

Information Tribunal

Appeal Number: EA/2005/0032

Freedom of Information Act 2000 (FOIA)

**Preliminary Hearing heard
at Procession House London
on 14 and 15 June 2006
and at 46 Bedford Square London
on 5 July, 2006**

Decision Promulgated

29th August 2006

Before

**JOHN ANGEL
Chairman
Henry Fitzhugh and John Randall
Lay Members**

Between

STEVEN SUGAR

Appellant

And

THE INFORMATION COMMISSIONER

Respondent

And

THE BRITISH BROADCASTING CORPORATION

Additional Party

Representation:

For the Appellant: in person

For the Respondent: Mr Paul Nicholls

For the Additional Party: Ms Monica Carrs-Frisk QC and Ms Kate Gallafent

Decision

At this preliminary hearing the Tribunal finds that at the time of the request made by Mr Sugar to the BBC for a copy of the Balen Report it was held for purposes other than those of journalism, art or literature.

The Tribunal substitutes a partial decision notice to this effect and requires the parties, within 20 days of the date of this decision, to provide written submissions as to how they consider the Tribunal should now best dispose of the appeal.

Reasons for Decision

The preliminary issue before the Tribunal

1. On 21 March 2006 the Tribunal ordered that two preliminary issues be considered as follows:
 - (a) whether the Tribunal had jurisdiction to hear the appeal and if it found that it did have jurisdiction then the Tribunal would consider the second preliminary issue, namely
 - (b) whether the Balen Report, the information requested by the Appellant under s1(1) the Freedom of Information Act 2000 (FOIA) in this appeal, was held by the British Broadcasting Corporation (the BBC) for the purposes of journalism or for some other purpose within the meaning set out in Schedule I Part VI to FOIA.
2. The Tribunal already having found that it has jurisdiction, now turns to the second preliminary issue.
3. It should be noted that the Tribunal holds the Balen Report in confidence in accordance with an order of 21 March 2006.

The request for information

4. On 8 January 2005 Mr Steven Sugar (Mr Sugar) requested by letter to the BBC “*a copy of the report by Mr Michael Balen regarding the BBC’s news coverage of the Middle East, in particular the conflict between Israel and the Palestinians.*” He continued “*I understand from press comment about this report that it was provided to BBC management in the last few months of 2004*”. Mr Balen’s actual name is Malcolm Balen (Mr Balen).
5. On 11 February 2005 Miss Liz Waite from Information Policy and Compliance BBC Freedom of Information department emailed Mr Sugar informing him that the information he requested was not covered by the Freedom of Information Act 2000 (FOIA). She continued:

“Information about BBC programmes, content and their production is not covered by the Act. The impartiality of our journalism is an important part of the production. (Schedule 1 of the Act says that the BBC is covered in respect of information held for purposes other than those of journalism, art or literature).”
6. By email dated 11 February 2005 Mr Sugar asked the BBC to review its decision. The decision was upheld on 16 March 2005.
7. Mr Sugar complained to the Information Commissioner (IC) by letter dated 18 March 2005. The IC issued a provisional decision on 24 October 2005 (the Provisional Decision) indicating that the IC was inclined to conclude that the BBC was correct to have “applied the derogation” to the request. On 2 December 2005 the IC issued a final decision in relation to the request stating that :

*“(i) the Balen Report is held for the purpose of journalism, art or literature: and
(ii) the BBC has correctly applied Part VI of Schedule 1 to the Act.”*

The statutory framework

8. S.1 FOIA sets out the general right of access to information held by public authorities. S.1(1) states
 - (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.
9. A “public authority” is defined in s.3 FOIA. S. 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.

(Section 4(4) is not relevant to this appeal)

10. S. 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.

11. 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.

12. The parties agree that the particular derogation with which this appeal is concerned is that of “journalism”.

Journalism

13. FOIA does not define “journalism”. The Oxford English Dictionary provides a number of meanings, for example:

- Journalism: the activity or profession of being a journalist; the business or practice of writing and producing newspapers.
- Journalist: a person who writes for newspapers or magazines or prepares news to be broadcast on radio or television; a person employed to write or, edit, or report for, a newspaper, journal, or newscast.

14. Mr Maurice Asielue (Mr Asielue), the Senior Complaints Resolution Manager of the IC in the Provisional Decision provides a well considered approach to the meaning of the derogation. He states:

It is the Commissioner's view that the ultimate purpose of the derogation is to protect journalistic, artistic and literary integrity by carving out a creative and journalist space for programme makers to produce programmes free from the interference and scrutiny of the public. This position is consistent with the Human Rights Act 1998, as it could be argued that the invasion of this space is a restriction on the programme maker's ability to exercise free speech. This ultimate purpose is referred to in this letter as the "Creative Journalistic Purpose".

15. Mr Asielue acknowledges that a source for a definition of the derogation is the "special purposes" under the Data Protection Act 1998 (DPA) which we consider later in this decision.
16. The Provisional Decision interprets the meaning of the derogation "*broadly to include all types of output which the BBC produces and broadcasts.*" However the Commissioner's view is that "*the derogation is not meant to exclude the more strategic, management and logistic activities of programme-makers from the remit of the Act, except where these activities:*
 - (a) deal with the sustenance, promotion and development of the Creative Journalistic Purpose that the derogation is meant to protect: and*
 - (b) involve the actual utilisation of creative journalistic, artistic or literary skills.*"
17. In this case we have heard different arguments from the parties as to the meaning of "journalism". In order to illuminate these competing arguments we set out the background to the legislation.

Background to the legislation

18. The White Paper, 'Your Right to Know', was published in December 1997. It sets out the purpose of FOIA as follows:

"This White Paper explains our proposals for meeting another key pledge – to legislate for freedom of information, bringing about more open Government. The traditional culture of secrecy will only be broken down by giving people in the United Kingdom the legal right to know. This fundamental and vital change in the relationship between government and governed is at the heart of this White Paper."
(Prime Minister's preface)

19. With the White Paper, the government also published a background paper setting out the key issues which had been considered in the preparation of the White Paper. These were the issues which were considered by the relevant cabinet committee, CRP (FOI), and on which decisions were taken before publication of the White Paper. The cabinet committee considered whether the public service broadcasters (PSBs) should be covered by any proposed Act and stated:

“Public Service Broadcasters: the BBC, Channel 4 and S4C are public corporations that operate to a defined remit specified in the Royal Charter (BBC) and legislation (Channel 4 and S4C). All three operate independently of Government editorially and to the greatest extent possible in economic and regulatory terms. It might be regarded as anomalous for them to be within the scope of the FOI legislation when the private media (Channels 3 and 5, cable and satellite channels, the Internet, the press and freelances of all sorts) would not.”

20. From the beginning of the legislative process, the government had considered the position of the PSBs in relation to their editorial independence and competitive position with other broadcasters. When the White Paper was published, however, the BBC, Channel 4 and S4C were included as bodies to whom the Act would apply without any qualification. This decision was explained, some time after the event, in a letter of 9th September 2003 to Rosemary Jay of Masons solicitors from the Information Rights Division of the Department of Constitutional Affairs (the Jay Letter). The letter said:

“The conclusion reached was that, subject to the exemptions in the act, the public function carried [by] public service broadcasters meant that they should be publicly accountable, and therefore should be covered by the FOI Act.”

(Word in square brackets added by the Tribunal to make sense of the sentence.)

21. On 19 May 1998, the House of Commons Select Committee on Public Administration published a third report on the White Paper. The report commented on the inclusion of the PSBs (at para 45) as follows;

The public service broadcasters—the BBC, Channel 4 and S4C will come under the Act. As the White Paper says, "it might be regarded as anomalous for them to be within the scope of the Freedom of Information legislation when the private media ... would not". As the Guild of Editors say, their inclusions raise some difficult questions in relation to their newsgathering activities. (They may well argue that other information they hold should be withheld on commercial confidentiality grounds: this is dealt with below, paras. 58 to 66). It is unclear if sources of information could be protected under any of the "specified interests" in the White Paper. We recommend that the Government should make this point clear in their response to this Report.

22. On 21 July 1998, the government's response to the Select Committee's report was published. The government responded to the Select Committee's comment on the PSBs inclusion in the Act (at para. 19) as follows:

"The Government is clear about the need to ensure that Freedom of Information does not diminish freedom of expression, and the rights of the media under Article 10 of the European Convention on Human Rights. The Government believes that the structure of "Gateway" provisions (including barriers to premature disclosure of information due to be published at a future date) together with the specified interests, should provide a good degree of protection for the necessary interests of public service broadcasters. In particular, the "information supplied in confidence" specified interest should protect confidential sources of information to journalists, while personal information within the data protection law will be covered by the particular protection given to information held for journalistic purposes. The Government will however, consider carefully as it moves towards publication of a draft FOI Bill, whether anything further is needed to ensure a satisfactory approach to the issue of investigative journalism which the Committee has raised. Broadcasting and other media organisations will of course have an opportunity to comment on the draft Bill after it has been published.

23. One broadcaster took an early opportunity to comment. On 10 June 1998, Jan Tomalin, Head of Legal and Compliance at Channel 4, wrote to the government minister, Lord Williams of Mostyn, about the effect of FOIA on PSBs. She explained Channel 4 was concerned that FOIA would:

“undermine programme-making and hence the steps taken by the Government to ensure that, on Data Protection and Human Rights, the door is not open to prior restraint and other inroads on legitimate free expression.”

24. She went on to say:

“We have asked that any freedom of information right which requires Channel 4 to disclose material collected for journalistic purposes be given the most careful scrutiny.”

25. On 25 September 1998, Lord Williams replied to Channel 4 to reiterate that the BBC and Channel 4 would be subject to FOIA because they should be publicly accountable. In response to Channel 4’s point on ‘material collected for journalistic purposes’. Lord Williams said:

“I am clear that the Freedom of Information Act must not diminish freedom of expression and the rights of the media under Article 10 of the European Convention on Human Rights. The proposed ‘Gateway’ provisions and the specified interests should provide the protection needed.”

It should be noted that most of these latter provisions and interests have become exemptions under FOIA.

26. It is clear from this exchange that the government recognised the need to consider the impact of Article 10 ECHR in relation to PSBs. For completeness we set out Article 10 ECHR:

Article 10 – Freedom of expression

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

27. A draft FOI Bill was published in May 1999. It did not expressly include the BBC in its coverage leaving that to be dealt with by statutory instrument, as with other public authorities.

28. On 21 October 1999, an internal BBC memo written by David Fawcett (Mr Fawcett), a Senior Adviser Policy Development, confirmed that several BBC representatives, including himself, had met Home Office officials to continue discussions on the draft Bill. The memo reports on the BBC's understanding of the outcome of the meeting, and records, in particular the following points made by Home Office officials:

“2. As you will recall, setting aside our dismay as journalists at a particularly restricted FOI regime, our position on the draft legislation was:

- *We accepted that the BBC as a public body should fall within FOI*
- *We were concerned, however, to ensure a distinction between our public functions (equivalent to those of the ITC) and our private functions (like those of other broadcasters or journalists). The draft Bill seemed to provide the vehicle for making this distinction.*
- *If we did not achieve this general protection, we would have to rely on a series of individual exemptions and exclusions in the draft Bill, on which we sought assurance and in some cases suggested improvements in the drafting.*
- *We wanted adequate protection for the free and frank exchange of internal advice and deliberation, similar to that afforded to Whitehall*

3. We reiterated these points at the meeting. The main points in response were:

- *Yes, the BBC would be designated as a public authority for the purposes of FOI*

- *But no, the Home Office did not intend to distinguish between our public and private functions – we were not alone in this (see, for example, Health Authorities who “compete” in the health care market), and Ministers were steadfastly refusing to open the floodgates. We were left in no doubt that it was not worth our while pressing this further – far better to focus on areas where concessions were possible.*
- *The Home Office believed that the various exemptions/exceptions in the draft Bill did provide sufficient protection for each of the areas in which we had specific concerns – including our competitive position, protection of our sources etc*
- *The Bill’s provisions were intended to give us the same level of protection for “free and frank exchange” as Whitehall.*

*4. In addition, **officials made two very significant offers:***

- *To seriously consider including in the Bill a specific exemption for “material held for journalistic, literary or artistic purposes”, for which there is a precedent in Data Protection law. This would be a very great prize for us, in the absence of a general distinction between public/private. At a stroke it would exclude most of our day-to-day activities in programmes and journalism. Officials felt that this was a very realistic suggestion, which Ministers could adopt without opening the public/private floodgates*
- *To support the designation of the Board of Governors as a “responsible person” under the legislation for the purposes of deciding what the BBC information would be considered to threaten “free and frank exchanges” or effective conduct of our affairs if released. This was a completely unexpected offer – we had it on our wish list, but barely hoped we would get a positive response.*

5. These are the headline points – and the overall picture is now very satisfactory indeed if we can ensure it is delivered.”

[Underlining and bold in original]

29. Mr Fawcett followed up the meeting in a letter to Lee Hughes at the Home Office of 22 October 1999. Mr Fawcett accepted that the BBC should be covered by the Act but expressed the BBC’s concern that the Act

“should not jeopardise the carrying out of our day-to-day functions as a public service broadcaster and journalistic organisation. In both respects, the BBC, though a public body, operates in a competitive marketplace in which ill-timed disclosure of information could seriously affect our ability to fulfil the objects set for us by our Royal Charter. At our meeting, we sought assurances that the way in which the legislation is implemented would recognise the need for confidentiality across much of our day-to-day activities.”

30. Mr Fawcett suggested that the proposed exemption for information intended to be published would not, by itself, be adequate. He expressed concern at:

“ having to rely on provisions such as this to protect us from having to provide programme material to the public (or our competitors) on demand. We do not believe that such material should be classed as ‘information’ for the purposes of the Act. Relying on general provisions which do not recognise the special nature of programme material is bound to be unsatisfactory. Here, for example, the clause would enable us to refuse to provide material which we intended eventually to publish. But it would arguably not cover programme material which is not transmitted – for example Out-takes, which may or may not be being held ‘with a view to publication’. We cannot see what public interest would be served by requiring us to make such material available”.

31. He went on to say:

“As argued at the meeting, in the absence of a general exemption for our private broadcasting and programme making functions, we would favour instead a solution tailored to these particular circumstances, whereby any information would be exempt from disclosure if it was being held for ‘journalistic, literary or artistic purposes’. This follows the formulation of section 32 of the DPA. We would press strongly for such a provision, and would welcome an early indication of whether Ministers are likely to find it acceptable.”

32. Mr Fawcett also reiterated the argument for the BBC to be included in what has since become s.36 FOIA exemption (prejudice to effective conduct of public affairs) by providing that it

should cover “any other public authority” and not just government departments. It should be noted that the BBC (through its Governors, sitting as a Board or individually) has been designated as “qualified persons” under the exemption.

33. On 25 October 1999, Mr Hughes replied to Mr Fawcett sending him an advance copy of Schedule I to the Bill and in his letter explained that the BBC had been designated as a public authority “otherwise than in respect of information held for the purposes of journalism, artistic purpose or literary purpose”.
34. The Bill in this form was presented to Parliament on 18 November 1999 and was unchanged, in respect of the derogation, during the Bill’s passage through Parliament and was enacted on 30 November 2000, in this respect, as originally drafted.
35. After publication of the Bill, the Department of Culture, Media and Sport (DCMS) was requested by a Japanese broadcaster to ‘expand on the definition of journalism, art or literature’ and to explain why this was excluded from the scope of the Bill. In a letter to the DCMS dated 13 January 2000 (HO Letter), the Home Office said:

“The Government has sought to ensure that by including them [the public service broadcasters] in the Bill does not place them at an unfair disadvantage to their commercial rivals. The Bill therefore provides that the inclusion of the public service broadcasters does not relate to information held for journalistic, artistic or literary purposes.

The intention behind this limitation is to protect the resource constituted by information gathered by the public service broadcasters for the purpose of programme making. Section 32 of the DPA makes similar provision.

Information held by the public service broadcasters in relation to their operation, administration, management, policies etc is covered by the Bill.”

Association with data protection laws

36. The Data Protection Act 1998 (DPA) makes specific provision for “the special purposes ...of journalism” (s.3 DPA). It is clear that this provision was included in the DPA in order to ensure compliance with the Article 10 ECHR. This can be seen from the Data Protection Directive 95/46/EC (the DP Directive) upon which the DPA was based.

37. Recital 37 to the DP Directive states that ‘the processing of personal data for purposes of journalism or purposes of literary or artistic expression... should qualify for exemption...in so far as necessary to reconcile the fundamental rights of individuals with freedom of information and notably the right to receive and impart information, as guaranteed in particular in Article 10...’ Article 9 of the DP Directive states:

Member States shall provide for exemptions or derogations... for the processing of personal data carried out solely for journalistic purposes or the purpose of artistic or literary expression only if they are necessary to reconcile the right to privacy with the rules governing freedom of expression.

It should be noted that exemptions or derogations were only permitted if they were ‘necessary’ to achieve Article 10 compliance.

38. In *Goodwin v. United Kingdom* (1996) 22 EHRR 123 the European Court of Human Rights (ECHR), considered the protection of journalists' sources and the extent to which it was acceptable under the ECHR for the English courts to have ordered a journalist to reveal her sources. The ECHR explained the importance of protecting journalists' sources in the following terms (para 39):

Protection of journalistic sources is one of the basic conditions for press freedom, as is reflected in the laws and the professional codes of conduct in a number of Contracting States and is affirmed in several international instruments on journalistic freedoms (see,

amongst others, the Resolution on Journalistic Freedoms and Human Rights, adopted at the 4th European Ministerial Conference on Mass Media Policy (Prague, 7-8 December 1994) and Resolution on the Confidentiality of Journalistic Sources by the European parliament, 18 January 1994, Official Journal of the European Communities No. C44/34). Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result the vital public-watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected. Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society and the potentially chilling effect an order of source disclosure has on the exercise of that freedom, such a measure cannot be compatible with Article 10 (art. 10) of the Convention unless it is justified by an overriding requirement in the public interest.

39. The DPA implemented an exemption under s.32(1) for “personal data which are processed only for the special purposes....if -

(a) the processing is undertaken with a view to the publication by any person of any journalistic, literary or artistic material,

(b) the data controller reasonably believes that, having regard in particular to the special importance of the public interest in freedom of expression, publication would be in the public interest, and

(c) the data controller reasonably believes that, in all the circumstances, compliance with that provision is incompatible with the special purposes.”

40. Under s.32(6) the DPA defines the term “publish” as making journalistic, literary and artistic material available to the public or a section of the public.

41. The DPA makes further provisions under s.32(4)-(5) to enable a court to stay proceedings brought against a data controller under other provisions of the DPA if it appears to the court, or

if the data controller claims, that the processing which is the subject of the proceedings is being carried out for the special purposes and to publication by the data controller (See *Campbell v Mirror Group Newspapers Ltd* [2002] EWCA Civ 1373 - Lord Phillips, at para. 121). The intention behind this sub-section appears to be to prevent so-called “gagging” orders intended to restrain freedom of expression and the freedom of the press.

42. Mr Nicholls argues that there is a difference between the BBC’s derogation under Schedule 1 FOIA and s.32 DPA, although both are concerned to protect the right to freedom of expression. Under the DPA there is a countervailing interest which needs to be borne in mind and that is the interest in the privacy of the data subject under Article 8 ECHR. Therefore, the right to free expression recognised by s.32, is curtailed by a competing right to privacy. Hence it is personal data processed only for these special purposes, which are exempt from the DPA's various provisions. Under FOIA there are no countervailing interests in relation to the BBC and its position in determining whether it is subject to FOIA. There is an interest similar to that under the DPA in protecting the Article 10 right to freedom of expression. But there is no countervailing interest under Article 8 which falls to limit that freedom.
43. Mr Nicholls finally submits that the scope of the meaning of journalism under the DPA is different from that under FOIA. The exemption under the DPA applies only where information is held ‘solely’ for the purposes of journalism. The derogation under FOIA does not require that the sole purpose for which the information is held is journalism.

Hansard

44. Mr Sugar referred the Tribunal to passages in Hansard. Until *Pepper v Hart* [1993] AC 593, the courts denied themselves reference to Hansard for the purposes of interpreting legislation. That case permitted reference but only subject to strictly controlled conditions which are set out in the speech of Lord Browne Wilkinson which is reported at page 634. He said:

“ My Lords, I have come to the conclusion that, as a matter of law, there are sound reasons for making a limited modification to the existing rule (subject to strict safeguards) unless there are constitutional or practical reasons which outweigh them. In my judgment, subject to the questions of the privileges of the House of Commons,

reference to Parliamentary material should be permitted as an aid to the construction of legislation which is ambiguous or obscure or the literal meaning of which leads to an absurdity. Even in such cases references in court to Parliamentary material should only be permitted where such material clearly discloses the mischief aimed at or the legislative intention lying behind the ambiguous or obscure words. In the case of statements made in Parliament, as at present advised, I cannot foresee that any statement other than the statement of the Minister or other promoter of the Bill is likely to meet these criteria.”

45. Mr Sugar submitted that references to Hansard were not admissible, although pointing us to a number of passages from Hansard, should we take a different view. We agree that the material referred to us from Hansard does not satisfy the criteria set out in *Pepper v Hart* and therefore we have not sought to take the Hansard references into account.

Background to the Balen Report

46. Richard Sambrook (Mr Sambrook), Director of News at the BBC in 2003, provided the context in which Mr Balen joined the BBC, in evidence to the Tribunal as follows:

“In mid-autumn 2003, the BBC was under close scrutiny from lobby groups in relation to its coverage of the Middle East. This scrutiny came from a variety of sources, including pro-Arab and pro-Israeli groups and leading members of the Jewish community.

I received a significant amount of correspondence on the subject. Due to the other demands of my job, I was not able personally to engage with these groups to the extent that I would have liked, but considered that it was important for BBC News to do so to a greater extent. I thought it would be useful to have a senior journalist with sound editorial judgment who was able to spend time talking to these groups and engage them in the discussion. This would reflect the BBC’s recognition that the lobby groups’ views

were important and worthy of being taken seriously, allowing us to better understand the merits of their arguments and, where appropriate, act on them”.

It should be noted that Mr Sambrook had a very senior role at the BBC responsible for a large number of employees.

47. Subsequently, Mr Sambrook hired Mr Balen. Mr Sambrook said in evidence:

“I discussed the idea with him initially because I knew that he was available and I had worked with him in the past and had a great deal of respect for him, and once I established that he would be interested in the role I discussed it with Mark Byford, who was then the Director of the World Service, because clearly that is the other important dimension of the BBC journalism, the international journalism” [Transcript 15th June p11].

48. In relation to the appointment Mr Sambrook explained:

“I think there were two aspects to employing Malcolm Balen which were unusual: one was to bring somebody in with a particular focus in that way, which I do not think we have done before. We often had asked for reviews of our coverage and had had intensive periods of reviewing aspects of coverage, not just the Middle East, but politics and business and many other things as well, but the normal pattern would be to second an editor into looking at that for a period of time. Indeed, when Malcolm was editor of The Nine O’Clock News I think he was seconded in that way for periods of time to do particular reports. But it was unusual to bring somebody in certainly. But one of the reasons I decided to do that I believed it would be a benefit to have somebody focused purely on that and was not also having to manage programme teams and manage bureau and so on as well. I thought there would be a benefit to having not only the concentrated attention, but somebody who was, if you like, free from those other pressures. I think the other unusual aspect of it was that from the very beginning I believed it was right that this role should have an external focus as well, because there was a high level of lobbying and concern and complaint, and therefore I thought it

appropriate and responsible of us to actively engage with that and take a view about whether those were justified or not” [Transcript 15th June p8-9].

49. Mr Balen signed a contract on 17 October 2003 to work as “Middle East Consultant in News” from 1 November 2003 to 31 October 2004. Mr Balen’s duties and responsibilities were not specified in his contract, and in evidence to the Tribunal, he explained that his role at entry was “not clearly defined”. In evidence to the Tribunal Mr Sambrook explained:

“I think it is quite important to understand that the role was originally envisaged as a support to me as Director of News, and somebody who could simply pay attention and advise me personally on the rights and wrongs of some of the complaints, but also take a view, as I say, across a period of time about our coverage and come up with some thoughts about how we strengthen our coverage going forward. So from that point of view it was not a formal position in the sense of an editorship would be, or a senior managerial responsibility, which is why it was configured as a senior editorial adviser. Malcolm, of course, is very well known and respected within BBC News, so I knew he would be able to build strong relationships with programme editors and so on as well. But it was very much an experiment. it was an unusual appointment, we had not done it this way before, so it was an experiment to some extent, and I think Malcolm and I decided we would agree the broad areas and broadly how it might work, but see how it evolved over the first few months and redefine it as we went along”.[Transcript 15th June p12-13]

50. Mr Balen was later referred as an “adviser”. Mr Sambrook explained this change in evidence to the Tribunal:

“He was concerned, and we did have a discussion, that he should be clearly positioned as separate from the programme teams and programme management, yes. Whether or not ‘consultant’ and ‘advisor’ reflect that independence, or there is a difference to the extent to which they reflect that independence, you know, I mean I do not think people judge. But I think the issue was much more that he was going to be positioned as not

having line management responsibilities, and we believed that although contractually – as I have said before, the basis of the BBC contract was to contract him as a consultant – he was ‘consultant’, we felt ‘adviser’ more properly reflected the role he was playing within the organization” [Transcript 15th June p17-18].

51. Mr Balen was introduced to BBC staff by emails sent by Mr Mark Byford (Mr Byford) the then Director of World Service and Mr Sambrook. These emails exemplify further the lack of specificity of Mr Balen’s day-to-day role. On 31 October 2003 Mr Sambrook sent the following email to his News Leadership Group:

“I’m pleased to say that Malcolm Balen will be rejoining BBC as a senior editorial advisor working for me and to Mark Byford on Middle East coverage. This is a particularly difficult and sensitive area for all broadcasters where we are subject to significant pressure and complaints from all parties. We believe BBC News will benefit from the dedicated attention of a senior and highly experienced editorial figure who can help manage the pressures on us and advise us on the complexities of the current situation. He will support us in continuing to deliver strong, accurate and independent journalism on Middle East affairs. Malcolm’s experience as a senior programme editor at BBC, ITN and Channel 4 will be invaluable in this role”.

52. Mr Byford sent an email on 3 November 2003 to his team stating that *“For information, Malcolm will be helping to co-ordinate and advise on all ME coverage including our own”*, together with a copy of Mr Sambrook’s email of 31 October 2003.

53. For approximately the first four months of Mr Balen’s appointment he delivered fortnightly or monthly reports to Mr Sambrook, and he addressed some external complaints about BBC coverage of the Middle East and met with internal editors and journalists to discuss Middle East coverage.

54. From about February 2004 Mr Balen’s main focus became the production of a report which he worked on for approximately six months. He explained in evidence:

“I was concerned in my report to do two things: one was to examine the pattern of the complaints against the BBC and, if you like, examine the coverage that I was reviewing through the filter of those complaints, to see whether I thought the complaints were justified or not, not individual complaints but the pattern of them. I was also examining, over time, a considerable amount of BBC output to see what it added up to over time, how those individual decisions, journalistic decisions, on a daily basis, what they amounted to in their totality”. [Transcript 15th June p99-100]

55. Mr Balen admitted that he had no idea how Mr Sambrook intended to use the report and explained:

“To be honest, I did not really have an expectation. The idea of the report grew, I think Richard probably mentioned it verbally to me when I rejoined the BBC and I do remember him saying, it was either late-2003 or early-2004, reminding me he did want a report. We decided, as I sort of looked at coverage, it was easier to handle if it was a written report ... As far as I was concerned, I was writing this report for Richard and I did not know what was going to happen to it. As such, the recommendations that I framed, I framed them in what I might term ‘quite a soft way.’ He did not ask me for recommendations. I felt the natural conclusion of the report was that there should be recommendations. I did not feel it was my place as somebody who had just come into the BBC as a one year contract to act as Senior Editorial Adviser. I did not feel it was my role to be didactic in what I was saying. They were just simply possibilities that he might wish to explore... To be honest, there was an awful lot of work involved in doing the report. While I say it acquired mythological status, I do stand by my work and did do a lot of work on it and I was busy doing that rather than contemplating what might happen to it when I finished it”. [Transcript 15th June p113-15]

56. Mr Sambrook received a draft of the Balen Report in June 2004 and by email to Mr Balen dated 18 June said “Your report is terrific by the way.” On 5 July 2004, Mr Balen sent by email a later draft of the report to Mr Byford, indicating “it should be ready in a week or so”.

Changes in management and the creation of the Journalism Board

57. In January 2004 the “Report of the Enquiry into the Circumstances Surrounding the Death of Dr. David Kelly C.M.G.” (The Hutton Report) was published. On 28 January 2004, the chairman of the BBC, Gavyn Davies resigned and Greg Dyke, the Director General, tendered his resignation, which was accepted by the Board of Governors. Eventually a new Director General, Mark Thompson (Mr Thompson) was appointed in June 2004 and soon embarked on reorganization. Mr Byford, had already been appointed Deputy Director-General in January 2004. Around August 2004, Mr Sambrook was appointed Director of World Service and Global News. Helen Boaden (Ms Boaden) replaced Mr Sambrook as Director of News and Mr Balen began reporting to her.

58. In addition to the Board of Governors and the Executive Board, Mr Thompson set up a newly-formed Journalism Board with Mr Byford as Chairman and Mr Sambrook as a member. Other members included Ms Boaden, Pat Loughrey, Director of Nations & Regions – responsible for all journalism in BBC local news across England and national news within Northern Ireland, Scotland and Wales, and Stephen Whittle, Controller of Editorial Policy. These were all senior managers within the BBC.

59. Mr Whittle described the remit of the Journalism Board in his evidence as follows:

“Between us, we were responsible for setting the strategy and values as well as overseeing journalism across all areas of the BBC’s output, including the UK-wide television and radio services, news online, national and regional news programmes, local radio, the World Service and BBC World, the BBC’s international facing commercial channels”.

The Balen Report

60. One of the matters considered by the Journalism Board soon after its establishment was the Balen Report. Mr Byford had originally wanted the report discussed at the Board in September 2004. Mr Balen’s report was eventually considered at the 9 November 2004 Journalism Board meeting. From a number of emails in early November 2004, it becomes clear that the report was common knowledge and in circulation amongst the Journalism Board members. In relation to the purpose for which the

Report was being considered by the Board, Mr Balen commented in evidence that *“it did go to the Journalism Board as part of a wider strategy review of the Middle East from which several decisions flowed”*.

61. Mr Balen was subsequently requested to assist in implementing recommendations made in the report. In evidence to the Tribunal, he explains, *“All of these [recommendations] were directed towards improving the BBC’s journalism and programme content”*.

62. Immediately following the 9 November 2004 meeting Mr Byford emailed Journalism Board members as follows:

“Following our very good discussion at the Journalism Board today on our Middle East coverage and on Malcolm’s report, can I summarise where we are. We will now take forward a number of strands of work which we will then bring together for approval at the Journalism Board as soon as possible in the New Year [late January/early February]... All these strands can be brought together in a paper ‘Taking Forward BBC Coverage of the Middle East’ in January/February, which should be set in the context of the Governors 2004/5 objective: ‘Ensure the BBC meets the highest standards of independence, impartiality and honesty in its journalism and implements recommendations on training, editorial control and complaints handling.’ We are then likely to take forward this amalgam of all our work on the Middle East to Executive Board and Board of Governors in February within this framework, Richard Addy to co-ordinate the overall progress on the strands and the drawing up of this paper”.

63. The Taking Forward paper was eventually presented to the Journalism Board on 9 February 2005. Progress on the implementation of enumerated strands was considered at Board meetings on 17 March 2004, 7 April 2004, 26 May 2005 and 1 November 2005.

64. Mr Balen explained *“the initiative stemming from my report”* in evidence at the Tribunal hearing as,

“The establishing of the post of Middle East Editor, reviewing the BBC’s analysis capability, developing a key facts guide, auditing the use of on air Middle East experts and developing BBC training” [Transcript 15th June p 99].

65. The Tribunal has seen the confidential Taking Forward progress documents and understands that significant changes at the BBC resulted. A very publicized change, for example, is the May 2005 announcement of the recruitment of a Middle East Editor. Jeremy Bowen was appointed to the post in August 2005.

Other uses of the Balen Report

66. Around June 2005, Mr Byford commissioned a news gathering strategy paper from Ms Boaden and Mr Sambrook; they used the Balen Report as a source. Mr Sambrook explained the remit of this paper in evidence at the Tribunal hearing:

“It was simply another constituent of a broad look at all the BBC’s coverage and casting forward what our future resources would be required in the future, in what was clearly going to be a very major issue in a major region of the world for reporting for years to come. So in this look across the Middle East, we absolutely considered Malcolm’s report, but we also, as I have said earlier, considered the way that the events were developing in Iraq” [Transcript 15th June p58].

67. Mr Sambrook explained that the Balen Report was “only one element” of a “wider discussion about the Middle East” [Transcript 15th June p59]. .

68. In mid 2005 the BBC Board of Governors appointed Sir Quentin Thomas as chairman of a panel, to undertake an external independent review of BBC reporting in the Middle East. His final document, the “Report of the Independent Panel for the BBC Governors on Impartiality of BBC Coverage of the Israeli-Palestinian Conflict” (The Thomas Report), was published in May 2006.

69. Sir Quentin sought a copy of the Balen Report in order to complete his assigned independent analysis of the BBC’s Middle East reporting. On 22 June 2005 Lea Sellers (Ms Sellers) of the BBC

Governance Unit sought access to the Balen Report on behalf of Sir Quentin; Ms Sellers remained unsuccessful through August 2005, as emails presented to the Tribunal show. On 3 November 2005 Sir Quentin requested a copy of the Balen Report from Mr Thompson. A copy was provided on 28 November 2005. Sir Quentin was specifically asked to keep “these management papers” confidential. Ms Boaden commented in an email to Richard Hutt copied to Mr Byford, Mr Balen and Ms Sellers:

“I am very happy for Sir Quentin Thomas and his panel to have access to the full Balen Report and any background material associated with it. However, this is conditional on the report remaining confidential to the Impartiality Panel. The report was commissioned from Malcolm Balen by Richard Sambrook on an entirely confidential basis and I do not want the letter or the spirit of that commitment be broken”.

70. In a letter dated 28 November 2005, Mr Byford informed Sir Quentin that the BBC had since established the post of Middle East Editor, reviewed the BBC’s analysis capability, developed a Key Facts Guide, audited the use of experts, and developed training.

71. The Thomas Report mentions Balen twice in the main report, referring to Mr Balen as a “Senior Editorial Adviser”, and noting that Thomas enquiry was supplied with the Balen Report “which was prepared for BBC Management”. In the Thomas Report, the Balen Report is mentioned under the heading of “Earlier Reviews”:

“Balen Report: the Panel was given, in response to a request, an unpublished internal report prepared for BBC Management by Senior Editorial Adviser on the Middle East Malcolm Balen in 2003. This was helpful to us but we say no more about it as it was given to us on confidential terms. A number of recommendations have been implemented”

72. As we understand it Mr Balen continues to review the BBC output on a regular basis.

Arguments on the meaning of ‘journalism’

73. The parties and their representatives made extensive arguments before the Tribunal as to the meaning of “journalism” under FOIA. The main arguments are summarised as follows.

74. Mr Sugar makes a number of submissions on the meaning of journalism. We have attempted to set these out briefly as follows.

75. Firstly he submits that the derogation applies only to journalists’ source material, scripts, recordings and other material collected or created for the direct purpose of making a programme and that the Balen Report does not fall within this class of material.

76. Alternatively he submits that information about editorial questions arising in relation to a programme in preparation may also be covered by the derogation. However, information about editorial matters arising in relation to programmes already transmitted (or to a whole class of programmes to be transmitted) is not within the derogation. He continues that in so far as the Balen Report is information about programmes that had already been transmitted, it is not covered by the derogation.

77. He also argues that journalism should be distinguished from the management of journalism and that, in effect, the latter usually will not be caught by the derogation. He further argues that words for ‘for the purposes of’ in the derogation cannot mean ‘for the direct or indirect purposes of’ and must mean only ‘for the direct purposes of’ say journalism.

78. He submits the purpose of the derogation is to protect BBC journalists from interference with their public watchdog functions as guaranteed by Article 10 of the ECHR and no further.

79. In effect he argues for a narrow definition of ‘journalism’ and that the legislative background supports this contention.

80. In contrast the IC argues that a broader definition of the derogation should be applied.

81. Mr Nicholls submits that the starting point is to put the derogations, namely journalism, art and literature, in a permissible legal context. In this respect he accepts that both the DPA and the ECHR are relevant, particularly as they relate to freedom of speech. They are the permissible legal background for the Tribunal to take into account, and not the detailed legislative history prescribed by Mr Sugar which he says is excluded under *Pepper v Hart*.

82. Mr Nicholls maintains that if an extravagantly broad view of the derogation were taken, and because nearly everything that the BBC does is concerned with journalism, art or literature, then it would not be difficult to argue that all information held by the BBC is held for those purposes. He concedes this is too broad a view, and is not the one which the IC puts forward.

83. However he submits that the reason that that extravagant view is not right is that there are two limitations which are implicit in the words of Schedule 1. First, that in order for the BBC not to be treated as a public authority bound by the Act, the information must be directly linked to a journalistic purpose and therefore remote links are insufficient. Secondly, that journalism, must be the dominant purpose for which the information is held. This issue of dominant purpose is dealt with later in this decision.

84. Therefore, he contends, as a matter of law, that you cannot argue that an element of journalism being present in the information held cannot preclude the BBC from being subject to the Act, even if correct as a matter of logic. He continues that journalism is a function or a process of gathering, analysing and conveying news to people. Therefore, prima facie, anything held for the purposes of that function or process is held for the purposes of journalism.

85. In relation to content or output reviews he argues that a review of news which had been broadcast, which is undertaken in order to improve future broadcasting has a direct link to programme content. Therefore, it is not simply a matter of looking retrospectively as Mr Sugar argues. It has ongoing implications of continuous improvement, and is part of the BBC's Charter obligations. So a link between an output review and programme content is an indication that the information is held for the purposes of journalism.

86. Mr Nicholls submits it is important to recognize that the concept of journalism, like that of art and literature, is broad. It is not a concept to which it is easy to draw precise boundaries. Mr Sugar argues the derogation only applies to a journalist's sources, scripts, recordings and materials collected for programmes. Mr Nicolls argues that that this contention is wrong for three reasons. Firstly, such a list inevitably gives rise to the hard cases. It makes it difficult to know how to categorize editorial reviews, particularly if they are designed for the purposes of looking at journalism going forward, developing ideas for new programmes, decisions on editorial lines and so forth. These are all matters which, he argues, are self-evidently journalism but may be rather difficult to squeeze into Mr Sugar's restrictive analysis.

87. The second problem, he argues, is that the approach involves rewriting Schedule 1, because it replaces the broad concept of journalism with narrower elements which it is difficult to suggest exhausts the concept of journalism.

88. His third argument is that if the legislature had wanted to go down this prescriptive route, there is a precedent for it to do so. S.10 Contempt of Court Act specifically protects journalist's sources. If the legislature had wanted to protect journalists' sources and the other matters which Mr Sugar has identified, it could have built upon the Contempt of Court Act precedent. It did not do that but used the broader concept of journalism.

89. In relation to the distinction which Mr Sugar sought to draw between journalism and the management of journalism, Mr Nicholls argues that this is not a legitimate distinction and that the management of journalism is an inextricable part of journalism. He contends that you can identify management issues which are not in any way related to journalism, such as, staffing issues, redundancy, pay rises, health and safety matters, environmental and property issues and so forth. However he does not accept as a proposition that where the subject matter in question is journalism that it makes any difference who is involved in the management chain. It does not matter where in the management chain decisions are taken, if they are taken about journalism, even if this extends to the Board of Governors.

90. This argument, he says, recognizes that the BBC has at its core certain obligations relating to its journalism, for example, the obligation of impartiality. If the Board of Governors were to lay down guidelines to ensure that the BBC adhered to its obligations of impartiality, those would be directly related to its journalism. Mr Asielue referred in the Provisional Decision to carving out a creative and journalistic space in which the BBC could exercise its rights of free speech, without public interference. This can also apply to management activity.

91. Ms Carrs-Frisk argues that the terms “journalism, art and literature” are very broad and not defined in FOIA. The most obvious source of these words is in the DPA where the so called “special purposes” in s.3 use the same words and like FOIA the DPA contains no definition of the words.

92. This means, she argues, that one must give the words their plain and ordinary meaning, whilst bearing in mind what appears to have been the statutory purpose behind their use, namely to protect freedom of expression and the rights of the media under Article 10 of ECHR and so as not to place PSBs at an unfair advantage compared to their commercial rivals.

93. On this basis she continues the IC was correct to conclude in the Provisional Decision that journalism includes “all types of output which the BBC produces and broadcasts”. She maintains that the word includes not only journalistic output or content or product or expression but also the activity of journalism.

The Tribunal’s finding on the meaning of “journalism”

94. The Tribunal wishes to give “journalism” its natural meaning as intended by Parliament. We need to do this so that we can decide this appeal, and if possible provide guidance to PSBs, those requesting information from them and the IC in relation to the scope of this part of the derogation. We recognise that the derogation was largely introduced in order to protect freedom of expression as espoused by Article 10 ECHR.

95. FOIA includes the BBC “in respect of information held for purposes other than journalism, art or literature”. The Tribunal has to determine two matters concerning this limited application of FOIA to

the BBC. The first is what does “journalism” mean for the purposes of the Act. The second is whether, on the date on which Mr Sugar made his request, the Balen Report was held for the purposes of journalism or for some other purpose. We have set out above the main arguments of the parties on the first matter and a considerable amount of evidence and background information relating to both matters.

96. On a broad definition, it could be argued that all of the activities of the BBC are for the purposes of journalism, art and literature, as these are broad descriptions of a substantial part of its broadcast output. This is the position taken by some of the BBC’s witnesses including Mr Sambrook.

97. The BBC agrees that the words “journalism, art, or literature” should be given their plain and ordinary meaning. Mr Sambrook in evidence as to what this means starts off by saying:

“I think I would characterise "journalism" as the process or discipline of collecting, verifying, analysing and presenting information about current events or issues.”

[Transcript June 15, p. 80 lines 7-18]

98. This would appear to provide for a fairly narrow definition of journalism. However, Ms Francesca Unsworth (Head of News Gathering for BBC News) in evidence considered that the decision to create a new post of Middle East Editor was part of journalism and that you “*cannot divide the managerial function from the journalistic function*” in relation to the appointment [Transcript June 14 p. 135 lines 10-16]:

99. Mr Sambrook expressed the same view, despite his earlier statement [Transcript June 15, pp.48-49, lines 19-25, 1-23]

“I think the difficulty is in the BBC -- if I can just make a general point first -- is that actually unlike newspapers which are generally organised where you have an editor and a managing director and the editorial and management functions are separated to quite a senior level, that is not the case in the BBC. From programme editor upwards, journalistic and managerial functions are mixed. ... There are clearly issues which are purely journalistic and some issues that are purely managerial. ... most of the decisions

that are taken there are driven journalistically because in the end, our business is about broadcast news and broadcast journalism, ...[Transcript June 15, pp.78-79, lines 19-25, 1-7]

100. Later he said in evidence

“I think one of the recurring themes of this tribunal is that I think it is very difficult to separate management and journalism as cleanly as that. And questions about how you make those selections, the resources that are available to you to make selections, might be characterised on the one hand as management, but they are absolutely core to journalism and determine both the quality, the nature and the character of journalism.”
[Transcript June 15 pp. 82-83, lines 14-25, 1-2]

101. It would appear from this evidence that the BBC believes that the ordinary meaning of journalism is such that it permeates all levels of management to the extent that the largest part of what is done by that management is journalism and therefore covered by the derogation. This would have the effect of excluding most of the BBC’s management information from the remit of FOIA.

102. However, if a very broad definition was intended, there would be little point in including the BBC in Schedule 1, Part VI of FOIA. The BBC could have been omitted altogether from the scope of the Act.

103. On a narrow definition, journalism might be limited to the generation of specific journalistic output, that is, material that is published or broadcast. If that view is taken, protection of materials prior to broadcast could be covered by the FOIA exemption in s.22 (information intended for future publication), protection of journalistic sources could be covered by the exemption in s.41 (information provided in confidence), information of interest to commercial competitors could be covered by the exemption in s.43 (commercial interests) and internal editorial reviews could be covered by s.36 (prejudice to effective conduct of public affairs). If a very narrow definition was intended, provision for a limited application of FOIA to the BBC would not have been required.

104. It was argued before the Tribunal that a line should be drawn between journalism and the management of journalism. The Tribunal does not find this a helpful distinction, nor is it one that is capable of reasonably precise definition. “Management” can be exercised at many levels. The management of a front-line journalist by a more senior journalist is, arguably, directly for the purpose of journalism. Management at a strategic or directing level may have an impact on journalism but is, arguably, too remote from the journalistic function to be said to be for the purpose of journalism, as opposed to the overall direction of the organisation.

105. Having considered all the evidence and arguments we find a more useful distinction may be between functional journalism, and the direction of policy, strategy and resources that provide the framework within which the operations of a PSB take place.

106. In relation to functional journalism we find that it covers collecting or gathering, writing, editing and presenting material for publication, and reviewing that material. In order to further understand functional journalism the Tribunal considers the following three elements constitute functional journalism.

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

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

- the selection, prioritisation and timing of matters for broadcast or publication,
- the analysis of, and review of individual programmes,
- the provision of context and background to such programmes.

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

110. In the Provisional Decision Mr Asielue, described the derogation as protecting “*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*”. The Tribunal accepts the argument that the derogation was intended to establish a “*journalistic space*”, but considers some closer understanding of that space is required. The three elements described above of collecting or gathering, editing and quality assuring material for journalistic output appear to the Tribunal to be the ordinary meaning of “journalism” which makes sense of the derogation.

111. We note that our approach is consistent with that set out in the HO Letter, referred to above, although we do not rely on the letter as supporting our view. It will be recalled that the letter was intended to assist DCMS in answering a request for information from a Japanese broadcaster regarding the treatment of PSBs under the (then) Freedom of Information Bill. Stephen Earl (Mr Earl), from the Freedom of Information Unit of the Home Office, said that the Government had sought not to place the PSBs “*at an unfair disadvantage to their commercial rivals*”, hence the decision to limit the application of the legislation to information other than that held for journalistic, artistic or literary purposes.

112. Similarly we note that our approach is consistent with Mr Earl’s view that: “*The intention behind this limitation is to protect the resource constituted by information gathered by the public service broadcasters for the purpose of programme making.*” Mr Earl’s letter clarified also those matters not intended to be covered by what became the derogation. He said: “*Information held by the public service broadcasters in relation to their operation, administration, management, policies etc is covered by the Bill.*” However we do not rely on Mr Earl’s view.

113. The Tribunal accepts that “*information gathered ... for the purpose of programme making*” is a reasonable starting point for a definition of what falls within the “*creative and journalistic space*” referred to in the Provisional Decision. The Tribunal considers it self-evident that the news gathering and editorial functions (the first two legs of the Tribunal’s definition set out above) fall within the “*journalistic space*” and constitute a part of the “*information gathered ... for the purpose of programme making*”. Some further consideration of the third, quality assurance leg is required, as this is of particular relevance to the nature of the Balen Report.

114. It makes sense to us that an integral part of programme making is striving continuously to improve performance, and that measures are in place to assure and enhance quality. This is why the Tribunal includes within the ordinary meaning of journalism the third leg relating to quality assurance.

115. As stated earlier in this decision, the Tribunal was informed in the evidence of Mr Sambrook that ‘output reviews’ were undertaken of areas of the BBC’s broadcasting. These were said to enable senior journalists to reflect on the quality and balance of output. Mr Sambrook told the Tribunal that such reviews were a “*primary means of influencing journalism*”. In his evidence, Mr Balen told the Tribunal that he regarded his report as being very much of the nature of an ‘output review’. The Tribunal has had the benefit of reading the Balen Report, and the nature of the bulk of the material contained within it is consistent with Mr Balen’s description.

116. Self-critical review and analysis of output is a necessary part of safeguarding and enhancing quality. The necessary frankness of such internal analysis would be damaged if it were to be written in an anodyne fashion, as would be likely to be the case if it were potentially disclosable to a rival broadcaster.

117. In our view, output reviews, including the bulk of the material in the Balen Report, are produced for the purposes of journalism, and will be generally within the scope of the derogation. As such, if held solely for that purpose, they would be outside the remit of FOIA. However, it is possible that some information may be held by the BBC for more than one purpose, and may be held for different purposes at different times.

Multiple purposes

118. What happens if the information the subject of a request is held by the BBC for both journalistic and non-journalistic, art and literature purposes? Clearly many requests will cover a number of purposes, in and outside the derogation.

119. Mr Sugar submits that the wording of the derogation is clear. It includes within the Act information held by the BBC for purposes other than those of journalism. If information is held for a non-journalistic purpose it is held for a purpose other than the purposes of journalism. As a matter of language, it is simply irrelevant that the information is also held for a journalistic purpose.

120. He argues the derogation could have been expressed so as to exclude from the Act information held by the BBC for the purposes of journalism whether or not it was also held for a non-journalistic purpose. The language which would have expressed this would have been to define the BBC as a public authority 'in respect of information not held for the purposes of journalism etc'. On this wording, if information was held for the purposes of journalism, it would be outside the Act whether or not it was also held for other purposes.

121. He submits that as a matter of language if information is held for a non-journalistic purpose then it is within the scope of the Act. It is simply irrelevant that it may also be held for a journalistic purpose.

122. Ms Carrs-Frisk on behalf of the BBC argues that information may often be held for more than one purpose, and the purposes may vary in significance. But the intention behind the designation (as she refers to the derogation) of the BBC in Schedule 1 to FOIA is plainly to draw a dividing line between information which is and is not subject to FOIA. This suggests that the derogation should be interpreted either so that the BBC is a public authority in relation to information which is *exclusively* held for purposes *other* than journalism, etc ("non-journalistic purposes"), or so that the BBC is a public authority where the *dominant* (albeit not necessarily exclusive) purpose for which it is held is non-journalistic.

123. She continues it is clearly arguable that exclusivity is the test. However she submits that the most sensible approach (which Parliament is likely to have intended) is to consider whether the *dominant* purpose of holding the information is non-journalistic. Another way of posing the same question is to ask whether the information is predominantly held for non-journalistic, or journalistic, purposes. This approach is consistent with the test applied by the Courts in considering whether a

document created for multiple purposes is covered by litigation privilege (see *Waugh v British Railways Board* [1980] AC 521).

124. The Tribunal agrees that the dominant purpose test is the test that Parliament is likely to have intended. However we find that there is a difference between a dominant purpose test in relation to the “creation” of a document, as in *Waugh*, and a dominant purpose test in relation to the “holding” of the document which is the criterion under FOIA. Clearly whereas the purpose(s) for which a document is created is set in time, the purposes for which a document is held can change over time. Therefore the application of a dominant purpose test under FOIA will relate to the purpose(s) for which the information was held at the time the request was received by the public authority and not at the time the information was created.

125. A document that is primarily an output review may be held for more than one purpose. Such a review might disclose a weakness in news gathering. If the review was a factor taken into account by an editor in deciding to run a story from an area of news gathering strength, rather than one from an area of relative weakness, that in our view would be a purely journalistic decision, and the information would be held for the purposes of journalism. However, if the review was used to support a case for additional financial or staffing resources to enable the weakness to be corrected, or to make a case for additional resources to be allocated to one area rather than another, it would then be held for other purposes and would lie outside the derogation.

126. At the highest level, the BBC Governors exercise responsibilities laid upon them by the Charter. The Tribunal was told that the objectives of the Governors for the period in question (2004/5) included ensuring that the BBC meets the highest standards of independence, impartiality and honesty in its journalism. It is easy to see that the content of an output review particularly if it contained suggestions or recommendations dealing with these standards, as the Balen Report does, could assist the Governors in the discharge of that responsibility. If an output review was to be used in that way, then in our view it would be held for the purpose of governance, in addition to any other purpose for which it might be held.

127. In his evidence, Mr Sambrook said that he had engaged Mr Balen because he “*wanted a private, informal view of our journalism from someone whose judgement I trusted*”. Had the matter ended there, the Tribunal would have had little difficulty in concluding that Mr Balen’s work was “journalistic” under the definition provided above.

128. However, the matter did not end there. Mr Balen wrote his work up as a formal report entitled “Reporting the Middle East” which was submitted to the BBC’s Journalism Board as paper JB(04) 40 on 9th November 2004. The Journalism Board, as we have already established, is a very senior body within the BBC, chaired by the Deputy Director General. The functions of the Journalism Board were described to the Tribunal by Mr Whittle.

129. He described the work of his Department as including the production of editorial guidelines for the BBC as a whole. The Tribunal was told that the guidelines include provisions on bias, accuracy, impartiality and other issues relating to programme standards and journalistic integrity. A current version of the guidelines was “*approved for publication by the Board of Governors*” in April 2005. This approval by the Governors is a clear indication that the document, and related policy work at this level, related as much to the discharge by the Governors of their responsibilities under the Charter as to the purposes of functional journalism.

130. Against this background, Mr Whittle described the establishment of the Journalism Board by the Director General in 2004. It consisted of those senior executives who “*were responsible for setting the strategy and values as well as overseeing journalism across all areas of the BBC’s output*”. The Tribunal considers that these oversight and strategic responsibilities are not within the “*creative and journalistic space*” that is protected by the derogation. Furthermore, they have a clear relationship to the exercise of the overall responsibilities of the Governors.

131. Mr Whittle’s evidence records the consideration by the Journalism Board of the Balen Report. He said “*The review itself was relevant to the strategic editorial oversight of programme making the Board was expected to have. It enabled the Board to consider what improvements if any it needed to make to the BBC’s coverage.*” He went on to say: “*The report also stimulated the Board into*

commissioning additional journalistic tools to assist in coverage of the area to have an impact on the way that news editors treated a story.”

132. Mr Whittle regarded the Balen Report as having been prepared for the purposes of BBC journalism. The Tribunal considers that when the Report was considered by the Journalism Board, the purposes it supported were of a policy and strategic nature, related to the overall allocation of resources, and to the discharge by the Governors, through the senior executives of the BBC, of their Charter responsibilities.

133. The Tribunal is clear that, when originally commissioned, Mr Balen’s work was for predominantly journalistic purposes. It formed a part of the third leg of the meaning of journalism that the Tribunal has adopted, in that it was primarily an output review intended to assure and enhance quality. However, when elevated to the Journalism Board on 9th November 2004, as a formal report, it was being used for, and hence was held for, wider purposes of strategic policy and resource allocation, which lie outside the scope of the derogation.

134. There were significant consequences arising from the consideration by the Journalism Board of the Balen Report, not least the allocation of resources to appoint a Middle East Editor, in the person of Mr Jeremy Bowen. In Mr Byford’s letter to Sir Quentin Thomas of 28 November 2005 he stated that:

“The initiatives have included establishing the post of Middle East Editor; reviewing our analysis capability; developing a Key Facts guide; auditing the use of on air ‘Middle East experts’; developing our training.”

135. The seniority of the Journalism Board, and the strategic and resource consequences of its consideration of the Report, lead the Tribunal to the view that, from 9th November 2004 the dominant purpose for which the information was held lay outside the scope of the derogation.

Tribunal's findings

136. The Tribunal finds that at the date the request was received by the BBC the dominant purpose for which the Balen Report was held was for purposes other than those of journalism, art and literature. Mr Sugar made his request for information on 8th January 2005. At that date the dominant purpose for which the information was held lay outside the derogation. The BBC was wrong to rely on the derogation in refusing to provide information and the IC was wrong to uphold that decision.

137. Our finding in relation to the derogation is supported by the fact that the BBC has available to it a number of exemptions under FOIA to enable it to further protect its commercial position in relation to private media rivals, in addition to the derogation. These exemptions are principally set out in paragraph 103 above.

138. Our finding means that the request was a valid request under s.1 FOIA and the Balen Report was held for a purpose within the remit of FOIA. This decides the second preliminary issue in this case.

139. The Tribunal invites submissions from the parties on how Mr Sugar's request should now be dealt with following this decision. The Tribunal considers there may be several possible options. Clearly, the effect of the Tribunal's decision is that the BBC should now consider the request under the provisions of Parts I to IV of FOIA. The BBC might then send Mr Sugar a copy of the Balen Report, or issue a refusal notice under s.17 FOIA, or provide Mr Sugar with a redacted version of the Balen Report and issue a refusal notice in relation to the redacted parts. If the BBC issues a refusal notice then what is the process by which any exemptions claimed can be challenged by Mr Sugar? Should such challenge be considered by the IC in the first instance or dealt with by the Tribunal at a full hearing of this appeal? What time limits should be applied to this exercise?

140. The Tribunal invites the parties to provide written submissions to the Tribunal as to how the matter should be dealt with from here onwards, within 20 days of the date of this decision, and to indicate whether there is agreement between the parties or some of them as to the way forward. Also the parties should indicate whether they are content for the Tribunal to decide on the next steps based on their written submissions or would wish to present the submissions to the Tribunal at a hearing convened for the purpose.

Signed

Date 29th August 2006

John Angel
Chairman