



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

Appeal No. EA/2009/0118

BETWEEN:

ANTHONY GEORGE FOSTER NEWBERY

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

and

THE BRITISH BROADCASTING CORPORATION

Additional Party

**HEARD ON 29 AND 30 OCTOBER 2012 AT THE LONDON CIVIL JUSTICE CENTRE,
PARK CRESCENT, LONDON**

BEFORE

**DAVID MARKS QC
TRIBUNAL JUDGE**

**ALISON LOWTON
NARENDRA MAKANJI**

Appearances:

The Appellant: In person

The BBC: Kate Gallafent (Counsel)
Jonathan Scherbel-Ball (Counsel)

The Information Commissioner was not represented and did not appear

Subject Matter:

Freedom of Information Act 2000, Schedule 1, Part VI and the scope of the 2000 Act with regard to the BBC's activities, in particular for purposes other than those of journalism, art or literature.

Cases and authorities referred to:

BBC v Sugar (No 2) [2009] EWHC 2349 (Admin)
BBC v Sugar (No 2) [2010] EWCA Civ 715; [2010] 1 WLR 2279
BBC v Sugar (No 2) [2012] UKSC 4; [2012] 1 WLR 439

DECISION

The Tribunal dismisses the Appellant's appeal against the Decision Notice of the Information Commissioner dated 17 November 2009 under Reference No. FS50176386.

Reasons for Decision

Introduction – an overview

1. Regrettably, the matters which are considered in this appeal are of some age. The Appellant made a request of the Additional Party, i.e. the BBC by letter dated 20 July 2007. The request referred to a BBC report and publication entitled "From Seesaw to Wagon Wheel: Safeguarding Impartiality in the 21st Century". The nature of the publication will be addressed in further detail below. That report made reference to a seminar, the general subject matter of which was climate change. In his request, the Appellant made a series of eight numbered requests, four are no longer in issue. The remaining four questions asked for the agenda for the Seminar, the names of all those invited to attend and of those who attended, and all minutes and all similar written records relating the seminar.
2. In August 2007, the BBC declined to give the information requested. It referred to what is sometimes called the designation being an expression to describe the particular provision relating to the scope and applicability of the Freedom of Information Act (FOIA) as it applies in particular to the BBC. The BBC claimed that the information sought by the request or requests fell outside FOIA since the BBC, and indeed other public service broadcasters, are bound by FOIA only in respect of information held for purposes "other than those of journalism, art or literature": see Schedule 1, Part VI.
3. The Information Commissioner (the Commissioner) issued his Decision Notice on 17 November 2009. He applied the designation and upheld the BBC's decision. Directions were made in this particular case in July 2010. An oral hearing was then envisaged. However, at that time, proceedings concerning the designation issue were on-going stemming from a request made by Mr Sugar (now deceased) for copies of the report dealing with the BBC's Middle East coverage.

That report was called the Balen Report. By mid-July 2010, those proceedings (the *Sugar* proceedings) had reached the Court of Appeal. The Court of Appeal upheld the prior decision of Irwin J in *BBC v Sugar (No.2)* [2009] EWHC 2349 (Admin) - *BBC v Sugar (No.2)* [2010] EWCA Civ 715; [2010] 1 WLR 2278. The Court of Appeal decided the relevant issues as had the Judge at first instance in favour of the BBC and Mr Sugar was by then applying for permission to appeal to the Supreme Court. He was duly granted such permission as will be seen ultimately in the decision of the Supreme Court reported at [2012] UKSC 4; [2012] 1 WLR 439. The Court of Appeal decision was upheld and his appeal was dismissed.

4. The present proceedings were stayed. The stay was removed only in March 2012.

The present request: further background

5. The Appellant had made his request both under FOIA and under the Environmental Information Regulations 2004 (the EIR) whichever was appropriate. Shortly before this hearing, the Appellant withdrew his appeal in relation to the EIR. The BBC report referred to above stated at page 40 that “climate change is another subject where dissenters can be unpopular”. It went on to state as follows, namely:

“The BBC has held a high level seminar with some of the best scientific experts and has come to the view that the weight of evidence no longer justifies equal space being given to the opponents of the consensus [*i.e. that climate change is “definitely happening”*] ... The BBC’s best contribution is to increase public awareness of the issues and possible solutions through impartial and accurate programming ...”

6. In its initial response in writing, the BBC informed the Appellant that the seminar which has been referred to (called “Climate Change – the Challenge to Broadcasting” and which was held at the BBC’s Television Centre at White City in London) was held on 26 January 2006. It also voluntarily provided certain additional information to the Appellant including the fact that the attendees were made up of 30 key BBC staff as well as 30 invited guests said to be specialists in the area of climate change. It also voluntarily provided information that the event was hosted by Jana Bennett, then Direction of Vision and Helen Boaden, the

then Director of News and that the key speaker at the seminar was Robin McCredie, the then Lord May of Oxford. The event was chaired by Fergal Keane, Special Correspondent with BBC News. The seminar was described to the Appellant as having the following aims, namely, to offer a clear summary of the state of knowledge on the issue, to find where the main debates lie and “to invoke imagination to allow the media to deal with the scope of the issue” as well as to consider the BBC’s role in public debate. As noted above, the BBC refused to comply with the request, at least as to five of the items sought.

7. The Appellant appealed to the Commissioner on 5 September 2007. On 2 October 2009, as indicated above, Irwin J gave judgment in the *BBC v Sugar (No.2)* [2009] EWHC 2349 (Admin) decision and the closely related case of *BBC v Information Commissioner* [2009] EWHC 2348. On 17 November 2009 the Commissioner issued his Decision Notice in the present appeal. In that Notice, he ruled as indicated that as the BBC was not a public authority for the purposes of the EIR, i.e. the Environmental Information Regulations or FOIA in respect of information held for the purposes of journalism, art or literature, no disclosure should be made. In any event, any request or requests which the Appellant had made needed to be considered under FOIA and not the EIR.
8. The Commissioner also referred in his Decision Notice to the conclusion reached by Irwin J in his two judgments: see in particular paragraph 20 of the Decision Notice, to the effect that the words in the schedule to FOIA, (i.e. the designation) meant that the BBC had “no obligation to disclose information which they hold to any significant extent for the purposes of journalism, art or literature, whether or not the information is also held for other purposes”.
9. In the light of Irwin J’s determination in both his decisions, the Commissioner determined that the purpose of the seminar was:

“... to inform the BBC’s editorial decisions and direction in relation to its coverage of climate change in both factual and non-factual programmes. The Commissioner is satisfied that as the purpose of the seminar was to influence the BBC’s creative output, the details about its contents are held by it to a significant extent for the purpose of art, literature or journalism. Furthermore, he is satisfied that details of those who attended the seminar are held by the BBC to facilitate the delivery of the event and to ensure that the appropriate people were in

attendance. Therefore that information is also held to a significant extent for the purpose of art, journalism or literature.”

10. It necessarily followed in the Commissioner’s view that the outstanding requested information was held for the purposes of journalism and the BBC had been correct to refuse to comply with Parts I-V of FOIA.
11. The Appellant filed a Notice of Appeal dated 16 December 2009. With due respect to the Appellant, the Tribunal does not regard it as any longer necessary to set out in detail what the specific grounds were as stated in that original notice since they have been superseded by the *Sugar* proceedings.. The Appellant freely accepted that the outcome of the *Sugar* proceedings might be relevant to his case.
12. The Court of Appeal handed down its judgment in the *Sugar* proceedings in the matter of *Sugar v BBC* [2010] EWCA Civ 715; [2010] 1 WLR 2278 on 23 June 2010. The Supreme Court’s judgment in the *Sugar* case was handed down on 15 February 2012. The Tribunal discharged the stay it had previously imposed on 2 March 2012. On the same day it issued directions primarily for the purposes of inviting the parties to submit amended “pleadings”. The Appellant filed Revised Grounds of Appeal supplementing his original Grounds.

Sugar in the Court of Appeal and beyond

13. Before turning to the considerations of the Supreme Court’s decision in the *Sugar* proceedings the Tribunal feels it is important to note a number of salient points which emerge from the Court of Appeal’s decision. The Court of Appeal, in brief rejected what could be called a dominant purpose test which had been the foundation of the initial Tribunal’s decision in the *Sugar* proceedings. The Supreme Court upheld that view and made the same finding.
14. The Court of Appeal also emphasised that each case was to be determined on its own facts. They gave some general guidance as to the meaning of “journalism” within the scope and meaning of FOIA. In his judgment, the Master of the Rolls (see particularly at paragraph 23) stated that in his view, the Court of Appeal should “primarily concentrate on the reasoning and decision of the tribunal”. At paragraph 31, the Master of the Rolls has set out how that Tribunal had expressed its own view as to the meaning of the term “journalism” at paragraphs

105-109 of the Tribunal's initial decision. This Tribunal feels that those paragraphs should be set out in full, namely:

“105. ... [A] more useful distinction may be between functional journalism and the direction of policy, strategy and resources that provide the framework within which the operation of a [public service broadcaster] 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 replication.

108. The second is editorial. This involves the exercise of judgment on issues such as: the selection, prioritisation and timing of matters for broadcast or publication; the analysis of and review of individual programmes and the provision of context and background to such programmes.

109. The third [element] is the 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.”

15. The Master of the Rolls pointed out at paragraph 39 and following of his judgment that he had misgivings, if not difficulty, in applying a predominant purpose test particularly with information which was said to be held for more than one purpose. He held (see paragraph 44) that once it is established that the information sought is held by the BBC for the purposes of journalism “it is effectively exempt from production under the Act, even if the information is also held by the BBC for other purposes”. He added that the word or term “journalism” should be given its natural meaning. He expressly approved another paragraph in the original Tribunal's judgment that in effect the line should not be drawn between “journalism and the management of journalism”. In paragraph 55

he said in terms that “the question whether information is held for the purposes of journalism should thus be considered in a relatively narrow rather than a relatively wide way.” At paragraph 56, he said the following, namely:

“That view is reinforced by the fact that the expression “journalism” is linked to “art and literature”. One cannot say that financial information which may affect the financing of an arts programme, a drama series, or a broadcast opera is ex hypothesi held “for purposes...of...art or literature”, and such programmes are rarely within “journalism”. It would be surprising and internally inconsistent if the 2000 Act provided for a wholly different test when considering whether information was held “for the purposes...of journalism” than when considering whether it was held “for the purposes...of... art or literature”. Having said that, I would be inclined to accept that “journalism” probably embraces significantly more activities than “art or literature” when it comes to the activities of the BBC”.

16. On the facts of the *Sugar* appeal, the Master of the Rolls held that the purpose for which information was sought, i.e. the Balen Report, was in order to ensure the BBC’s Middle East coverage was “effective and impartial”.
17. In the Supreme Court at [2012] UKSC 4; [2012] 1 WLR 439, their Lordships unanimously determined that the Balen Report was held for the purposes of journalism at the time of the request. By a majority with Lord Wilson dissenting, the Supreme Court agreed with the Court of Appeal’s approach to the effect that if information is held “to any significant extent” for journalistic purposes, such information falls outside the scope of FOIA. Journalism does not need to be the dominant purpose for which the information is held: see in particular paragraphs 67, 75, 103 and 110.
18. Even though Lord Wilson dissented as to the extent to which information must be held for the purpose of journalism, he did not dissent as to the outcome of the appeal. He remarked on how the three elements comprising the designation itself could be said broadly to include all types of the BBC’s overall “output”: see paragraph 38. He added at the same paragraph: “So, although one might have an interesting debate whether nowadays the word “journalism” encompasses more than news and current affairs, the debate is likely in this context to be sterile. For any output which did not obviously qualify as journalism would be likely to qualify either as literature or – in particular, in that its meaning has a

striking elasticity – as art.” (see also similar views expressed by Lord Walker at paragraphs 70 and 79. See also Lord Phillips at paragraph 67).

19. Lord Wilson expressed his approval of the three-fold analysis afforded to the practice of journalism by the original Tribunal and already quoted in this judgment, i.e. paragraphs 107 to 109 of the original Tribunal decision.

20. As for the critical issue relating to the determination of the purpose for which information was held at the relevant time, three of their Lordships, namely Lords Phillips, Walker and Brown, especially at paragraph 67, 83 and 106 stressed in the words of Lord Phillips that the answer to the issue regarding the definition “must lie in adopting a purposive approach to the *definition*” (see para 63). At paragraph 83, Lord Walker said the following, namely:

“In my view the correct approach is for the tribunal, while eschewing the *predominance* of purpose as a test, to have some regard to the *directness* of the purpose. That is not a distinction without a difference. It is not weighing one purpose against another, but considering the proximity between the subject matter of the request and the BBC’s journalistic activities and end-product, as Irwin J observed in the *Financial Information* case [2010] EMLR 121, para 86 in the context of a critique of what was “operational”: “the cost of cleaning the BBC board room is only remotely linked to the product of the BBC”.”

21. Finally, with regard to Lord Brown at paragraph 106, namely:

“As for the point at which information will cease to be held to any significant degree for the purposes of journalism and become held instead, say, solely for archival purposes, that necessarily will depend on the fact of any particular case and involve a question of judgement. I too agree with Lord Walker...that the central question to be asked in such a context will be, not which purpose is predominant, but rather whether there remains any sufficiently direct link between the BBC’s continuing holding of the information and the achievement of its journalistic purposes.”

22. It follows in this Tribunal’s clear judgment that in the light of the Supreme Court’s findings, information that is held for the purpose of journalism (or indeed of art or literature) to any significant extent falls outside the FOIA and is absolutely exempt from disclosure. ‘Significant’ in this context is akin to being more than de minimis. The element of public interest at least in the sense and way in which

public interest is addressed in the context of for example qualified exemptions within FOIA has no bearing whatsoever on that issue. Insofar as the Appellant in this case sought to claim that it would be in the public interest to disclose the information requested, this is irrelevant.

23. The Supreme Court's judgment is the precedent which binds this Tribunal in respect of the designation's proper interpretation and application. Moreover, insofar as it is contended by the Appellant that the Supreme Court's decision established that FOIA created a public right of access to information which should be interfered with to the extent absolutely necessary, the Tribunal is clear that this is simply not what the Act provides for. The Appellant also appeared (at least at one stage) to argue that the release of the disputed information would not have any negative impact on the BBC and indeed might have a positive one. The designation afforded to the BBC and indeed other public service broadcasters is clearly not only applicable where the release of the disputed information would demonstrably have a detrimental impact upon the BBC.
24. At paragraph 65 of the Supreme Court's judgment Lord Phillips said the following, namely:

“A purposive construction of the *definition* will prevent disclosure of information when this would risk interference with the broadcasting function of the BBC. This will not depend upon the predominant purpose of holding the information. It will depend upon the likelihood that if the information is disclosed the broadcasting function will be affected. The same is true in the case of the Bank of England. For this reason I do not agree with the approach of Lord Wilson...to this issue.”
25. The Tribunal therefore rejects any contention that in or by this passage, Lord Phillips is in anyway entertaining, let alone accepting the contention that the designation in some way be disapplied in whole or in part dependant on the particular circumstances. He is simply identifying and confirming why the BBC and similar organisations have been granted the dispensation constituting the designation itself.
26. Nor in the Tribunal's firm judgment can recourse be had to what Lord Neuberger as Master of the Rolls might be taken to have said when he referred to the question whether information was held for the purposes of journalism had to be “in a relatively narrow way”: see para 55 of his judgment.

27. In the Tribunal's judgment, the interpretation of the designation as upheld and confirmed by the Supreme Court reflects the interpretation afforded to the designation by the Commissioner in his original Decision Notice in this case. It cannot be said that the Supreme Court whether through the medium of any of their Lordships' speeches advocated a narrower application of the designation than that applied by the Commissioner in this case.

The essential issues

28. In the Tribunal's view and judgment and in the light of the Supreme Court's decision, there are three basic questions of principle which have to be addressed and resolved in any case in which the designation is in issue and certainly in the context of this case. First, there has to be an analysis of the purpose or purposes for which the requested information is held. Second, there has to be an examination of the relationship between that information and the BBC's output as a whole. Third, there needs to be a consideration of who the users of the information are likely to be.
29. The BBC in its response dated 16 April 2012 to the Appellant's revised Grounds of Appeal submits that there is an additional factor that needs to be considered, namely the need to ensure that there is a level playing field as it is put as between the BBC and its commercial rivals.

The BBC

30. The BBC Trust is established by Royal Charter. The Trust's role is to set the overall strategy and direction of the BBC. It exercises general oversight over the work of and over the Executive Board of the BBC. The Trust operates in accordance with the BBC's Public Purposes. The BBC is in essence required to promote via the provision of its output principally information, education and entertainment. The BBC sees impartiality and independence as its defining qualities. The Trust represents a final arbiter with regard to the matters of complaints regarding impartiality and inaccuracy. In November 2005, the then BBC Board of Governors which was the precursor to the Trust, in association with the then Executive of the BBC commissioned a report (the 'Wagon Wheel' report) with the purpose of considering the BBC's impartiality 'at a time of great changes in the broadcasting environment and in British society more generally.'

This report set some guiding principles for the application of impartiality at the BBC.

31. On 18 June 2007 the Trust published the report which triggered the original request. The title was set out at the start of this judgment. The title represented a reference to the requirements and impartiality with regard to the BBC's output as a whole. In general terms, the BBC contends that the report was published to reflect a change from a situation in which there was usually a two-sided debate to a situation or a series of situations in which a wider and more diverse range of opinions had to be addressed.
32. At page 7 of the Report in the middle of a section addressing twelve so-called Guiding Principles, the 4th such Principle is set out as follows, namely:

“Impartiality involves breadth of views and can be breached by omission. It is not necessarily to be found on the centre ground. The continuing changes in British society mean that the parameters of “normality” and “extremism” have shifted. Reporting from the centre ground is often the wrong place to be. Impartiality does not entail equal space for every attitude, but it should involve some space provided that points of view are rationally and honestly held, and all of them are subject to equal scrutiny. It is not the BBC's role to close down debate.”
33. The Tribunal notes that all twelve Guiding Principles expressly consider the element of impartiality and its central importance to programme making. Indeed, the title of the Report itself refers specifically to the safeguarding of impartiality in the 21st century. The Report as a whole is 81 pages or so in length. The Tribunal is not minded to do anything other than paraphrase certain portions of it. It is based on a number of specific inputs consisting of audience research, interviews and a seminar referred to in the Appellant's request. At page 3, the Report is described as suggesting: “some guiding principles for the application of impartiality at the BBC and draws a number of conclusions for the Trust and the Executive Board to enhance its delivery”.
34. Its stated aim is to “stimulate further discussion throughout the BBC and so bring impartiality to the forefront of the production process.”
35. There is no specific reference to climate change or to any subject matter that could reasonably be regarded as related to climate change save for the passage

on page 40 within the Report already referred to in this judgment. Indeed, this is the only page in the entire Report which mentions the topic. At page 40 as indicated above there is the explicit reference to the seminar which is in question. After alluding to the fact that climate change is “another subject where dissenters can be unpopular” the Report refers to what it calls “a high level seminar with some of the best scientific experts” and goes on to say that it has “come to the view that the weight of evidence no longer justifies equal space being given to the opponents of the consensus.” The paragraph then goes on as follows, namely:

“But these dissenters (or even sceptics) will still be heard, as they should, because it is not the BBC’s role to close down this debate. They cannot be simply dismissed as “flat-earthers” or “deniers”, who “should not be given a platform” by the BBC. Impartiality always requires a breadth review: for as long as minority opinions are coherently and honestly expressed, the BBC must give them appropriate space. “Bias by elimination” is even more offensive today than it was in 1926. The BBC has many public purposes of both ambition and merit – but joining campaigns to save the planet is not one of them. The BBC’s best contribution is to increase public awareness of the issues and possible solutions through impartial and accurate programming. Acceptance of a basic scientific consensus only sharpens the need for hawk-eyed scrutiny of the arguments surrounding both causation and solution. It remains important that programme-makers relish the full range of debate that such a central and absorbing subject offers, scientifically, politically and ethically, and avoid being misrepresented as standard-bearers. The wagon-wheel remains a model shape. But the trundle of the bandwagon is not a model sound.”

The Seminar

36. The Seminar was held, as has been noted, on 26 January 2006. In the words of Ms Boaden who gave evidence on behalf of the BBC as set out in her witness statement at paragraph 7:

“One of the aims of the Seminar, as with other seminars organised by the BBC, was to enhance knowledge and understanding of the key issue on the global news agenda, so as to identify where the main areas of debate lie and to consider the role of the BBC in broadcasting the public debate.”

37. Ms Boaden helpfully amplified this in her evidence to the Tribunal. She stressed that most journalists were generalists and it was important to ensure that they were kept abreast of and had enthusiasm for key issues. She explained that in the context of 24/7 news it was important that they had some space for the examination of these issues which might well inform later programme making.
38. Elsewhere the BBC has contended that the seminar had been intended to offer a “clear summary of the state of knowledge on the issue of climate change”, to ascertain where the main debates lay, to involve what was called “imagination” so as to allow the media to deal with the various issues, and to consider the BBC’s role in the public debate in that connection.
39. According to the BBC’s written submissions submitted on 20 September 2012, since 2004 the BBC has organised a series of seminars by means of an ad-hoc partnership with the Cambridge Media and Environmental Programme (CMEP) in conjunction with the BBC News senior management team. Again, Ms Boaden makes this clear. These seminars were originally called the CMEP Seminars, but later became known as the Real World Seminars. The seminars as a whole have informed a wide range of BBC output. They have also served to diversify and stimulate the creative coverage of many issues covered by the BBC. One aim as is clearly implicit in what has been said is to stimulate ideas. This no doubt in part explains the use of the expression “imagination” as used by the BBC in this connection.
40. The seminar in question it seems was in fact attended by 28 BBC representative and 28 outside invitees. The number seems to vary from about 28 to 31 for both BBC and external attendees but this discrepancy is not of any significance. The latter, i.e. the outside invitees, included scientists and policy experts. The seminar focussed on climate change and climate science and was designed to stimulate the BBC’s journalists in the long term. The BBC attendees came from a variety of different departments. The event looked forward to the coming ten years to explore the challenges facing the BBC, particularly in covering the breadth of climate science. It discussed what is said to be inventive and creative ways of engaging with the BBC audience on that topic. Ms Boaden again formally confirmed this in her witness statement and in her evidence to the Tribunal. She confirmed that this was a ‘free wheeling’ event and as such there was no formal minute or note of the day. Some of the attendees, including

herself, made notes of issues which interested them. She had no idea where her notes now were.

41. The BBC maintains and the Tribunal has no reason whatsoever to doubt this that the holding of such seminars bringing together insiders and outside expertise is a standard BBC practice. Ms Boaden again describes this as a vital tool in maintaining and enhancing BBC journalistic standards and output. Many of these seminars (including this one) are held under the so-called "Chatham House Rule" and to encourage openness and the sharing of information. This too was confirmed by Ms Boaden. She stated that to undermine this confidentiality might severely impact upon the quality of future seminars which the BBC is able to, and does in fact hold, for the purpose of informing and developing its journalism. She told the Tribunal that she very clearly stated the basis on which the seminar was to proceed and that it was always important to be clear where journalists were involved.
42. Ms Boaden also said that attendance at this seminar led to an enriched understanding among the attendees of the breadth and diversity of the various issues which relate to climate science. This in turn had an impact on a broad range of that side of the BBC output which related to science programmes as well as to news reports and business programmes together with respect to items dealing with major and developing economies across the world. She said that some editors who attended went on to produce specific reports for programmes in part informed by discussions held at the seminar.
43. In short, the BBC claims that the seminars helped generally to inform and enrich BBC journalism. It did so by providing information, context and background. It also provided assistance to editors and to journalistic members of the BBC staff and those connected with BBC in the exercise of their judgement and in the presentation of issues surrounding climate science in terms of programming. The BBC specifically points out that seminars do not set editorial practice. However, they do add to and contribute to ongoing debates and discussions regarding the BBC's practice and practices in relation to the presentation of climate science issues. Editorial policy however is ultimately determined through more formal procedures involving various BBC Boards and/or the Trust itself.
44. The Tribunal also notes that another recent gloss to the BBC's case is made in its written submissions of 20 September 2012. The BBC does not contend that the

requested information, i.e. principally the agenda for or content of the seminar in any way “informed” the published Wagon Wheel report.

45. The specific requests made by the Appellant were eight in number. Numbers 4 to 8 featured in the Commissioner’s Decision Notice. They should for the sake of completeness be set out in express terms, namely:

- “4. A copy of the invitation that was sent to prospective participants.
5. The agenda for the seminar together with any notes that were provided for the participants.
6. The names of all those who were invited to attend the seminar as participants, observers or in any other capacity to go with their job description, organizational affiliation’s (sic) or any other information relating to their eligibility for being invited to be present.
7. The names of all those who attended the seminar as participants, observers or in any other capacity together with their job description, organizational affiliation’s (sic) or any other information relating to their eligibility for being invited to be present.
8. Any minutes, notes, electronic communications, recorded material or other records of the proceedings of the seminar.”

46. In due course the BBC voluntarily sent a description of the attendees, i.e. said to be 30 key BBC staff and 30 invited guests: it also provided as indicated the names of the hosts being Ms Bennett and Ms Boaden. It referred to Mr Keane and to the key speaker being Lord May of Oxford. The BBC also confirmed what the aims of the seminar were.

47. In her witness statement, Ms Boaden usefully identifies the information that remains disputed. These are what she calls a detailed schedule, an agenda, a briefing note on the aims of the seminar, the lists of attendees (some including contact details), various documents for the conduct of the seminar including signs and labels, and opening remarks by Ms Bennett. She refers this as to the Information Held.

48. In practical terms this means that the BBC does not hold and did not hold the subject matter of the Appellant’s request number 4. It did hold the subject matter

of request number 5 but did not hold any information identifying all those who were invited qua participants in accordance with request 6. It did however hold the names of all those who attended and their job description and/or affiliation with accordance with request 7, but it did not hold any minutes, etc other than those indicated in relation to request 5.

49. The BBC has also confirmed it held other non-requested information which has been called in general terms “logistic details”, e.g. a schedule identifying meeting rooms. The Tribunal has been given a closed bundle in which all these materials and the so-called Information Held are contained.
50. At this point the Tribunal reverts to the fundamental issues set out above that need to be addressed. It deals first with the question of purpose.
51. Ms Boaden claims that there are at least five creative and journalistic purposes behind the seminar. These to some extent have been addressed already. The first sought to improve the knowledge of BBC editors and journalists on climate science by allowing them if not encouraging them to discuss issues with a broad variety of perspectives. Secondly it was intended to stimulate those editors’ and journalists’ creative thinking on climate science and its implications. Third it allowed journalists from different departments within the BBC to benefit from the opportunity to develop their ideas and share ideas as it was put “across genres”. Fourth it encouraged programme makers to introduce international themes and stories into their programmes. Fifth it considered the role and the BBC in broadcasting the public debate over climate science and exploring the challenges facing the BBC in covering that issue. In evidence to the Tribunal Ms Boaden also confirmed that the list of attendees also constituted ‘live’ journalistic information as it constituted a list of journalistic contacts. For this reason, she had, after the seminar, “cascaded” this list to her direct reports. Journalistic contacts represent a central pillar of journalism. These contacts allow BBC producers and journalists to develop and maintain links within the scientific community.
52. It is claimed that in fact the seminar did lead to inspire a number of programmes including a three-part series broadcast in September 2008 being over a year after the initial request by the Appellant, entitled Earth: The Climate War. There was also a BBC Horizon special broadcast in December 2009 on global population issues.

53. The BBC therefore contends that the disputed information directly reflects and comprises the second and third types of journalistic activity identified by the original Tribunal in the *Sugar* case and subsequently approved by the Court of Appeal and the Supreme Court.
54. Insofar as the purpose could be said to be a mix, the BBC refers to those passages in the speeches of Lords Brown and Mance in the Supreme Court at paragraphs 108 and 111 respectively to the effect that if the information is held to any significant degree for the purposes of journalism then the designation will apply.
55. Moreover, insofar as it is relevant, the BBC confirms that the disputed information had not been archived as at the date of the Appellant's request. It was held as reference material. The BBC claims that the format of the seminars as a whole, in particular this seminar, proved to be very popular amongst BBC editorial staff. It was therefore essential for organisers of subsequent conferences on similar themes to be able to refer to earlier agendas, schedules and the list or lists of previous attendees. Much more importantly however it is claimed by Ms Boaden that the review of the approach or approaches in previous seminars allows BBC journalists to consider whether they are still adopting the correct approach in major broadcasts.
56. Ms Frances Weil provided a witness statement for the Tribunal and also attended to give evidence. She is a Project Manager for BBC Vision and her responsibilities include editorial briefings. As part of this, she manages seminars including recent 'Real World' seminars. She said that she had taken on this role shortly after the seminar which forms the subject matter of this request. She had not therefore organised it, although she did attend it. Her witness statement stated and her evidence to the Tribunal was that the disputed information had not been archived at the date of the request. She said that she was required to consider whether this sort of information should be archived two years after the event. The fact that it had not been archived showed that it was very much 'live' information. Indeed she held it on a shared drive which made it accessible to others within the BBC.
57. The Tribunal can here deal with the other two components in the three-part exercise and analysis which was set out above, insofar as not addressed in the previous passages. The second element concerns the relationship between the

information and the BBC's output. Enough has been said to show that the relationship could not be closer even with what might be regarded arguably as a degree of mixed purpose. The answer to the third element is self-evident. The users were initially the BBC programme makers themselves and by virtue of their work, the wider general public.

58. The corollary of these conclusions is also addressed by Ms Boaden in her evidence. Any release of the requested information she said would be likely to interfere with or constrict the BBC's broadcasting functions.

The Appellant's arguments

59. Out of due consideration to the careful manner in which the Appellant has attempted to marshal his arguments, the Tribunal will attempt to address them as best they can. Many of them are duplicated across a number of documents he has submitted including a 14 page skeleton argument submitted effectively on the eve of the appeal hearing.

60. The principal plank of the Appellant's submissions appears to be that the Supreme Court's decision in *Sugar* established a public right of access to information which should only be interfered when absolutely necessary. This contention has already been set out above in this judgment.

61. However, the Tribunal completely rejects this contention. Apart from what is said above, the underlying basis for the Supreme Court's decision is the purposive construction already identified particularly in the speech of Lord Phillips. At paragraphs 64 and 65 of his speech Lord Phillips expressly referred to the protection reflected in the designation which was designed to prevent interference with the performance of the functions of the BBC in broadcasting, art and literature.

62. The essence of the Supreme Court's decision appears to the Tribunal to be contained in Lord Walker's speech at paragraph 78 (which was expressly followed by Lords Phillips and Brown.) Lord Walker said:

'...public service broadcasters...should be free to gather, edit and publish news and comment on current affairs without the inhibition of an obligation to make public disclosure of or about their work in progress. They should also be free of inhibition in monitoring and reviewing their output in order to maintain standards

and rectify lapses. A measure of protection might have been available under some of the qualified exemptions in Part II of the 2000 Act....But Parliament evidently decided that the BBC's important right to freedom of expression warranted a more general and unqualified protection for information held for the purposes of the BBC's journalistic, artistic and literary output.”.

63. The interpretation afforded by the Appellant to the Supreme Court's decision would result in the BBC being forced to disclose more information that it might otherwise be obliged to disclose under FOIA itself.
64. The Tribunal notes that although the Appellant appears not to accept that those who attended the seminar could properly be described as “scientific experts”, let alone as “the best scientific experts” as the BBC would have it, he nonetheless appears to accept that the seminar was in fact organised for the purposes of the BBC's journalistic and editorial activities.
65. Indeed and again for the reasons provided by Ms Boaden articulated above, the Tribunal finds it impossible to find that the information was held for any purpose other than journalism, quite apart from the apparent concession to that effect by the Appellant himself.
66. Next, the Appellant contends that the BBC is not obliged to comply with FOIA and in particular section 1(1)(a) in circumstances where the requested information falls outside its scope. The core of his argument (although the Tribunal found it hard to follow) appeared to be the assertion that the disputed information had archival and not journalistic purposes. He claimed to rely on the Supreme Court's judgment which does make some reference to archived material and archives. The Tribunal understands that the Appellant's use of the word ‘archival’ was intended to demonstrate that how the information was held (i.e. whether it was in fact held in an archive) was irrelevant and that his focus was on the purpose for which it was held. The Tribunal would not disagree with this. The Appellant appeared to argue that information which related to past events could not be held for journalistic purposes. There is nothing in the Supreme Court judgment to give credence to this argument. In any event, even if the Tribunal agreed with the Appellant that this distinction was created by the Sugar judgment, the uncontested evidence before the Tribunal was that the disputed information was neither archival nor archived, but live.

67. The contents of the disputed information has been amply summarised already in this judgment. It has also been described above precisely what information falls within or without the requests which are in issue here, namely requests 4 to 8 submitted by the Appellant. Next, the Appellant appears to contend that the Commissioner failed to apply what he called a public interest exemption to his request. The Tribunal finds this argument difficult, if not impossible, to follow. No such phrase or concept appears anywhere in the statutory language of FOIA. Nor does the phrase appear to mean anything, save for consideration of the public interest in disclosure in cases where a qualified exemption is engaged under Part II of FOIA. However, the Supreme Court's decision shows unquestionably that in enacting the designation, Parliament predetermined and pre-empted any residual public interest argument in relation to information which did not fall within the designation: again, see particularly Lord Walker at paragraph 78 and 79. In addition, the Appellant found it impossible to accept that the BBC was not legally a public body or that it was only a public authority in FOIA terms in relation to material which was not held for journalistic, artistic or literary purposes.
68. At paragraph 11 of his most recent submissions in the form of a skeleton argument referred to above, the Appellant says that he considers that at the time of his request, namely some 18 months or so after the date of the seminar, some of the information which he sought, particularly as reflected in request number 7 relating to the names of attendees, etc "was no longer held by the BBC for purposes that would exclude it from the designation in light of the Supreme Court's judgment". This submission again is not entirely understood by the Tribunal. However, if it seeks to refer to the fact that the information requested was later only of historical and more particularly of archival value alone (as indeed the Appellant seems in terms to say), this contention as addressed by Ms Boaden has been dealt with above in relation to the BBC's case. The Appellant makes much of the fact in her witness statement at least, Ms Boaden states that the disputed information was "being held as potential reference material". For the Appellant this means that it must be archival (regardless of the direct evidence to the contrary given by Ms Boaden). The Appellant claims that the participants' list cannot be said to have any meaningful purpose either as considered and discussed both by the Court of Appeal or by the Supreme Court or at all. Nor he claims could it be regarded as "work in progress" in any real sense, that phrase being one employed by Lord Walker in the Supreme Court.

69. The Appellant takes particular issue with the statement in Ms Boaden's witness statement that as at the date of the request what he called the information "had not been archived and was being held as potential reference material and a list of journalistic contacts". In particular she noted the following, namely that:
- "Contacts and sources of information are the central pillar of journalism, and journalists who cover science are encouraged to develop and maintain links including within the scientific community. To this end one of the primary recommendations of Professor Jones' 2011 Report accepted by the BBC Trust in its "Review of Impartiality and Accuracy in the BBC's Coverage of Science" was that the BBC should work to improve and strengthen its contacts with the science community."
70. Later, she adds that in her view it is essential that those arranging the Real World Seminars "can review what was discussed in earlier sessions in order to inform agendas for future seminars. Seminar organisers also need to be able to review past lists of attendees".
71. The Tribunal regards Ms Boaden's and Ms Weil's evidence as a conclusive answer to these particular contentions made on behalf of the Appellant.
72. The Tribunal therefore finds that the disputed information falls firmly outside the designation and therefore outside the scope of FOIA.

Section 40 of FOIA

73. The Tribunal heard submissions and evidence in relation to the application of s40 (the personal information exemption). The basis for this was that if the Tribunal were to find against the BBC, then the BBC would wish to rely on s40 at least in relation to part of the disputed information. Given that the Tribunal has found in favour of the BBC there is no need to deal with the arguments presented on s40. Nonetheless, for completeness the decision will deal briefly with those arguments.

S40 provides that:

- (1) Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject*

(2) *Any information to which a request for information relates is also exempt information if:*

- a. It constitutes personal data which do not fall within subsection (1) and*
- b. Either the first or the second condition below is satisfied.*

(3) *The first condition is:*

- a. In a case where the information falls within any of the paragraphs (a) to (d) of the definition of 'data' in section (1) of the DPA 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene*
 - i. Any of the data protection principles, or*
 - ii. Section 10 of that Act (right to prevent processing likely to cause damage or distress), and*
- b. In any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the DPA 1998 (which relate to manual data held by public authorities) were disregarded.*

(4) *The second condition is that by virtue of any provision of Part IV of the DPA the information is exempt from section 7(1)(c) of that Act (data subject's right of access to personal information).*

Section 1(1) of the DPA defines 'personal data' as:

'..data which relates to a living individual who can be identified –

- (i) From those data, or*
- (ii) From those data and other information which is in the possession or is likely to come into the possession of the data controller*

And includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual.

74. The Appellant did not agree that the information on the attendance list constituted personal information. He based this view on his argument that those attending must have done so in their professional capacity. The Tribunal had evidence from the BBC that all external attendees were invited in their personal capacity. In any event, the basis of their attendance has no impact on whether the information is in fact personal information. Having seen the attendance list (as part of the closed bundle) the Tribunal has no hesitation in determining that the information is personal.
75. The FOIA states that personal data are exempt from disclosure if disclosure would contravene any of the data protection principles. This is not subject to the public interest test. The relevant data protection principles are the First and the Second Data Protection Principles. The First Data Protection Principle states that:
- Personal data shall be processed fairly and lawfully and in particular shall not be processed unless-*
- a. At least one of the conditions in Schedule 2 is met,*
76. At page 10 and paragraph 29 of his latest skeleton argument, the Appellant takes issue with the fact that the BBC in its contentions and in the evidence of Ms Boaden has made reference to and apparently sought to rely on section 40 of FOIA which deals with personal data and the Chatham House Rule as “grounds for not releasing information about the participants at the seminar and particularly their names”.
77. The Appellant made much of the BBC’s reliance on the Chatham House Rule and appeared to argue that the fact that the BBC had, in his view, breached the Rule meant that they could not rely on it. The Tribunal has no jurisdiction over compliance with the CHR and in any event, the only way the CHR could be relevant is in consideration of whether releasing the personal information could be done fairly. The explicit application of the Rule would clearly lead to an expectation from participants that the BBC would not disclose the attendance list. To that extent therefore it is hard to see how releasing the information could be fair.
78. The Appellant also sought to argue that in his view the participants would crave the publicity of attending the seminar rather than maintaining confidentiality. The

Appellant provided no evidence to support this contention and in any event, the views of individuals about the release of their personal information has no bearing on the BBC's responsibilities. The Tribunal has dealt with this aspect of the case very briefly but sees no reason why it cannot conclude that even if it had not agreed that the disputed information was held for journalistic purposes, some at least of the disputed information would be exempt from disclosure under s40 FOIA.

Conclusion

79. For all the above reasons, the Tribunal dismisses the Appellant's appeal against the Commissioner's Decision Notice.

Signed:

David Marks QC
Judge

Dated: 8 November 2012