult to find people to serve in that capacity. Those who accept public office may have to accept a degree of public scrutiny. We would contrast the facts in Decision Notice FS50086131, where there was evidence that, if the requested report was put into the public domain, it would be impossible to find persons willing to prepare such reports in the future.

124. In our judgment, as at March 2005 the public interest in maintaining the s 36 exemption in the present case did not outweigh the public interest in disclosing the information contained in the minutes of the meeting of 28 January 2004.

#### Redaction

125. In the light of this decision, the question remains whether the public interest in disclosure can be satisfied by the release of a redacted version of the minutes of 28 January 2004.

126. In substance, we consider that the answer to this question is negative. If the minutes were subject to substantial redaction, much of the value of public disclosure would be lost. We are, however, willing to receive confidential submissions from the BBC if the BBC considers that, on the basis of accepting our decision and reasoning, there are nevertheless particular points of detail which ought properly to be redacted before release. Any such submissions (including any request for a continuation of the oral hearing) should be copied in confidence to the Commissioner and sent to us within 14 days from the date of this decision.

#### Other documents requested

127. The Guardian's request asked for a complete copy of the agenda for the meeting. The evidence initially before us in regard to the agenda was somewhat unclear. Ms Carrs-Frisk told us on instructions, without objection, that the written agenda originally prepared for the meeting (dealing with other topics, not the Hutton report) was withdrawn and the BBC's response to the Hutton report was the sole business of the meeting. There was no other written agenda. It follows that there is no relevant written agenda for the BBC to disclose.

128. Ms Brooke's request asked for all minutes from January 16 to 31, 2004. On the evidence the only other meeting in that period was on 29 January 2004. We have already referred to the evidence that there were no minutes kept of the gathering on that day: see paragraph 47 above. As a result, there are no minutes falling within her request other than those of 28 January 2004.

#### Conclusion and remedy

129. In our judgment, and on the facts that we have found, the notices against which the appeals are brought are not in accordance with the law, because as at March 2005 the public interest in maintaining the s 36 exemption did not outweigh the public interest in disclosing the information contained in the minutes of the BBC Governors' meeting of 28 January 2004.

130. Subject to paragraph 132 below, we therefore allow the appeals and substitute the Decision Notices set out above.

131. Our decision is unanimous. We wish to record our particular thanks to all counsel, to Ms Brooke, and to the witnesses for the help that we received from them.

132. The question of statutory interpretation discussed by us at paragraphs 16 to 23 affects only the form of order and not the substance of our decision. Since that question was not the subject of submissions, the parties may if they wish make further written submissions on that aspect in writing, and if appropriate we will adjust the form of order in the light of them. Any such submissions should be copied to all other parties and sent to us within 14 days from the date of this decision.

Signed – Andrew Bartlett QC

Deputy Chairman

Date 4 January 2007