



Tribunals Service

Information Tribunal

Information Tribunal appeal numbers:

EA/2008/ 0019, 0034, 0051 and 0058

Information Commissioner's references:

**FS50140478 (30 January 2008), FS50072198 (27 February 2008),
FS50140478 (28 May 2008) and FS50115188 (17 June 2008)**

**Heard at Audit House
On 6, 7 and 8 October 2008**

**Decision Promulgated
On: 7 November 2008**

BEFORE

CHAIRMAN

Robin Callender Smith

and

LAY MEMBERS

Dr Henry Fitzhugh

Andrew Whetnall

Between

BRITISH BROADCASTING CORPORATION

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

Consolidated Preliminary Issue

Representation:

For the Appellant: Ms Kate Gallafent (Counsel for the BBC)
For the Respondent: Mr Ben Hooper (Counsel for the Information
Commissioner)

Freedom of Information Act 2000

Meaning of Public Authorities s.3, and

Schedule 1 Authorities to which the Act has limited application s.7

Cases:

Pepper v Hart [1993] AC 593, R v Secretary of State for the Environment, Transport and the Regions ex p Spath Holme Ltd [2001] 2 AC 349, R (Westminster City Council) v NASS [2002] 1 WLR 2956, Wilson v First County Trust Ltd (No 2) 1 AC 816, McDonnell v Congregation of Christian Brothers Trustees [2004] 1 AC 1101, Sugar v Information Commissioner [2007] 1 WLR 2583, Sugar v Information Commissioner [2008] EWHC Civ 191, Office of Government Commerce v Information Commissioner [2008] EWHC 737 (Admin), Department for Education and Skills v Information Commissioner (EA/2006/0006), Guardian Newspaper and Brooke v Information Commissioner and the BBC (EA/2006/0011 and 0013), Campaign against the Arms Trade v Information Commissioner (EA/2007/0040) and Home Office v Information Commissioner (EA/20080027).

Other materials:

Bennion, *Statutory Interpretation*, 5th ed 2002, sections 213, 217, 231 and 232; House of Commons Standing Committee debate 11 January 2000 and Information Commissioner's Decision Notice FS 50072937 issued 8 January 2008.

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

SUBSTITUTED DECISION NOTICE

Dated 1 November 2008

Public Authority British Broadcasting Corporation (BBC)
Address of Public Authority Room 2251
White City
201 Wood Lane
London
W12 7TS

Complainant Mr David Gordon
Belfast Telegraph Newsroom
124 – 144 Royal Avenue
Belfast
BT1 1EB

Nature of Complaint

The Information Commissioner received a complaint from the above person on 21 January 2005 following the BBC's refusal – among his other requests - to provide information about the annual gross salaries paid by the BBC to each of the following: George Jones, Stephen Nolan, Hugo Duncan, Gerry Anderson, John Daly, David Dunseath, Donna Traynor, Noel Thompson, Conor Bradford and Seamus McKee.

The BBC refused to provide this information on the basis that it was held for the purposes of journalism, art or literature within the terms of the derogation expressed in Part VI of Schedule 1 of the Freedom of Information Act 2000.

The Information Commissioner decided on 27 February 2008, inter alia, that the BBC had misapplied the Schedule 1 derogation and that the information fell within the scope of the Freedom of Information Act 2000.

Although it is incidental to this substituted decision notice the Information Commissioner went on to find that the salaries of the individuals in question were, in fact, exempt from disclosure under Section 40 of the Freedom of Information Act 2000.

Substituted Decision

For the reasons set out in the Tribunal's Decision at Paragraphs 96, 97 and 98, the substituted decision is that the derogation given to the BBC by virtue of Sections 1, 3 and 7 and Part VI of Schedule 1 of the Freedom of Information Act 2000 applies in relation to this particular request and that the predominant purpose of the information being held by the BBC is for "journalism, art or literature".

Action Required

No action is required.

Dated: 1 November 2008

Signed:

Robin Callender Smith
Deputy Chairman

Decision

1. The Tribunal dismisses – with one exception (see 3 (b) (i) below) - the appeal by the BBC on the preliminary issue about whether information requested in four consolidated appeals was information to which the “derogation” in the Freedom of Information Act 2000 (“FOIA”) applied.
2. At issue was whether the information requested – most of which was financial - was in respect of information held for purposes other than those of journalism, art or literature within the meaning of Part VI of Schedule 1 of FOIA. The BBC is a public authority and therefore subject to FOIA only in respect of information so held, by virtue of sections 1 (1), 3 (1) and 7 (1) and Schedule 1 of the Act.
3. For clarity, the information requested, in each of the four cases is set out below:

(a) EA/2008/0019 (“The Jackson Request”)

On 28 February 2006 Mr Jamie Jackson (The Observer) asked the BBC how much the BBC paid for the rights and to cover the recent winter Olympics in Turin, Italy.

(b) EA/2008/0019 (“The Gordon Request”)

On 21 January 2005 Mr David Gordon (Belfast Evening Telegraph) asked the BBC the following series of questions:

- (i) What is the annual gross salary paid by the BBC to each of the following: George Jones, Stephen Nolan, Hugo Duncan, Gerry Anderson, John Daly, David Dunseath, Donna Traynor, Noel Thompson, Conor Bradford and Seamus McKee?
- (ii) How much did the BBC pay Straightforward Productions last year and what programmes did this relate to?
- (iii) What was BBC Newsline's annual budget for outside broadcasts in each of the last five years?
- (iv) How many individual foreign trips had been made by personnel working for BBC NI Spotlight programme in the past three years?
- (v) What has been the total cost of BBC NI Spotlight programmes involving overseas travel in the past three years?
- (vi) What has been the single most expensive BBC NI Spotlight programme involving foreign travel in the past three years?

(c) EA/2008/0051 ("The Goslett Request")

On 31 May 2006 Mr Miles Goslett (The Evening Standard) asked the BBC for the following information:

- (i) What is the budget for the current series of Top Gear on BBC2? (Please specify whether this figure includes presenters' fees.)
- (ii) What is the annual budget for EastEnders on BBC1? (Please specify whether this figure includes actors' fees.)
- (iii) What is the annual budget of Newsnight on BBC2? (Please specify whether this figure includes presenters' and journalists' salaries.)

(d) EA/2008/0058 ("The Trice Request")

On 28 March 2006 Mr Arthur Trice asked the BBC "in respect of your successful soap EastEnders":

- (i) Total annual staff costs (performers, writers and production staff) of the programme.
- (ii) The range of contract values (excluding extras) from minimum to maximum.

4. The Tribunal's decision is that all of these requests for information – save for EA/2008/0019 Question 1 about the annual gross salary paid by the BBC to each of 10 named individuals – relates to information held for purposes other than those of journalism, art or literature.

Statutory Provisions

5. Section 1 of FOIA sets out the general right of access to information held by public authorities. Section 1 (1) makes it clear that the right of access is only capable of applying where the request is made to a public authority:

"(1) Any person making a request for information to a public authority, is entitled –
(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
(b) if that is the case, to have that information communicated to him."

6. The concept of a "public authority" is defined in section 3 of FOIA. Section 3 (1) provides:

"(1) 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."

7. Section 7 (1) of FOIA provides 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."

8. The BBC is listed in Part VI of Schedule 1 to FOIA as follows:

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

Timing

9. It is agreed between the parties that the relevant time for considering whether the requested information was "held for purposes other than those of journalism, art or literature" is on or around the time of the requests.
10. The Tribunal notes that the "Jackson" request in relation to the Turin Winter Olympics was made two days after that Olympic event was concluded on 26 February 2006. The "Gordon" requests (save for Question 1) related to historical information. The "Goslett" requests sought information that was interpreted as relating to the financial year of the enquiry (2006/2007) and the "Trice" information related to historical information.

History of the Interpretation of the Derogation

11. The issue of the proper approach to the meaning of the phrase "...for purposes other than those of journalism, art or literature" first came before the Tribunal in an appeal by Mr Steven Sugar (*EA/2005/0032* 29 August 2006) and, subsequently before the High Court, in *Sugar v BBC and Information Commissioner [2007] 1 WLR 2583*.
12. In that case the Information Commissioner had determined that the information requested (about an internal BBC editorial report which came to be known as the Balen Report) was held for the purposes of journalism and therefore fell outside the scope of FOIA.
13. The BBC argued that the Tribunal did not have jurisdiction to hear Mr Sugar's appeal as, in circumstances where the Information Commissioner had determined that the BBC was not a public authority within the meaning of FOIA, it followed that the Information Commissioner could not have issued a Decision Notice within the meaning of Section 50 of FOIA, and, therefore, no appeal to the Tribunal lay against the Information Commissioner's determination.

14. The Tribunal found that it had jurisdiction as a preliminary matter and then as another preliminary matter that the information was held at the time of the request outside the derogation but then invited the parties suggest how the matter should be dealt with. In effect the Tribunal invited the BBC to claim an exemption if it so wished.
15. The BBC brought a statutory appeal and a judicial review against each of the jurisdiction and derogation decisions, Mr Sugar then brought - at a late stage - an application for judicial review against the Information Commissioner's original decision, in order to protect his position should the BBC succeed in its appeal on the jurisdictional issue.
16. The High Court allowed the BBC's appeal on the jurisdictional issue, and quashed both the Tribunal's decision that it had jurisdiction and its decision on the substance of Mr Sugar's appeal (about whether the information was held for purposes other than journalism, art or literature), on the grounds that the Tribunal had no jurisdiction to make such a determination.
17. Having allowed the BBC's appeal on the jurisdictional issue, the High Court then granted Mr Sugar permission to apply for judicial review of the Information Commissioner's original determination. The High Court gave some guidance about the approach to be taken in deciding the meaning of the phrase "for the purposes other than those of journalism, art or literature".
18. The key passages are set out below from the judgement of Davis J in the High Court:

55.....“The phrase ‘for purposes other than those of journalism ...’ has to be looked at compendiously. The word ‘journalism’ no doubt does have, if taken on its own, a reasonably clear meaning, even if any one definition may be elusive. (As for the words “art” and “literature” which, as is common ground, are not in truth relevant in this case - these are, notoriously, much less susceptible of definition.) I agree with the submissions of the BBC that journalism extends to (journalistic) activity as well as (journalistic) product. In my view, journalism at least extends to the processes of collecting, analysing, editing and communicating news. That, moreover, at least in the context of considering what is “for the purposes of journalism”, is not necessarily – though sometimes it may be – distinct from assessment, quality control or management processes, whether concurrent or subsequent, directly relating to the collecting, analysing, editing, and communicating of such news. (Conversely, I might add the BBC cannot argue that, just because much of its entire business in essentials relates to gathering and disseminating news, all information held by the BBC is necessarily within the derogation: otherwise, indeed, the inclusion of the BBC in the way specified by the language of s.7 and Part VI of Schedule 1 would be pointless). As to the words “for the

purposes of” those words – although not the same as, for example, “in connection with” – are words, in my view, capable of having a wide import. Moreover those words connote at least some subjective element on the part of the holder of the information: even if the ultimate assessment of whether or not information is held for the purposes of journalism (or, more accurately, “held for purposes other than those of journalism ...”) is an objective exercise in itself.”

....

57. *“In my view whether a piece of information is or is not “held for purposes other than those of journalism” (or, as the case may be, “art” or “literature”) ultimately involves a matter of judgment on the part of the IC by reference to the circumstances of each case. In the present case the determination of the IC would, on the view I take, have the effect of establishing whether or not there was jurisdiction to decide substantively on Mr Sugar’s complaint and to serve a decision notice. But it does not follow that the issue of derogation is one of unequivocal, bright-line interpretation: rather, in my view, it calls for an assessment of whether the conclusion was within the range of reasonable judgments. Questions of fact and degree can arise. In my judgment, and in agreement with Mr Hooper’s submission on this, the applicable approach here is that indicated by the House of Lords in R v Monopolies and Mergers Commission ex p. South Yorkshire Transport Limited [1993] 1WLR 23. That case involved a consideration of s.64(3) of the Fair Trading Act 1973, and in particular the phrase “a substantial part of the United Kingdom”. Lord Mustill pointedly declined to offer his own test “because it would substitute non-statutory words for the words of the Act which the Commission is obliged to apply, and partly because it is impossible to frame a definition which would not unduly fetter the judgment of the Commission in some future situation not now foreseen” (p31H-32A). He then went on to summarise the argument and his conclusion on it in his speech (with which the other members of the House agreed) in these terms:*

“The respondents say that the two stages of the Commission’s inquiry involved wholly different tasks. Once the Commission reached the stage of deciding on public interest and remedies it was exercising a broad judgment whose outcome could be overturned only on the ground of irrationality. The question of jurisdiction, by contrast, is a hard-edged question. There is no room for legitimate disagreement. Either the Commission had jurisdiction or it had not. The fact that it is quite hard to discover the meaning of section 64(3) makes no difference. It does have a correct meaning, and one meaning alone; and once this is ascertained a correct application of it to the facts of the case will always yield the same answer. If the Commission has reached a different answer it is wrong, and the court can and must intervene. “

“I agree with this argument in part, but only in part. Once the criterion for a judgment has been properly understood, the fact that it was formerly part of a range of possible criteria from which it was difficult to choose and on which opinions might legitimately differ becomes a matter of history. The judgment now proceeds unequivocally on the basis of the criterion as ascertained. So far, no room for controversy. But this clear-cut approach cannot be applied to every case, for the criterion so established may itself be so imprecise that different decision-makers, each acting rationally, might reach differing conclusions when applying it to the facts of a given case. In such a

case the court is entitled to substitute its own opinion for that of the person to whom the decision has been entrusted only if the decision is so aberrant that it cannot be classed as rational: Edwards v Bairstow [1956] A.C. 14. The present is such a case. Even after eliminating inappropriate senses of “substantial” one is still left with a meaning broad enough to call for the exercise of judgment rather than an exact quantitative measurement. Approaching the matter in this light I am quite satisfied that there is no ground for interference by the court, since the conclusion at which the commission arrived was well within the permissible field of judgment.”

58. *“In my view, that is likewise so here: not least because to seek judicially to define, as a matter of interpretation and in vacuo, the meaning of the phrase “held for purposes other than those of journalism, art or literature” – which the FOIA itself conspicuously has not sought to define -seems to me to be both an impossible and a futile exercise. The context and circumstances in which the issue arises need to be considered; and by reference to the factual situation in each case, the matter becomes one of assessment and judgment, albeit an assessment or judgment potentially capable of being challenged on public law grounds. The assessment – even though it might involve a decision on whether there was a complaint in respect of which the IC could serve a decision notice as to whether or not the requirements of Part I had been complied with – was an assessment for the IC to make: cf. Wade & Forsyth 9th edition at p.257ff. I have decided to give leave to Mr Sugar to expand on this point by way of amendment. I do so because it is linked to his overall argument and because there is no prejudice to the respondents in allowing it to be so raised, albeit late in the day. But even so in my view his further attempt to style the interpretation of the phrase “for purposes other than those of journalism, art or literature” as, in effect, a hard-edged “jurisdictional fact” (as he put it) and as one on which the court is free or bound to reach its own conclusion afresh is incorrect.”*

....

61....*”The IC’s unequivocal conclusion in his decision letter was that the Balen Report was held for the purposes of journalism, art or literature. The IC set out comments on the purpose of the derogation which in my view cannot validly be criticised. Nor, in my view, can there be any valid criticism of the conclusion that the terms “journalism”, “art” or “literature”, as used in the FOIA, are capable of being broad – a viewpoint with which, in fact, I myself agree. The IC then correctly directed himself that in essence the issue was whether the Balen Report was “held for the purposes of journalism”. He posed several criteria – all, in my judgment, properly assessed as relevant to that issue. One was the relationship between the Balen Report and Programme Content (which latter was agreed to be within the journalistic derogation). The IC found there to be a direct relationship. Mr Sugar challenged that finding; but it was a finding open to the IC. The IC then found that, although the Balen Report reviewed programmes that had already been produced and broadcast, the Creative Journalistic Purpose (as defined) was still present: because the Balen Report contained suggestions and ideas that might enhance journalistic standards in future productions of Programme Content (as defined); and the IC also found that the raison d’être of the report was to promote and develop the Programme Content. These were findings*

open to him. He went on further to find, in assessing what he called "the multi-purpose criterion", that the Creative Journalistic Purpose was "manifestly" the dominant purpose; that the origins of the Balen Report supported that; and that the "primary constituency" to benefit from the report were "journalists". All these findings led to the conclusion that the Balen Report was "held for the purposes of journalism".

....

62.....(iii) "Third, Mr Sugar complained that if there was more than one purpose, or if there were mixed purposes, for which the Balen Report was held then the Balen Report could not be held "for the purposes of journalism". In my view, that approach would be virtually unworkable in practice. In any event it simply is not called for by the language of the words of Schedule 1 relating to the BBC. Nor would it fit with one clear broad underlying purpose of the FOIA, viz. in protecting freedom of journalistic expression for public media authorities such as the BBC. Mr Hooper and Miss Carss-Frisk were in fact content with the application of a "dominant purpose" test as applied by the IC (and also by the Tribunal). Given that, I need not express any view of my own as to whether or not some lesser degree of journalistic purpose (provided that it was a significant purpose) might suffice."

19. In summary, the main propositions described above are:

- (1) The phrase "for the purposes other than those of journalism...." has to be looked at compendiously (Paragraph 55);
- (2) Journalism extends to (journalistic) activity as well as (journalistic) product (Paragraph 55);
- (3) The words (for the purposes of) are capable of having a wide import (Paragraph 55);
- (4) Those words denote at least some subjective element on the part of the holder of the information, even if the ultimate assessment of whether or not information is held the purposes of journalism is an objective exercise in itself (Paragraph 55);
- (5) Whether a piece of information is or is not "held for purposes other than those of journalism...." (or, as the case may be, "art" or "literature") ultimately involves a matter of judgement on the part of the Information Commissioner by reference to the circumstances of each case (Paragraph 57);
- (6) Attempting to define, as a matter of interpretation and in fact, the meaning of the phrase "held for purposes other than those of journalism, art or literature" is both impossible and a futile exercise (Paragraph 58);

- (7) In determining whether information is “held for purposes other than those of journalism....” it may be relevant to consider factors such as the relationship between the information and Programme Content; the Creative Journalistic Purpose; the origins of the information and the primary constituency to benefit from it (Paragraph 61); and
- (8) Where information is held for more than one purpose or there are mixed purposes, it is appropriate to apply the dominant purpose test (and it may even be that some lesser degree of journalistic purpose, provided that it was a significant purpose, might suffice) (Paragraph 62 (iii)).
20. The “Creative Journalistic Purpose” had been defined by the Information Commissioner as being “to protect journalistic, artistic and literary integrity by carving out a creative and journalistic space for programme makers to produce programmes free from the interference and scrutiny of the public”. “Programme Content” had been defined by him “to include all types of output which the BBC produces and broadcasts”.
21. The background history of how the BBC came to acquire the “derogation” itself is comprehensively summarised in the Tribunal’s original *Sugar* decision. This was approved by Davis J in Paragraph 9 of his decision in the High Court. While the Tribunal’s decision – in the light of subsequent appeal proceedings – is historic, the analysis set out in Paragraphs 18 to 35 of that decision provides a definitive background note for all subsequent actions that have and will refer to this issue.
22. In the original *Sugar* decision the Tribunal found that references to material in Hansard did not satisfy the criteria set out in *Pepper v Hart* and, as a consequence, it had not taken Hansard references into account.
23. Mr Hooper – who had agreed with the BBC on behalf of the Information Commissioner on this point in the original *Sugar* decision and maintained that view in the High Court – sought to reverse his position in respect of the instant appeal.
24. This Tribunal finds that there is nothing that has been presented in this appeal that warrants a change of view in relation to the material in

Hansard. It does not satisfy the criteria set out in *Pepper v Hart* and has not been taken into account.

Summary of Evidence presented at the Preliminary Issues Hearing

25. The Tribunal heard evidence from 12 witnesses called by the BBC. Two further witnesses' evidence was tendered in witness statements. All the witnesses were employees of the Corporation. Nine witnesses were individuals involved in the production of programme content and four were involved in finance and accountancy roles. Five witnesses gave their evidence in closed session.
26. The Tribunal notes that no witnesses were called to give comparative evidence from other bodies listed in Part VI of Schedule I FOIA subject to the same derogation (The Channel Four Television Corporation and Sianel Pedwar Cymru (S4C)).
27. Much of the evidence that was confidential related to material annexed to witness statements and subsequent oral evidence which, in itself, did not involve confidential material. This material focussed in nearly every case – except in matters relating to Northern Ireland - on the witnesses' emphasis on the connection between financial information and programme content.
28. The Tribunal has not felt it necessary to set out the detail of the evidence heard in closed session in a Closed Annexe to this decision. It has taken everything put before it into account. It has proceeded, as far as possible, to deal with evidence that was open and public. Given the number of witnesses that it heard from or read, the Tribunal does not propose to set out in detail all of the evidence that it received because, insofar as that evidence is open, it is a matter of public record.
29. Some of the confidential closed material may be relevant at the next stage of the proceedings in the full hearing of each of the individual cases in respect of exemptions under various sections of FOIA. The Tribunal, however, has been careful to consider the evidence presented to it at this stage only in relation to the issues relating to the derogation and whether the information requested was held for the purposes of journalism, art or literature.
30. The evidence presented to the Tribunal in relation to the 2006 Turin Winter Olympics came from Mr Dominic Coles (Chief Operating Officer for BBC Journalism, News, Sports and the Nations and

Regions), Mr David Murray (Senior Rights and Commercial Executive in the Sports Rights Department of BBC Sport), Mr Richard Jones (Finance Partner for BBC Sport) and Mr Dave Gordon (Head of Major Events for BBC Sport). They all emphasised the "rolling" nature of the competitive bidding process where figures for one particular event helped inform the bidding stance for other events often in an immediate and dynamic way.

31. Mr Gordon had overall responsibility for the broadcasting of the Olympics in Sydney (2000), Salt Lake City (2002), Athens (2004), Turin (2006) and Beijing (2008) and had worked at the BBC for 36 years. His first involvement as a BBC employee was with the 1976 Montréal Olympics. He said that decisions in respect of the budget of the BBC's coverage of a major sports event such as the Turin Olympics were a fundamental part of the creative process and were central to the creative and editorial decisions taken about how such events were covered by the BBC, which was a world-renowned broadcaster of major sports events. One of the key creative decisions taken in respect of the coverage of the Turin Winter Olympics was the location for the presentation of the games.
32. *"The decision was taken to present the games from Italy rather than presenting the coverage from studios in the United Kingdom. This is in line with the ongoing ambition of BBC Sports to take the viewer to the location of the action itself to give an enhanced sense of feeling of location of the event. This led to further decisions in respect of the split of the presentation between Sestriere, where most of the mountain winter sports were taking place, and Turin, the host city of the games and where other competitive events were taking place. These choices were directly informed by the cost of presenting the games in this way, and the impact those costs had on the overall budget,"* he said (Dave Gordon Witness Statement Paragraph 18).
33. *"In my view not only is the setting of the overall budget of the coverage of the games a creative decision but every item of expenditure within the overall budget reflects a creative decision as to how a major event such as the Olympics will be covered. The budget is the result of an incredibly complex series of choices and decisions as to how the broadcasting of the games will be produced. Financial information concerning the cost of the games is at the heart of the planning and delivery of content, and as such, a creative decision on the basis of the Information Commissioners own characterisation,"* he added (Dave Gordon Witness Statement Paragraph 19).

34. His conclusion was that the BBC's production costs of major sporting events such as the Olympics were not a mechanical figure but were a by-product of the creative decision to broadcast the games. The production budget formed an integral part of the decision to cover the games and - in his view - carried just as much creative value as the decision to bid for the rights to broadcast the event.
35. In her evidence Ms Claire Evans, Head of Operations and Business Affairs for Commissioning in the Vision Group of the BBC, set out the background for the way in which she and others like her operated. She explained that the Vision Group of the BBC is made up of three sub departments: Fiction, Knowledge and Entertainment.
36. *"There is a separate Head of Commissioning for each of Knowledge and Entertainment. As part of my role I have direct responsibility for commissioning in Fiction. I have been in my current role for 18 months. My previous roles at the BBC have been Head of Channel Management on BBC2 and Head of Operations and Business Affairs for entertainment. I trained as an accountant with Stoy Hayward,"* she said (Claire Evans Witness Statement Paragraph 4).
37. *"My department runs teams that work with the genre commissioning teams for each BBC channel. My department's teams have three main roles:*
- (i) Supporting the genre commissioning process: this involves supporting ideas for programmes from conception through development to the point of commissioning the programme. This developmental work constitutes a large majority of how the teams' time is spent.*
 - (ii) Managing finances and allocating resources: this involves allocating the total budget which Division is allocated for Fiction, Knowledge and Entertainment to commissioned programmes within those genres, according to the editorial specification required by the commissioner.*
 - (iii) Carrying out the contractual work and programme deals that arise as a result of commissioning programmes: this involves entering into contracts with independent production companies and the acquisition of series and individual programmes from in-house*

production teams with Fiction, Knowledge and Entertainment," she added (Claire Evans Witness Statement Paragraph 4).

38. In her role she had direct responsibility for determining the commissioning budget for EastEnders on BBC One and had overall responsibility for determining the commissioning budget for Top Gear on BBC Two. She explained that the role of the Programme Commissioner was to develop, inspire and create a group of programme ideas (a "slate") to enable the delivery of creative ideas sought by the controllers of each BBC channel and to make decisions about which programs to commission ("greenlight"). This also involved deciding on the resources to allocate to each programme within a fixed pool of funding.
39. *"Those judgements and decisions in respect of the allocation of financial resources within the commissioning process are in my view creative, editorial decisions, just as much as the decision to "greenlight" a particular programme is itself a creative decision,"* she said. (Claire Evans Witness Statement Paragraph 9).
40. *"The commissioners decided what sense of scale and ambition a particular programme will have, based on what they think it requires to deliver the essential appeal of an idea to the audience, and the budget allocated to that programme will reflect that ambition. The financial resource which is allocated to a particular programme is completely wrapped up in the creative process."* she said. (Claire Evans Witness Statement Paragraph 10).
41. She gave the example of changing the nature of Top Gear on BBC Two from a *"primarily consumer style show about motoring to being in essence an entertainment show which has motor vehicles as its focus. That creative decision to change the nature of Top Gear involved the decision that the budget for the show would be increased significantly as a result of the revised remit and ambition of the programme. That creative decision is intrinsic to the creative process involved in creating Top Gear, just as much of the decision to commission the programme itself. The effect of allocating more to the budget of Top Gear within an overall fixed budget has the consequential effect that there is less resource within the overall budget to be spent on other Entertainment shows."* (Claire Evans Witness Statement Paragraph 12).
42. Commenting on the Information Commissioner's view that the requested financial information served a number of direct purposes

which were operational in nature rather than being journalistic, artistic or literary, she stated: *"For example, the IC states that the information is used to budget, monitor expenditure, identify opportunities to improve efficiency and comply with legal obligations."* (Claire Evans Witness Statement Paragraph 19).

43. In terms of the budget, she believed that the fixing of the budgets for programmes formed part of the creative and editorial process. Budgets allocated to previous series - either of the same or similar programmes - were useful shorthand for discussing the editorial specification of programmes under discussion or in the process of being commissioned. That was the main use of previous budget information.

44. Dealing with the monitoring of expenditure she said that the amount spent on the programme was constantly monitored by the production team to ensure that they kept within the production budget for the programme or a series of programmes. If the production overspent in one area it would have to reduce the spending in another area to keep within budget. That was within the overall budget for the programme and, in her view, *"formed part of the creative process"* (Claire Evans Witness Statement Paragraph 22).

45. In terms of identifying opportunities to improve efficiencies she accepted that the information was held in part for that purpose. *"...in my view this information informs future decisions within the commissioning process itself which, as I have explained, is fundamental to the editorial, creative decisions taken in respect of the allocation of financial resources,"* she said (Claire Evans Witness Statement Paragraph 23).

46. Ms Jane Tranter also gave evidence. She is Controller of the BBC Fiction Department within the BBC's Vision Group which is the group responsible for all of the BBC's televised output. Ms Tranter is responsible for Drama Commissioning, Comedy Commissioning, Programme Acquisitions and the BBC's Film Department.

47. It was her opinion that the Information Commissioner had greatly oversimplified the way in which financial information about programmes was used and held by the BBC. It was not simply the case that financial support was necessary to produce programme content. *"How financial resources within an overall budget are*

allocated to programmes or a series of programmes is directly informed by the editorial and creative nature and scope of those programmes. The annual budget which is allocated to a particular programme or series of programmes within Drama, for example, represents a creative and editorial decision and will have a direct impact on the final programme or series of programmes that is viewed by the audience. Such decisions also directly influence how much is available to be allocated within the departments' budgets to other series or programmes," she said (Jane Tranter Witness Statement Paragraph 13).

48. In her role as Controller of the BBC Fiction Department she had overall responsibility for the annual budget of EastEnders and that included the staff costs although she did not see the annual budget broken down to that level of detail.

49. She said that EastEnders was by far the most popular continuing drama series on the BBC and was considered one of the flagship programmes of BBC Drama. It was able to attract the hard to reach audience of school-age children aged between 11 and 18.

50. Budgets and the budget process involved constant evaluation of the editorial remit and benchmark price of the drama to be scheduled at different times within programme schedules. The BBC disclosed large amounts of information in its annual report and accounts about the direct cost of making programmes per BBC television channel and the costs per hour across the BBC's television channels.

51. In Ms Tranter's view: *"...the BBC would suffer serious prejudice to its editorial freedom if it had to disclose the commissioning budgets for individual dramas and other programmes within the overall budget for Drama Commissioning.... The amount of money which is invested in a drama is not the only factor which is determinative of how the BBC assesses the value of the drama. Other factors which are taken into account are, for example, how the drama fulfils the public purposes of the BBC and in some cases reaching particular sections of the viewing public.... Disclosure of that financial information in isolation would expose those editorial decisions to scrutiny by the public and the press without any of the context or the reasons for which those decisions were taken. It would be impossible to inform every licence fee payer of the proper context of those decisions and what the financial amounts actually represent.... I understand that neither Channel Four nor Channel Five would have to disclose financial*

information of this kind as they do not commission productions in house.” (Jane Tranter Witness Statement Paragraphs 22-26).

52. Ms Tranter was asked by Counsel for the BBC what would happen if there was no budget set for a particular programme and whether this would have any impact on the quality of the product.
53. *“If you didn't give a team a price to go out and make that drama for, they could just go out and make it. They could shoot every element of the script and furnish up every element of the script in a particular way, so what you got back from that script was a very, very ornate pair of brocade Victoriana-type curtains for example, when actually what I had intended was a pair of rather modern, minimalistic, all Scandi-designed wooden Venetian blinds. There are two ways of going. One is more minimalist, a more pared-back kind of way and the other is something altogether more ornate. Part of the whole point of giving people amounts of money to make programmes is because it is essentially part of an overall tone discussion about the programme. It is as critical as it is in the choice of what form you film it on, whether you film it on 35mm or whether you film it on video. It is all part and parcel of the same discussion about what your end piece of work is going to look and feel like,”* she replied (Transcript Day 2 Page 83 Line 18).
54. Mr Peter Horrocks, Head of Multi-Media News in BBC News, explained that since September 2005 he had had responsibility for the news output, including its overall budget, on television. His view was that, if the BBC was ordered to disclose the annual budget for Newsnight and other news programmes, his principal concern would be that an analysis of annual budgets for Newsnight in respect of the period of several years would lead to the editorial freedom of the BBC (the creative space which the Information Commissioner describes) being prejudiced and restricted.
55. *“In addition to the large amount of financial information which is published in the Annual Report and Accounts about the costs of programmes by genre and by service licences, the BBC would have to account for and be drawn into public debate over editorial decisions in respect of the allocation of financial resources on a yearly basis between individual news programme budgets,”* he said (Peter Horrocks Witness Statement Paragraph 15).

56. *"Although the requested information in this appeal relates only to the total annual budget of Newsnight, rather than line by line items.... issues would arise throughout news programming in the BBC if line by line items were disclosed, which would impinge upon the editorial and creative space of programme makers even further than disclosure of a total budget. For example, the Tribunal will be aware of the extent of lobbying which the BBC receives on issues such as the impartiality of its reporting of the Israeli/Palestinian conflict from the appeal brought by Steven Sugar, in which case the High Court accepted that the information requested in that case, being an output review, was held for the dominant purpose of journalism. Were financial information on particular news programmes or programme items to be disclosed the creative space, which the High Court accepted should be protected, would be very considerably encroached upon,"* he added (Peter Horrocks Witness Statement Paragraph 16).

57. In terms of the requests in relation to Northern Ireland, the Tribunal heard closed evidence from Mr Peter Johnston (Controller of BBC Northern Ireland since 2006) Mr Andrew Colman (Head of News and Current Affairs, BBC Northern Ireland since March 1998) and Mr Stephen Loughrey (Director of BBC's Nations and Regions since May 2000). All three made it clear that the sensitivities involved in producing balanced news and current affairs programmes in Northern Ireland were a significant and additional factor in the ways in which they had to conduct their jobs and fulfil their responsibilities. The BBC had an obligation to reflect both sides of the community fairly and it did so. But it was often the case that costs incurred in reporting similar news items differed from item to item due to various circumstances, in particular making certain that there was unbiased reporting.

58. Responding to queries about production costs in relation to line by line enquiries could mean that the costs would be submitted to close scrutiny with a view to analysing the fairness of the BBC's approach to different sides of the community. Disclosing the costs of individual programme items would compromise the BBC's ability to respond to news stories as they emerged and make decisions based solely on editorial merit.

Submissions

59. Ms Gallafent, for the BBC, submitted that it was appropriate and relevant to consider the post-enacting history of FOIA for reasons set out in *Bennion: Statutory Interpretation* 5th edn. Paragraph 231:

“Contemporary exposition helps to show what people thought the Act meant in the period immediately after it was passed. Official statements on its meaning are particularly important here, since every Act is supervised, and most are originally promoted, by a government department which may be assumed to know what the legislative intention was.”

60. While such statements were not of any binding authority, they could be taken into account as persuasive authority on the legal meaning of the Act's provisions (Bennion p.702).
61. She drew attention to a statement of this type in a letter dated 9 September 2003 from the Department of Constitutional Affairs ("DCA") to Masons Solicitors (acting on behalf of the BBC). The DCA explained that the intention behind the derogation was to protect freedom of expression and the rights of the media under Article 10 of the ECHR, as well as to ensure that FOIA did not place public sector broadcasters at an unfair advantage compared to their commercial rivals. This emphasised that one element of the Parliamentary intention was to ensure that FOIA did not disadvantage the BBC (and other public sector broadcasters) vis-a-vis their commercial rivals. Those intentions were relevant to and informed the approach that the Information Commissioner ought to have taken when considering whether financial information in particular is held for the purposes of journalism art or literature.
62. The BBC's position on the proper approach to the application of the derogation was as follows:
- (1) Firstly, the Information Commissioner should consider whether the particular information requested is held at all for the purposes of journalism, art and literature. In so doing, it may be relevant to consider the following factors:
 - (a) the purpose which the information was created;
 - (b) the relationship between the information and Programme Content (that is, all types of output which the BBC produces and broadcasts);
 - (c) the Creative Journalistic Purpose (that is, to protect journalistic, artistic and literary integrity by carving out a creative and

journalistic space programme makers to produce programmes free from the interference and scrutiny of the public); and

(d) the users of the information.

(2) Secondly, if it is so held, the Information Commissioner should consider whether the information is also held for other purposes.

(3) Thirdly, if the Information Commissioner finds the information is held for more than one purpose, he should consider which purpose is dominant. In doing so, it may be relevant to consider:

(a) the relationship between the different purposes; and

(b) by whom and for what purpose is the information used or reviewed for each of the different purposes.

63. She conceded that, in principle, there was probably little difference between the BBC's position and that of the Information Commissioner save on the dual aspect of the legislative purpose (creative space and preventing the BBC suffering an unfair disadvantage compared to its commercial rivals).

64. She submitted that the Information Commissioner's approach was flawed in three specific areas. He had failed properly to assess the extent to which information was in fact held for the purposes of journalism, art or literature; he had failed properly to assess which of the purposes he had identified, including those of journalism, art or literature, was, as a matter of fact, predominant and finally he had erred in his approach in considering what constituted a creative decision and/or "sufficient journalistic application".

65. At the root this appeared to derive from the Information Commissioner's "class-based" approach to the information and - specifically - an approach that held that financial information was held for predominantly operational purposes whatever it related to (a paperclip or the cost of all programming on BBC 1).

66. She pointed out that in considering whether the Information Commissioner's Decision Notices were not in accordance with the law the Tribunal had to consider whether the provisions of FOIA had been correctly applied. The Tribunal was not bound by the Information Commissioner's views or findings but had to arrive at its own view,

giving such weight to the Information Commissioner's views and findings as it saw fit in the particular circumstances (*Guardian Newspapers & Brooke v Information Commissioner and BBC EA/2006/0011 & 0013*).

67. That review could result in the Tribunal finding that the Information Commissioner had not made any errors of legal reasoning because, having heard new evidence in the appeal hearing, it made findings of fact which were different from those made by the Information Commissioner.
68. The role of the Information Commissioner in respect of the appeal was limited. Having made his decisions recorded in the Decision Notices he was *functus officio* in respect of those and it was not open to him to re-take or revise his formal positions. Significantly in these appeals, because none of the original complainants had appeared in the proceedings, it could not be the Information Commissioner's role to adduce additional evidence in response to any new evidence served by the BBC.
69. She urged the Tribunal not to seek to identify some sort of bright white line dividing information that was held for the dominant purpose of journalism, art or literature, and that which was not. As has been noted in the High Court, whether a particular piece of information was held for purposes other than journalism, art or literature depended on a judgement to be exercised on the basis of the circumstances of each case. Also the requestors had primarily sought financial information relating to programming (production, rights and talent costs).
70. Mr Hooper, on behalf of the Information Commissioner, highlighted the fundamental nature of the divide created by the derogation. Information falling outside the derogation still had the protection of FOIA in respect of the exemptions in s 12, s 40 and s 43. A finding that the information fell within the derogation meant that FOIA could not ever require disclosure, irrespective of whether the information could properly be said to be in any way sensitive and irrespective of the strength of any public interest in disclosure.
71. In addition, any finding by the Commissioner that the requested information fell within the derogation left the complainant without recourse to the Information Tribunal. The only way of challenging that

situation was by way of Judicial Review with the associated cost consequences and greater levels of formality.

72. The Information Commissioner accepted that the disputed information was *in part* held for the purposes of "journalism, art or literature" but had concluded that the disputed information was not the product of purely creative or journalistic decision-making and that it was predominantly held for other "operational" purposes particularly:

- (i) Enabling the BBC to monitor its expenditure and remain within budget;
- (ii) Enabling the Governors (now the BBC Trust and Executive Board) to perform their functions under the BBC's Royal Charter; and
- (iii) Enabling the BBC to generate the financial information necessary for its annual accounts.

73. The Information Commissioner was not saying that all financial information necessarily fell outside the BBC's derogation and remained committed to considering the evidence on a case-by-case basis. In an appropriate case, and given sufficiently cogent evidence, the Commissioner might reach a contrary view.

74. The ethos behind FOIA (as evidenced in *Office of Government Commerce v Information Commissioner [2008] EWHC 737 (Admin) Paragraph 71*) was :

"It can be said that there is an assumption built into FOIA, that the disclosure of information by public authorities on request is in itself a value and is in the public interest, in order to promote transparency and accountability in relation to the activities of public authorities."

75. Either the BBC was making proper use of its financial resources or it was failing so to do. If it was the former then disclosure of that information should not cause the BBC to take a different editorial course. The BBC was the largest broadcaster in the world and was well able publicly to defend its financial decisions. If for any reason the BBC was inappropriately using its resources there was no good reason to keep the information relating to this from the public (not least given that it was the public that provided the BBC with its funding). While the circumstances of news programming in Northern Ireland gave rise to particular sensitivities, that analysis applied equally there.

76. As the derogation was to be construed relatively broadly (*Sugar* Paragraphs 55 and 61) the Commissioner accepted that it might extend beyond the "core" types of information such as scripts, research notes and audio recordings. The derogation however could not cover all the information that the BBC held. In particular it was the Commissioner's case that the BBC could not claim that, because its business was in essence the production of creative or journalistic programmes, all information was necessarily within the derogation. If that were the case then including the BBC in Part VI of Schedule 1 of FOIA would be pointless.

77. Mr Hooper urged a construction of the derogation which envisaged that financial information was generally disclosable upon request under FOIA (save where an exemption applied) as this would provide an explanation as to why Parliament included public service broadcasters within FOIA in the first place. Given that public service broadcasters spent money, there was an obvious value in bringing financial information (as opposed to creative or journalistic product) within the FOIA regime.

78. The Commissioner's view was that the information requested fell outside the derogation because the financial information was held for three predominantly operational purposes: monitoring expenditure to ensure that matters remained within the budget, oversight under the Royal Charter and the production of annual accounts.

Reasons

79. The Tribunal makes its findings on the basis that the derogation should be interpreted in accordance with its plain and ordinary meaning in the light of its two-fold legislative purpose. The first part of that purpose is in relation to the protection of freedom of expression and the rights of the media under Article 10 of the European Convention on Human Rights and the second part was to ensure that FOIA did not place public sector broadcasters at an unfair disadvantage to their commercial rivals.

80. The purpose of the derogation is to protect journalistic, artistic and literary integrity and to preserve a "creative space" in which programme makers can continue their core activities free from outside interference.

81. The Tribunal was invited by the BBC to consider the effect of the DCA letter dated 9 September 2003 to Masons Solicitors (acting on behalf of the BBC). The DCA explained that the intention behind the derogation was to protect freedom of expression and the rights of the media under Article 10 of the ECHR, as well as to ensure that FOIA did not place public sector broadcasters at an unfair advantage compared to their commercial rivals. The Tribunal finds that this was a letter sent to a private firm of solicitors and it was not something that was published to the world at large. It was sent in 2003 in respect of an Act passed in 2000.
82. For all these reasons the Tribunal finds that the letter is not a persuasive authority on a point of statutory construction. To find otherwise would allow the Executive to issue private letters to individuals or corporations some considerable time after legislation had been enacted in terms that generated persuasive authorities about the meaning of Acts of Parliament about which the public would be ignorant. In principle and in practice that cannot be acceptable in relation to this letter or any other like it generated by the Executive in these circumstances.
83. It was clear from the evidence presented by the BBC's witnesses that its employees – without exception – believe that the ordinary meaning of “for the purposes of journalism art or literature” permeated all levels of programme making to the extent that the majority of the work of those witnesses – and their colleagues - was for the purposes of journalism, art or literature and therefore covered by the derogation.
84. If taken at face value it would have the effect of excluding most of the BBC's management information from the remit of FOIA.
85. The Tribunal finds that the witnesses' evidence was presented with an honest and genuine belief but with a degree of subjective bias that requires the Tribunal to stand back and assess more objectively the thrust of what was being said against the relative elements of the derogation.
86. The Tribunal agreed with the Information Commissioner's approach that, if such a very broad definition was intended, there would have been little point in including the BBC in Schedule 1, Part VI of FOIA. The BBC could have been omitted completely from the scope of the Act.

87. Many of the witnesses were asked, by Counsel for the Information Commissioner and the Tribunal, whether – given the BBC’s position as the world’s major broadcaster – errors of perception or context in the publication of the information that the BBC sought to withhold under the derogation could not be corrected by subsequently broadcast material or information. The general response was that, once the information was out in the public domain, then the ability of the BBC to explain, control or otherwise contain its context had vanished and could not be regained.
88. In all but one request the Tribunal has found that the Information Commissioner’s decisions – as set out in the relevant Decision Notices – were correct. They were (per Davis J at Paragraph 59 of *Sugar*) decisions which are “*lawful and rational... properly open to him on the material before him*”.
89. The Commissioner has, in effect, developed what the Tribunal will refer to as a “cumulative predominant purpose” test. He has measured the various purposes – including those relating to journalism, art and literature – for which the information was held. It is properly open to him to do this aggregation and balancing exercise in relation to each request as a test to see whether the derogation applies. He must do it, in fact, for such requests now and in the future.
90. This is not an area that permits any interplay with public interest factors that may exist when looking at the operation of exemptions under FOIA.
91. The Tribunal accepts the Commissioner's view that financial information can reflect creative (or journalistic) decisions without itself being creative (or journalistic) in nature. It agrees that the total budget of the BBC's programme coverage of the Turin Olympics – for instance - is not a "creative" decision in and of itself but the financial consequence of a large set of interconnected creative decisions about the precise nature and form of the coverage.
92. By the same token the budgets for other less complex programming are a financial reflection of creative decisions on the part of programme commissioners about the "scale and ambition" of the programmes at issue.

93. Financial information plays a role in ensuring that the BBC keeps within its financial limits and make sufficient and proper use of its financial resources. Financial information assists programme commissioners and others to understand what a given sum of the money can be expected to achieve in terms of programme output and also how much money may be required to deliver a particular creative vision.
94. Applying what amounts to a “cumulative predominant purpose” test to the *Jackson* request, made just after the conclusion of the 2006 Turin Winter Olympics it is clear to the Tribunal that the requested financial information is held - as well as for journalistic, artistic and literary purposes – on both points (the bid and the production costs) predominantly for operational purposes including budgeting, monitoring expenditure, identifying opportunities to improve efficiency and to comply with legal obligations under the Royal Charter.
95. This financial information supported the delivery of programme content, enabled the BBC to monitor its expenditure against its agreed budgets for the year, enabled the BBC to predict with some certainty the future costs of producing programmes in-house, contributed to the BBC's obligations to publish annual accounts and the ability of its Governors (now the BBC Trust) and the Executive Board to perform their respective functions and operational duties under the Royal Charter. It was therefore held by the BBC for predominantly operational purposes including financial, management and administrative purposes and not predominantly for journalism, art or literature.
96. Applying the same test to the *Gordon* request produces, in the Tribunal's view, a slightly different result. In relation to the request for the annual gross salary paid by the BBC to each of 10 named individuals the Tribunal finds that this request falls within the derogation.
97. All the individuals are journalists and/or broadcasters in Northern Ireland. In a context of Northern Ireland - with a significantly smaller pool of professional talent - the elements of engaging talent constitute a creative decision relating to journalism, art or literature which is predominant over the basic financial nature of the request.
98. A decision on how much to pay talent is ultimately determined by an individual's creative contribution. The operational purposes for which the financial information about these talent costs is held are not the

predominant reason for their existence. For those reasons on this point the Tribunal has substituted its own decision notice for that of Information Commissioner.

99. In respect of all the other items in the *Gordon* request the Tribunal agrees with the Information Commissioner that the predominant purpose of that information is to support the delivery of programme content, to enable the BBC to monitor its expenditure against its agreed budget for the year, to enable the BBC to predict with some certainty the future costs of producing programmes in-house, contributing to meeting the BBC's obligations to publish annual accounts and the ability of the BBC's Governors (now the BBC Trust) to perform their respective functions and operational duties under the Royal Charter.

100. In respect of the *Goslett* request, seeking financial information about the budget for *Top Gear*, *EastEnders* and *Newsnight* the Tribunal agrees with the Information Commissioner that the predominant purpose of those items of information being held by the BBC relate to its operational purposes - including budgets, monitoring expenditure, identifying opportunities to improve efficiency and to comply with legal obligations - and outweighed the journalistic, literary and artistic purposes contended in this appeal.

101. If the BBC did not hold this information relating to the cost of in-house productions it would have a prejudicial effect on the ability of the Governors and Executive Board in their performance of their respective functions and operational duties under the Royal Charter. If the BBC failed to hold information related to business costs that practice would be incompatible with the most basic business and accounting practices and would absolutely affect the administrative, business and financial operations of the BBC.

102. Finally in relation to the *Trice* requests - seeking financial information about the total annual staff costs of *Eastenders* and the range of contract values as a minimum and maximum for *Eastenders* - the Tribunal agrees with the Information Commissioner that the predominant purpose of those items of information being held by the BBC was for operational purposes and outweighed the journalistic, artistic or literary purposes. It was information used to budget, monitor expenditure, identify opportunities to improve efficiency and to comply with legal obligations.

103. The annual staff costs and contract value maxima and minima support the delivery of programme content, enable the BBC to monitor its expenditure against its agreed budget for the year, enables the BBC to predict with some certainty the future costs of sending staff overseas, contributes to meeting the BBC's obligations to publish annual accounts and the ability of the BBC's Governors (now the BBC Trust) and the Executive Board to perform their respective functions and operational duties under the Royal Charter. The total annual staffing costs and range of contract values were held for predominantly financial and administrative purposes and outweighed any creative purpose.

104. The decision of the Tribunal is unanimous.

Post Hearing Matters

105. The composition of the Tribunal had been specifically arranged so that the same members could hear both the Preliminary Issue and if needed – as a result of its decisions on the Preliminary Issue – the full hearing of each of the four requests.

106. To that end, in Pre-Hearing directions, the diary commitments of all relevant Counsel have been accommodated and an initial four days set aside (Monday 15 December - Thursday 18 December) for that.

107. The Tribunal indicated that the sequence of the full hearings in December did not need to follow the chronological sequence of the appeals themselves.

108. After the Tribunal had reached its decision but before it had been promulgated it received from the BBC a faxed letter dated 28 October 28 2008. This letter invited the Tribunal to consider the effect of a “closure letter” the BBC had just received from the Information Commissioner and whether it would be assisted by further submissions on this issue.

109. The two core paragraphs of that letter, from Mr David Carrington at the BBC Litigation and Intellectual Property Department are as follows:

“The letter was issued in response to a request for the number of reporters and other personnel sent by the BBC to cover the Madeline

McCann story, and the estimated costs of coverage, including travel, accommodation and expense allowances. The IC held that the information fell within the derogation (i.e outside the scope of FOIA), on the basis that the decision as to how many reporters to send and the resources to be allocated to a given story is an editorial decision. Moreover, the IC accepted that an editorial decision to cover a story is always linked to some degree with financial considerations in relation to the resource allocated to it, that the two cannot be separated, and that such decisions are primarily based on the journalistic importance and merit of a given story and are not therefore primarily financial.

“This position is entirely consistent with that adopted by the BBC on these appeals. Two points in particular should be noted. First, the IC, correctly, did not decide that it was necessary for the BBC to demonstrate that prejudice would arise if the information were to be disclosed: that is clearly implicit within the notion of editorial decision making. Secondly, the IC's decision does not depend upon the particular facts of the case (i.e. the coverage of one particular story rather than another). There is therefore no principled or factual distinction to be drawn between the information requested in this case and that requested, at least in so far as it represents line by line production costs, and, the BBC submits, by parity of reasoning in respect of total production costs, in the pending appeals.”

110. The Tribunal responded to Mr Carrington, thanking him but rejecting his suggestion. It pointed out that it had already concluded its decision although minor editorial and proofing work was happening ahead of its promulgation.

111. The Tribunal was not persuaded - for the following reasons - that it should receive further evidence or submissions on the new decision by the Information Commissioner. The new decision was not binding on the Tribunal and was not a matter which the BBC itself would be appealing. The Tribunal's decision had already been made and the evidence had concluded. There needed to be a proper degree of certainty, when a Tribunal has finalised its decisions - but was at the final editorial stage - that matters could proceed to promulgation.

Dated 1 November 2008

Signed

Robin Callender Smith
Deputy Chairman