



NCN: [2022] UKFTT 00480 (GRC)

Appeal Number: EA/2021/0290

**First-Tier Tribunal
(General Regulatory Chamber)
Information Rights**

Between:

David Keighley

Appellant:

and

The Information Commissioner

First Respondent:

and

British Broadcasting Corporation

Second Respondent:

Date and type of Hearing: 6 May, 23 & 24 November and 14 December 2022.

Panel: Brian Kennedy QC, Pieter DeWall and Susan Wolff.

Representation:

For the Appellant: Thomas Roe K.C., Counsel.

For the Respondent: Jason Pobjoy, Counsel.

Result: The appeal was allowed in relation to Part 3 of the Request.

REASONS

Introduction:

- [1]** This decision relates to an appeal brought under section 57 of the Freedom of Information Act 2000 (“the FOIA”). The appeal is against the decision of the Information Commissioner (“the Commissioner”) contained in a Decision Notice (“DN”) dated 8 September 2021 (reference IC-81154-W4D3), which is a matter of public record.
- [2]** The Tribunal part heard the appeal on 6 May 2022 when the Appellant and Second respondent presented their legal submissions. The central issue in this case is whether information about editorial complaints falls within the derogation in Part IV of Schedule 1 FOIA, which provides that information held by the BBC is not disclosable pursuant to the FOIA if it is held for the “purposes of journalism, art or literature”. The Second Respondent relied, inter alia, on a number of earlier FTT decisions and also numerous ICO Decision Notices where the ICO upheld BBC decisions that requested information about editorial complaints are ‘held’ for the purposes of journalism. [OB. 4.1/ 190]. The Tribunal considered that it was not bound by these previous decisions and that it did not have sufficient evidence to reach a conclusion about the link between complaints and editorial output. Accordingly, the hearing was adjourned and the Tribunal issued Directions to the BBC to provide such evidence and further evidence about the searches in relation Part 3 of the Request.
- [3]** The second hearing took place on 23 November 2002. By agreement between the Appellant and the Second Respondent the focus of the hearing was on the evidence submitted by the BBC in relation to Parts 2 and 3 of the request. Some of this evidence was heard in closed session. A gist was provided to the Appellant and additionally the BBC provided some further explanatory narrative in relation to the closed elements of the witness statement.
- [4]** In the light of the legal submissions and the evidence the Tribunal concludes that the Commissioner did not err in law in relation to Parts 1 and 2 of the request, but did so in relation to Part 3.

Factual Background to this Appeal:

- [5] Full details of the background to this appeal, the complainant's request for information and the Commissioner's decision are set out in the DN. The appeal concerns a request for information relating to editorial guidelines, copies of complaints, and the recruitment to a post that was then occupied by Professor Richard Sambrook. In response, the British Broadcasting Corporation ("BBC") explained that the first two parts of the request were covered by the derogation from the FOIA. Further, that the third part of the request was exempt under section 40(2) FOIA. Subsequent to review the BBC stated that the information was not held.
- [6] The Commissioner maintains the position set out in her DN; namely that at part one and two of the request, the information is held for the purposes of *'journalism, art or literature'* and does not fall inside the FOIA. The Commissioner accepts, on the balance of probabilities, that the BBC does not hold any information relating to part three of the request. The Appellant now appeals against the DN. The Commissioner opposes the appeal and invites the Tribunal to uphold the DN.

History and Chronology:

- [7] In May 2020 the BBC published its Annual Plan 2020/2021 which includes recommendations from Ofcom's review of news and current affairs at page 50 as follows:

"We welcome the findings of the 2019 Ofcom Review of News and Current Affairs that audiences value the BBC as a universally available and accessible source of accurate and trusted news. We will be responding to Ofcom's recommendations as follows:

"• Accuracy is central to the BBC's reputation. We will continue to prioritise the highest standards of accuracy in our news provision. One component of our focus on accuracy will be helping audiences navigate an increasingly complex and contested news landscape, for example by strengthening our fact-checking initiatives such as Reality Check, and making more in-depth coverage and analysis available, such as Explainers "

• *Greater confidence in how it achieves due impartiality. The BBC remains the most trusted provider of news in the UK, and around the world, but the challenges of a fragmenting and polarising society mean that we must keep our editorial approach to controversial topics under constant review, and ensure our output reflects the views and experiences of the audiences we serve. We recognise that due impartiality requires sophisticated editorial judgements on a case-by-case basis and that audience expectations change both from subject to subject and over time. Appropriate challenge in interviews has always been an important aspect of achieving due impartiality. We have already rolled out revised impartiality training for our journalists to add to previous training, and are producing additional guidance on impartiality for those reporting on news and current affairs in particular. These are in addition to the existing Editorial Guidelines. We remain committed to improving the quality of public debate in order to help our audiences make up their minds about key issues.”*

[8] On 19 June 2020 the Appellant wrote to the BBC and made the following multi-part request:

“I refer to page 50 of the Annual Plan 20/21. Please provide details and all relevant documents including but not limited to memoranda and minutes relating to the Editorial Guidelines, training and the additional guidance given to those reporting on news and current affairs...including but not limited to the brief and instructions given to those training or providing guidelines for personnel.

Please also provide copies of all complaints to the BBC about date of my last FOI Request March 26th, 2020, to date and the BBC responses to the same including, but not limited to complaints about impartiality with regard to handling of the recent controversy involving Dominic Cummings and his trips by vehicle to Durham and Barnard Castle under lockdown, including but not limited to any comments by Emily Maitlis.

Please provide details and all relevant documents including memoranda and minutes relating to the decision to recruit a person to fulfil the role now occupied by Professor Richard Sambrook including but not limited to:

a. advertisements for the role now occupied by Professor Sambrook including proposed job descriptions.

b. details of all responses to those advertisements including the names and positions held of those responding.

c. minutes of the recruitment panel/panels that interviewed Professor Sambrook setting out the reasons why it was decided to offer the appointment to him.

d. all internal memoranda recommending Professor Sambrook's appointment.

e. his letter of appointment and statement of contractual employment terms or equivalent if he was appointed on a self-employed or consultancy basis.

f. all communications between the BBC, its recruitment agency (if used) and Cardiff University relating to the appointment and

g. Professor Sambrook's job description with the BBC."

[9] The BBC responded to the request on 20 July 2020. In response to part one and part two, the BBC explained that Part IV of Schedule 1 to FOIA provides that information held by the BBC is only covered by FOIA if it is held for "*purposes other than those of journalism, art or literature.*" The BBC confirmed that it is not required to provide "*information held for the purposes of creating the BBC's output or information that supports and is closely associated with these activities.*" In response to part three, the BBC explained that: Professor Sambrook is not employed by the BBC; no such post was advertised; he was engaged to do a specific task for the BBC; and his personal data is withheld from disclosure under section 40(2) FOIA.

[10] The BBC carried out an internal review for part three at the Appellant's request. Following this, the BBC notified the Appellant that it did not hold any information within the scope of part three of the request and as a result withdrew its reliance on section 40(2) FOIA. The BBC explained as follows:

- (a) The BBC asked Professor Sambrook to undertake an independent review of social media used by staff and freelance contributors in BBC News and Current Affairs;
- (b) Professor Sambrook undertook the appointment as an independent expert given his unique profile having significant relevant experience including, his former role as the Director of BBC News;
- (c) It was decided to appoint Professor Sambrook directly and the position was not advertised;
- (d) Professor Sambrook undertook no fee for this appointment and worked with paid researchers at Cardiff University; and
- (e) Professor Sambrook was engaged under Terms of Reference rather than a letter of appointment or by reference to a job description.

[11] The BBC pointed out that the Appellant had made further requests but said that they would treat it as part of the internal review.

Legal Framework:

- [12] **S1 FOIA – General right of access to information held by public authorities:**
- (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.
 - (2) Subsection (1) has effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14.
 - (3) Where a public authority—
 - (a) reasonably requires further information in order to identify and locate the information requested, and
 - (b) has informed the applicant of that requirement,the authority is not obliged to comply with subsection (1) unless it is supplied with that further information.
 - (4) The information—
 - (a) in respect of which the applicant is to be informed under subsection (1)(a), or

(b) which is to be communicated under subsection (1)(b), is the information in question held at the time when the request is received, except that account may be taken of any amendment or deletion made between that time and the time when the information is to be communicated under subsection (1)(b), being an amendment or deletion that would have been made regardless of the receipt of the request.

(5) A public authority is to be taken to have complied with subsection (1)(a) in relation to any information if it has communicated the information to the applicant in accordance with subsection (1)(b).

(6) In this Act, the duty of a public authority to comply with subsection (1)(a) is referred to as “the duty to confirm or deny”.

[13] The ‘derogation’ in Part VI of Schedule 1

Section 1 of the FOIA provides a “*General right of access to information held by public authorities*”.

Section 3 of the FOIA provides that the term “*public authority*” means anybody which is listed in Schedule 1 to the FOIA. Schedule 1 contains a long list of bodies, persons and office-holders, some defined generically and others specifically.

[14] Part VI of Schedule 1 (“*Other public bodies and offices: general*”) lists the BBC in the following terms:

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

[15] Section 7(1) of the FOIA provides:

“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.”

[16] The effect of s.7(1), read with Part VI of Schedule 1, is that information held by the BBC is not disclosable pursuant to the FOIA if it is held for the “*purposes ... of journalism, art or literature*”.

[17] The leading authority on the meaning of the phrase “*purposes ... of journalism, art or literature*” is *Sugar (No. 2)*. The following principles can be taken from the judgments in that case:

(1) The derogation is “*designed to prevent interference with the performance of the functions of the BBC in broadcasting journalism, art and literature. That is why it focuses on the purpose for which the information is held*” (§64, per Lord Phillips).

(2) The composite phrase “*journalism, art or literature*” seemed to be intended “*to cover the whole of the BBC’s output in its mission (under article 5 of its Royal Charter) to inform, education and entertain the public. On that comprehensive approach the purposes of journalism, art or literature would be, quite simply, the purposes of the BBC’s entire output to the public*” (§70, per Lord Walker).

(3) There was a “*powerful public interest*” in relation to public service broadcasters, including the BBC, pulling against the strong public interest in requiring public authorities to provide information about their activities. This flows from the fact that “*public broadcasters, no less than the commercial media, should be free to gather, edit and publish news and comment on current affairs without the inhibition of an obligation to make public disclosure of or about their work in progress. They should also be free of inhibition in monitoring and reviewing their output in order to maintain standards and rectify lapses*” (§78, per Lord Walker: see also §64, per Lord Phillips).

(4) As to what constitutes “*journalism*”, the Supreme Court approved the three types of activity which the First-tier Tribunal had identified:

(i) the collecting, writing and verifying of material for publication;

(ii) the editing of the material, including its selection and arrangement, the provision of context for it and the determination of when and how it should be broadcast; and

(iii) the maintenance and enhancement of the standards of the output by reviews of its quality, in terms in particular of accuracy, balance and completeness, and the supervision and training of journalists, in relation to which the Tribunal had noted (at §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.*” (§39, per Lord Wilson, affirming the analysis at §§107-109 of the Information Tribunal’s decision.)

(5) The proper approach to construction of the ‘derogation’ was 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” (§75, per Lord Walker approving the statement from Lord Neuberger MR in the Court of Appeal below). In other words, the only category of information that the BBC had to disclose was “*information held exclusively for non-journalistic purposes*” (§73, per Lord Walker). There are only two categories: “*one is information held for purposes that are in no way those of journalism, and the other is information held for the purposes of journalism, even if it is also held for other (possibly more important) purposes*” (§75, per Lord Walker).

- [18] This approach did not mean that all of the BBC’s information fell outside the FOIA. It is necessary for the decision-maker to have “*some regard to the directness of the purpose*” (§83, per Lord Walker, original emphasis). This requires the decision-maker to consider “*the proximity between the subject-matter of the request and the BBC’s journalistic activities and end-product*” (*id*). Hence, the cost of cleaning the BBC boardroom, or information about advertising revenue, property ownership or outgoings and financial debt, although remotely linked to the output of the BBC, would not be held “*for purposes ... of journalism*”.
- [19] The specific question for the Supreme Court had been whether archival material (the Balen Report commissioned by the BBC in relation to its Middle Eastern coverage) fell within scope of the derogation. In this context, the relevant question was said to be whether there was a “*sufficiently direct link*” between the holding of that information and “*the achievement of its journalistic purposes*” (§106, per Lord Brown). Material that did not “*interfere with or inhibit the BBC’s broadcasting functions*” (§67, per Lord Phillips), or which was “*not envisaged for any current purpose*” (§112, per Lord Mance), was not held for the purposes of journalism.
- [20] A similar set of principles to those set out above were summarised by the First-tier Tribunal in *Tomlinson v Information Commissioner & BBC (EA/2014/0298)* at §§17-18.

[21] As to how the principles in *Sugar (No. 2)* have been considered and applied in subsequent cases;

In *University and Colleges Admissions Service v Information Commissioner and Lord Lucas* [2014] UKUT 0557 (AAT) at §§53-55, the Upper Tribunal affirmed that the question of whether information is “*held for purposes other than*” a designated function cannot be resolved by a consideration of the “*predominant purpose*”. The correct test, as set out in *Sugar (No. 2)*, is whether there is a “*sufficiently direct link*” between the holding of that information and the exercise of the designated function (*id*).

In *Newbury v Information Commissioner & BBC* (EA/2018/0264), the Tribunal considered that the Supreme Court in *Sugar (No. 2)* “*was not primarily concerned...with the distinction between current and archival material but with the directness of the connection between the requested information and its journalistic purpose*” (§50). The relevant question was simply whether there was a “*sufficiently proximate relationship*” between the information requested and the BBC’s journalistic purpose (*id*).

In *Bradshaw v Information Commissioner* (EA/2017/0017), the Tribunal considered whether an internal memorandum drafted by the BBC’s former Head of the Political Research Unit (which included his analysis of the EU referendum poll) was held for the purposes of journalism. The appellant argued that the memorandum was not held for the purposes of journalism because it was “*not a collecting or gathering of materials for publication*” but rather “*disclose[s] policy assumptions behind the BBC editorial process and assertive assumptions conditioning BBC writing and outputs*” (at §14). He explained that the basis of his appeal was that “*the defence of “editorial process” does not apply because the memo reveals a collective mindset behind all editorial process, deeper than the process itself and conditioning it, going against balanced editing and journalism*” (at §17).

The Tribunal rejected the appellant’s reliance on “*strong public interest considerations*” (of the kind described above) as “*misconceived*” (at §18). It explained that the nature of the derogation, which is such that the right of access does not apply at all, means that there is “*no*

scope for applying a public interest balance, in deciding whether the information in question should be disclosed” (at §19). The Tribunal further held that:

(1) The memorandum was “*in essence, advising those involved in the editorial process relating to the BBC’s news output, of conclusions that might be drawn, following the EU referendum result*” (at §20).

(2) It was “*impossible to conclude that the memorandum has no direct link with journalism. To do so would be diametrically opposed to the majority judgments of the Supreme Court in Sugar*” (at §21, original emphasis).

(3) As regards the “*three elements of journalism*” (as set out at paragraph 27(4) above), the memorandum was “*editorial in nature as well as being directly relevant to the third element, and in particular to ‘the maintenance of the standards and quality of journalism (particularly with respect to accuracy, balance and completeness)’ and to the training and development of journalists*” (at §21).

Finally, in *Keighley v Information Commissioner* (EA/2021/0220), the Tribunal considered whether three categories of documents fell within the journalism derogation: (i) a copy of the brief and instructions given to IPSOS MORI for the purposes of a survey conducted by IPSOS MORI on impartiality; (ii) information on how the BBC altered or changed the presentation of the results provided by IPSOS MORI; and (iii) copies of all complaints to the BBC about impartiality from 2015 to date. The Tribunal dismissed the appeal, and held that the journalism derogation applied to all three categories:

(1) As to categories (i) and (ii), the Tribunal held that “*this falls squarely within ‘journalism’. It concerns the maintenance and enhancement of the standards and quality of journalism (particularly with respect to balance). It can directly impact on the output of the BBC*” (§82), and “[*o*]n this basis, we could that all the peripheral information which was created in order to produce that survey (the underlying contracts, the brief, instructions and related meeting notes) was held, at least in part, for the purposes of journalism” (§83). The Tribunal further held the requested information was “*not akin to information about advertising revenue, property*

ownership or outgoings or financial debt”, but was “*much more closely linked to the BBC’s output because it was directly used to commission a survey to be used to influence content and it includes ‘internal considerations about how the BBC perceives of its content and how it seeks to engage audiences’*” (§§86-87). For these reasons, the Tribunal concluded that “*the requested information is sufficiently proximate to the BBC’s journalistic purposes and the end product*” (§87).

(2) As regards category (iii), the Tribunal held that “*it is clear that the BBC uses previous complaints to inform content. In the particular context of bias, this use will undoubtedly include the use of previous complaints to monitor, maintain and enhance its journalistic output and to ensure the impartiality of that output*” (§97). In those circumstances, the Tribunal concluded that “*given the use to which the BBC puts previous complaints, they are clearly held for the purposes of journalism. Their use is directly linked to the BBC’s journalistic output*” (§98).

[22] Whether information is “*held*” by a public authority

The right of access to information in section 1 of the FOIA extends to information “*held*” by a public authority.

Pursuant to section 1(1) of the FOIA: “*Any person making a request for information is entitled to – (a) 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.*”

Before an authority can be said to “*hold*” relevant information, it must “*have been given it, or have obtained it, or have created it*”: *Department of Health v Information Commissioner & Lewis* [2015] UKUT 0159 (AAC) at §96. Where there is a dispute as to whether a public body in fact holds information within the scope of a request, the approach to be adopted by the Tribunal is as follows:

(1) Whether information is “*held*” by the authority is a question of fact to be determined applying a common sense and non-technical approach: *University of Newcastle upon Tyne v Information Commissioner and BUAV* [2011] UKUT 185 (AAC) at §§23, 27.

(2) The test is not one of certainty but whether on a balance of probabilities the public authority held more information than was disclosed at the relevant time: *Bromley & others v Information Commissioner* EA/2006/0072 at §13.

(3) This standard of proof necessitates the consideration of a number of factors, “including the quality of the public authority's initial analysis of the request, the scope of the search that it decided to make on the basis of that analysis and the rigour and efficiency with which the search was then conducted. Other matters may affect our assessment at each stage, including, for example, the discovery of materials elsewhere whose existence or content point to the existence of further information within the public authority which had not been brought to light. Our task is to decide, on the basis of our review of all of these factors, whether the public authority is likely to be holding relevant information beyond that which has already been disclosed”: *Bromley* at §13.

(4) If following a “reasonable and intelligent” search of the relevant areas, the information sought is not revealed, the public authority is entitled to consider on the balance of probabilities that the information is not held see Freedom of Information Code of Practice (“Code of Practice”) at §1.12.

The nature of the Tribunal’s appellate jurisdiction:

[23] Section 58 of the FOIA governs the Tribunal’s jurisdictional remit. The Tribunal must decide whether the notice against which the appeal is brought is “in accordance with law” or, if it involved an exercise of discretion, whether the IC “ought to have exercised his discretion differently” (FOIA s.58(1)).

In *Guardian Newspapers Ltd and Heather Brooke v Information Commissioner and British Broadcasting Corporation* (EA/2006/0011 and EA/2006/0013), the Tribunal made detailed observations regarding the nature of the Tribunal’s appellate jurisdiction (at §14), which were affirmed in *Birkett v Department for the Environment, Food and Rural Affairs* [2011] EWCA Civ 1606 (at §23).

Insofar as is relevant to this appeal, the Tribunal in *Guardian Newspapers and Brooke* observed as follows (at §14):

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

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

“(7) While it is not necessary for the purposes of the present case to consider the situation where the notice involved an exercise of discretion by the Commissioner, we incline to the view that in such a case the tribunal must form its own view on how the discretion ought to have been exercised...” (emphasis added).

Commissioner’s Decision Notice:

[24] The Commissioner investigated the matter and held that at part one and two of the request, the information is held for the purposes of ‘*journalism, art or literature*’ and does not fall inside the FOIA. The Commissioner accepted, on the balance of probabilities, that the BBC does not hold any information relating to part three of the request. The Commissioner reached her decision on the following grounds:

- a) *“The BBC was a public authority within the meaning of FOIA, but only had to deal with requests for information “in respect of information held for purposes other than those of journalism, art or literature” [§9-10 DN]. Accordingly where information was held for those purposes, the BBC had no obligation to comply with Part 1 of FOIA – “the derogation”.*
- b) *The information sought in parts one and two of the Request is held for the purposes of journalism, specifically the maintenance of editorial standards [§29, 32-33 DN].*
- c) *In respect of part one of the Request, the information requested is internal BBC correspondence and training material on the BBC’s journalistic rules for*

producing content. This information is held by the BBC Academy who administer training on rules such as the 2019 Editorial Guidelines [§25 DN] and the Editorial Policy staff who review editorial rules to ensure the standards are consistent with changes in journalistic practices, the law and community standards, as well as training BBC staff in how to implement principle-based rules [§30 DN].

- d) In respect of part two of the Request, information relating to complaints about the impartiality of the BBC's output relates to the maintenance of editorial standards [§29 DN] since the BBC will use information generated by such complaints to make editorial decisions about its output on news and current affairs and/or its journalistic activities. BBC complaint teams use the requested information to understand how audiences react to BBC content; the extent to which output may infringe editorial standards; and to remedy any breaches of those standards [§31 DN].*
- e) The Commissioner accepted the BBC's submission that "disclosure of the information requested at parts one and two of the Request would identify internal BBC discussions about how senior, experienced staff seek to administer editorial standards across the BBC in a way that is specific to the needs of content-makers and journalists in the BBC...disclosure would undermine editorial independence...exposing editorial decision-making to unfair external scrutiny [§31 DN].*
- f) As such, the BBC was not obliged to comply with Parts I to V of FOIA.*
- g) In respect of part three of the Request, on the balance of probabilities, the BBC did not hold relevant information [§34-46]."*

Grounds of Appeal:

- [25]** The Appellant's Grounds of Appeal argued that the Commissioner erred in law in concluding that the information sought in parts one and two of the Request is held for the purposes of journalism as interpreted by the Supreme Court in *Sugar (No 2)*. The Appellant stated as follows:

"i) The Commissioner erred in law in her application of the tests for ambit of the derogation and incorrectly applied the test in Sugar (No 2);

ii) The Commissioner afforded undue deference to the BBC's submission that the relevant information fell within the definition of "journalism", failed to adequately scrutinise the issue and thereby fetter her discretion."

[26] Further, the Appellant argued that the Commissioner unlawfully accepted the BBC's submissions that it did not hold information within the scope of part three of the Request.

The Commissioner's Response:

[27] The Commissioner maintained her position as outlined in the DN and resisted the appeal. The Commissioner submitted that the information in Parts 1 and 2 of the Request were within the journalism derogation and therefore not within the scope of the FOIA [see §61]. The Commissioner noted that the Appellant had incorrectly adopted language associated with judicial review proceedings to describe the alleged errors, which was outside of the Tribunal's appellate jurisdiction [see §48]. The Commissioner contended that the position with respect to whether the BBC "held" information relevant to Part 3 of the Request was "*less clear cut*", and the Tribunal would be assisted by receiving further information or evidence from the BBC in this respect [see §62].

Appellant's Reply to the Commissioner's Response:

[28] The Appellant lodged a reply to the Commissioner's response on 20 December 2021. The Appellant sought additional disclosure from the BBC following the issues raised by the Commissioner in her response with respect to part 3 of the request as follows:

"First, as to disclosure, the issues requiring response by way of Reply are:

(1) Given the First Respondent's ("Commissioner") revised position in respect of part 3 of the Appellant's request (concerning Professor Sambrook) disclosure is requested from the IC of the following:

“(a) any notes of the conversation between the Commissioner and the BBC dated 3 September 2021 recorded in footnote 3 and paragraph 57 of the Commissioner’s Response;

(b) a copy of the ‘Terms of Reference’ referred to at paragraph 56 of the IC’s response since they are plainly germane to the matters at issue to request 3 (and there having been no order, or indeed application, made under rule 14 of the Tribunal rules concerning the prevention of disclosure or publication of documents preventing disclosure of the same).

(2) In light of the Commissioner’s conclusions at paragraph 59 of their Response, it is requested that the BBC now makes the various searches therein requested of the email accounts, both personal and work, of the relevant senior News staff member and:

(a) confirms whether such records exist and if so to list the same; and

(b) discloses copies of all relevant communications for consideration by the Tribunal in same manner described by the IC at paragraph 56 of her Response.”

[29] The Appellant rejected the contention that the Tribunal did not have jurisdiction to hear the appeal based on the Appellant’s use of judicial review terminology as follows:

“The Appellant contends that the Tribunal has jurisdiction to determine this appeal and it will be asked to apply, on the appeal, the unvarnished statutory tests under FOIA.”

The Second Respondent’s Response:

[30] The BBC responded to the appeal on the 17 January 2022. In their response, the BBC invited the Tribunal to uphold the Commissioner’s DN and resisted the appeal. The BBC stated that further searches and inquiries requested by the Commissioner in relation to part 3 of the Appellant’s request had been conducted, which confirmed that, no relevant information was held and any further searches would be inappropriate and disproportionate.

Appellant's Reply to the Second Respondent's Response:

- [31] The Appellant replied to the BBC on 4 February 2022. The Appellant refuted BBC's reliance on the principles set out in *Sugar* in relation to the archived material. The Appellant contended that the appropriate test can be found at §66-67 of Lord Phillips PSC judgment, which states that archived material would not, as such, fall within the protection afforded by the definition of journalism for the purposes of the exception. Further, the Appellant averred that the material held by the BBC does not satisfy Lord Phillips' pre condition and thus it does not fall into the exception.

The Appellant's Skeleton Argument:

- [32] The Appellant lodged a skeleton argument on the 28 of April. The Appellant advanced three grounds. The Appellant's first ground concerned the error of law. In this ground of appeal the Appellant proffered three arguments. Firstly, that the information sought in requests 1 and 2 do not fall with the journalism exception. Secondly, the decision in *Sugar* deals with a different question and can be distinguished from the present requests; and that the information requested was (and/or now is) archival and therefore could not attract the protection of journalism exemption.
- [33] The Appellant's second ground stated that the Commissioner fettered her discretion in determining the decision as she did. The Appellant averred that the appeal will amount to a rehearsing of the matters which were before the Commissioner. In the Appellant's remaining ground, it was contended that in relation to the third part of the request, the conclusion reached was irrational, against the weight of evidence and deferential to the accounts given by the BBC. The Appellant invited the Tribunal to set aside the decision of the Commissioner and order the disclosure of the requested information.

The Second Respondent's Skeleton Argument:

- [34] In response to the Appellant's first ground, the BBC argued that there has been no error of law, the reasoning behind this is fivefold. Firstly, the BBC stated that there has been no misdirection or misinterpretation of law by the Commissioner

regarding the principles set out in *Sugar*. Secondly, the Appellant has erred in his selective reliance on Lord Neuberger MR's statement at §55 regarding the *relatively narrow* consideration to be afforded to the question of whether information is held for *the purposes of journalism*. In addition, the Appellant's argument in relation to the public interest of the journalism derogation is misconceived. The BBC referred to the Tribunal's decision in *Bradshaw* for the purposes of refuting the Appellant's contention.

[35] In relation to the Appellant's argument which considers "*Lord Phillips precondition*", the BBC argued that this argument is without merit and referred the Appellant to the *immediate object* of editorial training and the reviewing of editorial standards which, the BBC contended, is of an ongoing nature as held by Lord Phillips at §67. Finally, the BBC contended that there is no basis on which the Tribunal can otherwise conclude that the Commissioner erred in reaching the conclusions provided in her DN.

[36] The BBC submitted, in response the Appellant's second ground, that the DN is in accordance with the law and the Commissioner correctly exercised her discretion in deciding that the derogation in Part VI of Schedule 1 applied. The Appellant challenged the DN on rationality grounds. The BBC rejected this contention and stated that the Commissioner did not accept the BBC's account without taking all material considerations into account or making further inquiries. Furthermore, the BBC challenged the Appellant's argument on the grounds that the Commissioner pressed the BBC during the course of their investigation to reconsider whether the BBC held the requested information. The BBC invited the Tribunal to dismiss the appeal and uphold the DN

The Second Hearing:

[37] By agreement between the Appellant and the Second Respondent the focus of the second hearing was on the evidence submitted by the BBC.

[38] In response to the Tribunal's directions the BBC submitted two witness statements and confidential exhibits. The witness statement of Mr David Jordan was considered in closed session. The second witness statement was provided by

Brigit Morris who is employed by the Second Respondent as a lawyer. Ms. Morris advises the Second Respondent on Freedom of Information and Data Protection. Her evidence to the Tribunal was by virtue of a witness statement.

[39] In her witness statement Ms. Morris provided material information on the following issues:

- a. How impartiality complaints are held and processed by the BBC;
- b. How such complaints are used for purposes associated with the BBC's editorial output; and
- c. The searches conducted by the BBC in response to Part 3 of the Appellant's request for information.

[40] The Tribunal refer in particular to material detailed extracts from Ms Morris' witness statement which are shown below. The paragraph numbers are taken from her witness statement: This information was divided into Issues 1 – 3 respectively.

“Issue 1: How impartiality complaints are held and processed by the BBC.

“5. Audience complaints about BBC output can be made to the BBC via email, phone or post. The ‘BBC’s Complaints Framework’¹ sets out a two-stage process.

6. First, the Audience Services team (‘Audience Services’) are responsible for managing and adjudicating complaints received by the BBC (i.e. ‘Stage 1’ complaints). Second, if the outcome of a Stage 1 complaint is appealed, the complaints are adjudicated by the Executive Complaints Unit (the ‘ECU’) (i.e. ‘Stage 2’ complaints). Stage 2 is the final avenue of appeal for editorial complaints before a complaint can be raised with the broadcasting regulator, Ofcom.

7. Audience Services, who manage and adjudicate Stage 1 complaints, comprises BBC staff as well as workers from a third-party company, Capita, who are contracted to work on behalf of the BBC. Complaints managed by Capita are “held on behalf of the 88 C” for the purposes of the Freedom of Information Act (the ‘FOI Act’).

8. Audience Services hold editorial complaints centrally in a Case Management Record ('CRM') system. The CRM is hosted by Capita. The BBC receives some audience complaints about BBC output that are addressed to the Director-General or Chairman of the BBC that will not be handled by Audience Services. These will be passed to the Audience Services team by staff in the Director-General or Chairman's Office and fed into the CRM by Audience Services staff.

9. The spreadsheet of impartiality complaints provided to the Information Commissioner for their review, and later to the Tribunal, were extracted from the CRM.

10. Complaints are uploaded to the CRM at different times depending on the form in which they are received.

11. Webform based complaints (complaints submitted online) are stored in 'Real Time'. This means they are uploaded automatically to the CRM as they are received. Letter complaints are scanned and uploaded to the CRM as they are received by Capita; this may be on the date of receipt or a day or two after, depending on staff availability. Phone based complaints are transcribed by the agent who takes the complaint call and uploaded at the same time as letter complaints.

12. The retention period for complaints held in the CRM is different depending on the progress of a complaint. Stage 1 complaints are deleted two years from the date the complaint is closed. Stage 2 complaints are deleted three years from the date the complaint is closed. This is documented in the BBC's Corporate Retention Policy. The team also holds a separate reporting database where all complaints are anonymised after two or three years (depending on the aforementioned retention periods), so the team can perform historical reporting of complaint themes for ad hoc reviews within the BBC.

13. I understand from senior representatives in Audience Services that approximately 100 Capita staff and approximately 80 BBC staff have access to the CRM. Access is permission based, so, for example, only ECU staff can see Stage 2 complaints in the CRM as they are solely responsible for adjudicating those complaints (I explain this further in the section below).

14. The CRM captures information including: (i) date of complaint; (ii) date the complaint was uploaded to the system; (iii) relevant editorial standards (i.e. impartiality); (iv) whether the complaint relates to a specific programme; (v) nature or content of the complaint; and (vi) the name and contact details of the complainant (the personal data of the complainants has been removed from the copy provided to the Tribunal). This information is captured in the CRM to manage complaint responses to individuals, to track patterns in complaints for editorial reviews, and to monitor the number of complaints received about specific programmes. Programmes that receive a high volume of complaints are ordinarily published on the BBC's complaints website.

Executive Complaints Unit

15. The ECU is the appeals complaints body for adjudicating editorial complaints in the BBC. They are responsible for adjudicating Stage 2 complaints (i.e. the final stage of appeal for editorial complaints before a complaint can be raised with the broadcasting regulator, Ofcom). The ECU is comprised of seven members of BBC staff who are experienced editorial advisors and an eighth team member who is an administrator.

16. The ECU securely stores the editorial complaints that are appealed from Stage 1 to the ECU in an access-controlled section of the CRM. This means that some complaints will appear twice in different parts of the CRM depending on whether the Stage 1 decision was appealed.

17. Only the eight permanent members of the ECU have access to this area of the CRM. Additional BBC workers are, from time to time, added to the system on an as needs-basis. BBC staff from BBC News and Current Affairs and/or senior editorial advisors can make direct requests to a member of the ECU, via email, for copies of complaints for specific editorial content reviews.

Issue 2: How complaints are used for editorial reviews

Stage 1 complaints

18. *Based on information provided to me by Audience Services, the following is a list of the ways in which complaints that are stored in the Audience Services section of the CRM are requested, extracted, and used for editorial reviews of output:*

[Paras 19-25 of the witness statement were closed.]

Executive Complaints Unit

26. *When Stage I complaints are appealed to the ECU, the ECU will send a response to the complainant and publish a summary of the complaint and the ECU's response on the BBC's complaints website.*

27. *I understand that BBC staff, from time to time, request more detailed information about these complaints from the ECU for editorial reviews of output. I understand this is an ad hoc process that usually involves requests to ECU team members made by email or phone.*

28. *Such reviews may be specific to a single piece of output, such as where a complaint is received about an online news article that requires the article to be immediately amended for editorial or legal reasons.*

Broader official reviews

29. *Editorial complaints are also used for longer term, more substantive editorial reviews.*

30. *For example, there are planned editorial reviews that arose from the Serota Review and Impartiality Plan, April 2022 (the 'Serota Review'). That Review was commissioned by the BBC Board after the publication of the Dyson Report into the circumstances surrounding the 1995 Panorama Interview with Diana, Princess of Wales. The Review sought to:*

- a. *“establish whether there are defects in current editorial processes or governance which could allow these mistakes to occur again. We have considered the BBC's oversight of, and accountability for, editorial decision-*

making processes; the mechanisms in place for staff and others to raise concerns about editorial issues; the effectiveness of the 88 C's whistleblowing procedures with respect to editorial matters; and the culture within the BBC that supports compliance with the BBC's Editorial Values and Standards."

31. The authors of the Serota Review recommended the implementation of thematic and content reviews of BBC output.

32. It has been confirmed to me by the two senior editorial representatives who are leading on content and thematic reviews, that editorial complaints will be reviewed with a mind to improving audience perceptions of BBC content, and where necessary, remedying any issues in content from an editorial standards perspective.

33. To that end, the Serota Review's Action Plan states that such review 'will consider complaints and the broader public debate'⁴ in that work.

34. Aside from these types of ad hoc review, the BBC does not have a specific policy document that outlines how editorial complaints are used for journalistic review.

*35. Given the information provided in this statement about the editorial uses of impartiality complaints, it is clear that complaints are held for the purposes of journalism and fall within the third limb of the tripartite definition of "journalism" endorsed by the Supreme Court in *Sugar v BBC*. To disclose these complaints would, therefore, be incompatible with the derogation, which permits the BBC to withhold information related to its journalistic purposes*

Issue 3: Nature of Professor Sambrook's appointment

36. Based on the information supplied to me by senior staff in BBC News and editorial standards when I: (i) conducted the Internal Review of the BBC's decision (dated September 2020); (ii) drafted the responses to the Information Commissioner regarding the Appellant's complaint (dated 13 August 2021 and 10 December 2021); and (iii) advised on the BBC's defence to the Appellant's appeal in the First-Tier (Information Rights) Tribunal (dated 17 January 2022), I can confirm that Professor Sambrook was appointed directly without recourse to external recruitment. Further to this, I understand that no records were generated

relevant to Parts 3(a) to (e) and (g) of the Appellant's Request for Information as Professor Sambrook was appointed verbally and was not paid for his services.

37. The BBC's initial response (dated 20 July 2020) to the Appellant's request for information (the 'Request') (dated 1 July 2020) applied the personal data exemption in section 40(2) of the FOI Act to withhold information from disclosure. I understand no searches were undertaken at that time for relevant records. I was not aware of, nor involved in, that response.

Searches Undertaken

38. The Appellant made a request for an internal review ('Internal Review') of the BBC's response on 24 August 2020. I undertook the Internal Review as I had not been involved in the original response.

39. On 3 September 2020, and again on 10 September 2020, I liaised with the two senior BBC representatives who took the decision (verbally), to appoint Professor Richard Sambrook to conduct the 2020 Social Media Review; Mr David Jordan, Director of Editorial Policy and Standards and Ms Fran Unsworth, then Director of News. I also liaised with their administrative staff.

40. Given the fact that Mr Jordan and Ms Unsworth's decision to appoint Professor Sambrook was taken verbally, no searches were conducted at the Internal Review stage for relevant records as this appeared unnecessary and disproportionate.

41. The Freedom of Information Code of Practice (the 'Code') provides the following explanation for public authorities as to when and how searches should be conducted:

"Public authorities need to search for requested information in order to communicate to the applicant whether the information they are seeking is held or not held by that public authority. These searches should be conducted in a reasonable and intelligent way based on an understanding of how the public authority manages its records. Public authorities should concentrate their efforts on areas most likely to hold the requested information. If a reasonable search in the areas most likely to hold the requested information does not reveal the

information sought, the public authority may consider that on the balance of probabilities the information is not held.”

42. The Code makes clear that searches should be conducted “in order to” communicate to the applicant whether the requested information is held. In this case, at internal review, because of the way the decision to appoint Professor Sambrook was made, in the BBC’s view, it was not necessary to conduct searches “in order to” communicate to the applicant that no records were held relevant to his request.

43. I sent the internal review to the Appellant on 30 September 2020. I understand the Appellant subsequently contacted the Information Commissioner to raise a concern about the BBC’s handling of the Request.

44. In its subsequent letter to the BBC of 1 July 2021, the Information Commissioner asked the BBC questions relating to the BBC’s adherence to section 1 of the FOI Act. These questions were:

“What searches have been carried out to check no information was held within the scope of the request and why would these searches have been likely to retrieve any relevant information?”

Please describe thoroughly any searches of relevant paper/electronic records and include details of any staff consultations.

If searches included electronic data, which search terms were used and please explain whether the search included information held locally on personal computers used by key officials (including laptop computers) and on networked resources and emails.

If no searches or inadequate searches were done at the time, please rectify this now and let me know what you have done.

If the information were held would it be held as manual or electronic records?

Was any recorded information ever held relevant to the scope of the complainant's request but deleted/destroyed?

If recorded information was held but is no longer held, when did the BBC cease to retain this information?

Does the BBC have a record of the document's destruction?

What does the 88 C's formal records management policy say about the retention and deletion of records of this type? If there is no relevant policy, can the BBC describe the way in which it has handled comparable records of a similar age?

If the information is electronic data which has been deleted, might copies have been made and held in other locations?

Is there a business purpose for which the requested information should be held? If so what is this purpose?

Are there any statutory requirements upon the BBC to retain the requested information?"

45. In response to these questions, on 27 July 2021, I emailed the then Director of BBC News, Ms Unsworth, to ask her to confirm that, consistent with my understanding of the nature of Professor Sambrook's appointment, no recorded information was held. I asked her at this time to complete searches of email and other information from 2020 that may be relevant by reference to search terms "Richard", "Sambrook" and "Social Media".

46. I received confirmation on the same day from Ms Unsworth's office that searches of Ms Unsworth's two BBC email accounts had been conducted. This did not generate any relevant records.

47. Also on 27 July 2021, I emailed the Director of Editorial Standards and Policy, Mr David Jordan.

48. I received confirmation from Mr Jordan via email on 12 August 2021 that he also held no email records relevant to the Request.

49. The fact that no records were held was communicated to the Information Commissioner in the BBC's response dated 13 August 2021:

“On receipt of the ICC's complaint, / again contacted senior representatives from these teams who confirmed that searches need not be conducted as the request for information extends to material that would not be held by the BBC as the framing of the request misunderstands the way Mr Sambrook was appointed. In the interests of completeness however, email searches of a senior News staff member involved in Mr Sambrook's appointment was completed, by reference to Mr Sambrook's name, and no relevant information was produced.

To that end, it is important to note that while the BBC has a Records Management Policy and Corporate Retention Schedule which identify minimum retention periods for HR documents such as terms of engagement, such records were not created here as explained in our internal review, and so do not apply.”

50. I received a phone call from Information Commissioner casework officer, Ms Janine Gregory on 3 September 2021 about this matter. In response to Ms Gregory's questions about what searches the BBC had conducted, I explained that the BBC had conducted email searches and that to undertake any further searches would be unnecessary given the way in which Professor Sambrook was appointed.

51. For the Tribunal's information, the BBC did not determine it was necessary and proportionate to search the personal email accounts of the two senior representatives who made the decision to appoint Professor Sambrook. First, it was confirmed to me that one of the two does not have a personal email address. Second, it was confirmed to me that the other member of staff did not, and would not, use their personal email for BBC work. Third, the BBC's Acceptable Use of Information Systems Policy stipulates that:

“You must not use a personal email account for your 880 work. Secure options for accessing your BBC email on the go or at home are available.”

52. Therefore, unless the BBC had cause to request access to a member of staff's personal email, searching personal emails would be disproportionate and in the current circumstances, manifestly unnecessary.

53. For the Tribunal's information, the BBC has a Guide to processing Freedom of Information requests which includes information on how to conduct searches. This is available to all staff on BBC intranet.

Terms of Reference

54. I also wish to address any potential concerns the Tribunal may have regarding the BBC's position that the Terms of Reference for the Social Media Review (which was to be conducted by Professor Sambrook following his appointment) are not within the scope of the Request. The relevant parts of the Appellant's Request are for copies of:

*“e. his letter of appointment and statement of contractual employment terms or equivalent if he was appointed on a self-employed or consultancy basis.
g. Professor Sambrook's job description with the 880.”*

55. In the BBC's submission to the Information Commissioner dated 13 August 2021, I explained that:

Professor Sambrook was under Terms of than a letter of appointment or by reference to description.”

56. In subsequent correspondence from a lawyer acting for the Information Commissioner, Ms Louisa Lansell, dated 23 November 2021, the Information Commissioner wrote that the “the Tribunal are likely to be in determining the of 3 of the Appellant's by viewing the Terms of Reference referred to in the BBC's letter to the Commissioner 13 August 2021”.

57. In responding to that email on 10 December 2021, the BBC provided the Information Commissioner with a copy of the Terms of Reference accompanied by a letter dated the day which explained that:

“The ordinary meaning of (e) ‘letter of appointment of contractual employment terms of equivalent’ cannot be taken to refer to a terms of reference which to the way the project was framed, than to an individual’s terms of engagement. Were the document to fall within (e) one would to employment terms such length of engagement. These do not in the Terms of Reference.

A and ordinary understanding of (g) job description’ would expect to include the responsibilities, activities, qualifications and skills required for a role. These do not appear.”

58. Notwithstanding this, the BBC disclosed the Terms of Reference to the Tribunal in order to the Tribunal. In doing so, the BBC explained its position that the Terms of Reference relate solely to the or content of the inquiry (i.e. the Social Media Review itself), rather than to the employment conditions under which a person was asked to undertake the inquiry.

Payments made to Cardiff University

59. The Tribunal asked the BBC to provide more information about what, if any, information relevant to Part iii(f) of the Appellant’s Request is held by the BBC.

60. Part iii(f) of the Request sought copies of:

“all communications between the BBC, its recruitment agency (if used) and Cardiff University relating to the appointment.”

61. understand that no information relevant to Part iii(f) of the Request is held by the BBC. This has been our position since the Internal Review stage.

62. I understand the BBC paid a small fee to the researchers who worked with Professor Sambrook at the Cardiff University School of Journalism. This was explained to the Appellant in the BBC’s Internal Review response which was also provided to the Information Commissioner and to the Tribunal.

63. In my Internal Review of the BBC’s original FOI response, I explain that:

“Professor Sambrook elected to undertake the appointment for no fee but worked with researchers at Cardiff University who were paid a small fee by the BBC for their expertise in assisting Professor Sambrook.”

64. *For the benefit of the Tribunal, and in the spirit of cooperation, I attach in Confidential Exhibit 03 an invoice recording that this fee was paid to Professor Sambrook as a facilitator, which was to be on-paid in full to the University of Cardiff. However, the BBC’s position remains that this invoice not fall within the scope of the it is not a ‘communication relating to the appointment’. It is instead a proof of payment to who Professor Sambrook with his substantive role (following his appointment).*

65. *For completeness, I note also that the witness of David Jordan exhibits minutes from a meeting of Executive’s Editorial and Complaints Committee. For the avoidance of doubt, the BBC’s position is that this document could not reasonably be construed falling within the scope of the Request. This simply notes the decision that had already been taken. It does not relate to his appointment or “recruitment” (the term used in the Request), nor does it relate to payments made to Professor Sambrook or his job description. If such a broad approach was taken to the word “relate” it would mean that every document produced by, or about, Professor Sambrook during the entire review exercise would fall within the request, which was clearly not the intention”.*

[41] Some parts of the above witness statement (paragraphs 19-25) were not provided to the Appellant but were considered by the Tribunal in closed session. Following the closed session the BBC agreed to provide an open summary of the closed witness statements. This stated as follows;

“Open overview of closed paragraphs 19-25 of Brigit Morris’ witness statement

1. *A daily email is sent to the Head of Journalism each weekday morning reporting the main overnight complaints issues specifically related to BBC News.*
2. *A monthly report on editorial complaints is sent to two senior BBC editorial committees. The first reports into the BBC Board, and the second is a committee of the BBC Board. Complaints issues and editorial learnings are discussed at these monthly committee*

sessions. The expectation is that those attending the meetings will note those complaints which have lessons for their own Divisions and discuss them appropriately within the Division.

3. In addition, the Audience Services team provide a monthly overview of common complaint issues related to News to a senior editorial adviser in News and attend weekly meetings with the Director of News to discuss complaints issues in the context of broader audience research. Reports are also run on complaints that carry reputational risk and a summary of complaints on key thematic topics are also maintained which teams in News can draw upon.

Open overview of paragraphs 22 and 23 of David Jordan's closed witness statement 4. Audience complaints are integral in understanding audience reaction to BBC content. Where editorial complaints are upheld, this provides lessons learnt to the programme areas and it is expected that action will be taken about serious editorial breaches at a divisional level. It can also lead to changes in editorial standards and practice. Some actions taken with respect to upheld editorial complaints are made public.

5. Upheld and resolved editorial complaints are reported regularly to a committee that reports into the BBC Board. A summary of these complaints is then also reported to another committee, which is a committee of the BBC Board. Actions taken will be reported and discussed as appropriate. The analysis of complaints also form part of content and programme reviews. Disclosing editorial complaints of the kind requested by the Appellant would be incompatible with the BBC's journalistic mission to produce independent and impartial output. The BBC must have a safe space in which to critique its output, which in this case is by reference to complaints."

[42] Subsequent to the submission of Ms Morris' witness statement the BBC submitted a further witness statement on 18 November 2022. Despite the position maintained in Ms Morris' statement that the BBC held no information in relation to Part 3 of the request the BBC conducted some new searches on 10 November 2022 at the instigation of a newly appointed BBC lawyer who had formed the opinion that the initial searches may have been incomplete. The lawyer, Ishani Jayaweera, provided evidence about these 'new' electronic searches of email boxes. This review identified six documents as potentially responsive to Part 3 of the Request. These documents were provided to the Appellant with some redactions for personal data. The Tribunal acknowledges that the Appellant has

therefore received some further information in response to Part 3. However, this was provided as late as 18 November 2022, some two and half years after the BBC's initial response to the request and only days before the resumed hearing in this appeal.

The Appellant's Argument:

[43] The Appellant stated that the principal development since the matter was adjourned part-heard is the filing by the BBC of the witness statement of Brigit Morris dated 9 June 2022. The Appellant referred to para 18 of her statement where she explains that she has given the Tribunal, but *not* the Appellant, '*a list of the ways in which complaints that are stored in the Audience Services section of the CRM [which stands for Case Management Record] are requested, extracted, and used for editorial reviews of output.*'

[44] The Appellant submitted that this is unacceptable. How the BBC uses complaints is an important (*and material – our emphasis*) issue in considering whether it is really right to say that they constitute (and *all* constitute, and all still constitute even at today's date) '*information held for purposes [...] of journalism*', as that expression is properly to be understood. Yet the BBC proposes that the Tribunal should consider this issue on the basis of information that is not to be revealed to the Appellant. As the Supreme Court noted in *Bank Mellat v HM Treasury (No 2)* [2014] AC 700, 730 at para 2,

'A closed hearing is [...] even more offensive to fundamental principle than a private hearing. At least a private hearing cannot be said, of itself, to give rise to inequality or even unfairness as between the parties. But that cannot be said of an arrangement where the court can look at evidence or hear arguments on behalf of one party without the other party knowing, or being able to test, the contents of that evidence and those arguments [...] or even being able to see all the reasons why the court reached its conclusions.'

[45] The Appellant stated that it is true, of course, that the GRC Rules 2009 allow at rule 14(6) that the Tribunal may '*give a direction that certain documents or information must or may be disclosed to the Tribunal on the basis that the Tribunal*

will not disclose such documents or information to other persons, or specified other persons.’ But this exceptional course requires an application in writing (see *Practice Note—Closed Material in Information Rights Cases*), and the test is a necessity.

- [46] In the present case, the Appellant averred that there has been no application, and it is anyway not at all obvious why it is necessary to withhold from the Appellant (still less to withhold from his legal representatives: see rule 11(4)) the ‘*ways in which complaints that are stored in the Audience Services section of the CRM are requested, extracted, and used for editorial reviews of output*’. The Appellant asked the Tribunal to direct that the material to which Ms Morris refers at para 18, if it has been seen by the Tribunal, be disclosed at once to the Appellant. (If it has not been seen by the Tribunal, the Appellant submitted that the BBC should be required to elect between providing it to the Tribunal and all parties or not relying on it at all.)
- [47] Secondly, the Appellant contended that his request in relation to Professor Sandbrook’s appointment was for ‘*details and all relevant documents [...] relating to the decision to recruit a person to fulfil the role now occupied by Professor Richard Sandbrook*’. The request went on, in paras 3(a) to (g), to provide an explicitly non-exclusive (‘*including but not limited to*’) list of documents. Ms Morris’s statement, however, is limited to addressing (at para 36) that list, as if that were all that the Appellant had requested: ‘*I understand that no records were generated relevant to Parts 3(a) to (e) and (g) of the Appellant’s Request for Information as Professor Sambrook was appointed verbally and was not paid for his services.*’ (Ms Morris goes on to explain that some records were generated relevant to para 3(f).)
- [48] In these circumstances, quite apart from the issue of whether the BBC has conducted an adequate search for documents within paras 3(a) to (g) of the Appellant’s list, the Appellant argued that it appears that the BBC has not searched generally for ‘*all relevant documents [...] relating to the decision to recruit Professor Sandbrook*. The Appellant contended it is not credible that an important decision in an organisation such as the BBC generated not a single record.

[49] Thirdly, the Appellant drew the Tribunal's attention that one of the decisions on which the BBC relies, namely *Keighley v Information Commissioner (EA/2021/0220)* (see para 33 of the BBC's skeleton argument dated 29 April 2022), which is now under appeal to the Upper Tribunal, pursuant to permission granted by the Upper Tribunal on 31 October 2022. The issue in the appeal is the width of the concept of '*information held for purposes [...] of journalism*'.

[50] Finally, it may be noted that the Upper Tribunal (Lands Chamber) (Fancourt J) has recently considered the question of the date at which the First-tier Tribunal (Property Chamber), which like the present Tribunal exercises a *de novo* jurisdiction, should assess the issue before it: *London Borough of Waltham Forest v Hussain [2022] UKUP 241 (LC)*. In that case, the issue was whether the appellants were fit and proper persons to be granted certain licences under housing legislation. The local authority, as the primary decision maker, decided not. The FTT, expressly considering the issue as at the date of its decision, and taking into account developments since the local authority had taken *its* decision, disagreed and ordered that licences should be granted. The local authority contended before the Upper Tribunal that this had been an error. The Upper Tribunal disagreed. Fancourt J stated (at para 66) that:

'The touchstone [...] is always the nature of the decision under appeal, the statutory provisions in issue and whether matters that have happened subsequently are relevant to assessing whether the decision of the authority is shown to have been wrong. [...] Where the question is, as it is here, whether the authority was wrong to refuse to grant, or to revoke, a licence on the basis that the proposed licensee is not a fit and proper person, evidence that tends to show whether that person is now a suitable person is likely to be relevant and should be taken into account by the FTT, whether the factual matters occurred before or after the authority's decision. That is because the reality of the appeal is a contention that a licence should now be granted, or allowed to remain in place.'

[51] The present context, it was submitted, is analogous. The statutory question is not whether the notice against which the appeal is brought was not in accordance with the law, but whether it '*is*' in accordance with the law and the reality of the appeal is that the Tribunal will either endorse the conclusion that the relevant information

does not fall within the scope of the Act, or decide that it does and order it to be communicated to the Appellant.

[52] It follows, the Appellant submitted, that the date at which the Tribunal should consider the nature of the information, the disclosure of which he seeks, is the date of this hearing. This is relevant when it comes to parts 1 and 2 of the request: the issue is not whether the relevant information did at some previous time constitute *'information held for purposes [...] of journalism'* but whether that is what it is *now*.

Second Respondents' further Skeleton Argument:

[53] The Second Respondent provided an updated skeleton argument on 18 November 2022 in relation to the following:

- (I) how impartiality complaints are held and processed by the BBC;
- (II) how impartiality complaints are used for purposes associated with the BBC's editorial output;
- (III) the circumstances surrounding the appointment of Profess Sambrook; and
- (IV) the searches conducted by the BBC in response to Part 3 of the Appellant's request for information.

[54] The Second Respondent stated that There is a two-stage process for complaints. The Audience Services team are responsible for managing and adjudicating complaints received by the BBC ("Stage 1" complaints). If the outcome of a Stage 1 complaint is appealed, the complaints are adjudicated by the Executive Complaints Unit ("ECU") ("Stage 2" complaints). The Second Respondent outlined that Audience Services hold editorial complaints centrally in a Case Management Record ("CRM") system. The spreadsheet of impartiality complaints provided to the IC for her review, and later to the Tribunal, were extracted from the CRM.

[55] The Second Respondent detailed that Stage 2 complaints are also stored in an access-stored section of the CRM. This means that some complaints will appear twice in different parts of the CRM depending on whether the Stage 1 decision was

appealed. Further, the CRM captures information including (i) the date of complaint; (ii) the date the complaint was uploaded to the system; (iii) relevant editorial standards (i.e. impartiality); (iv) whether the complaint relates to a specific programme; (v) nature or content of the complaint; and (vi) the name and contact details of the complainant (the personal data of the complainants has been removed from the copy provided to the Tribunal). The Second Respondent confirmed that Stage 1 complaints are deleted two years from the date the complaint is closed. Stage 2 complaints are deleted three years from the date the complaint is closed.

[56] In relation to how impartiality complaints are used for purposes associated with the BBC's editorial output, the Second Respondent stated it is clear that the complaints held on the CRM are held for the purposes of journalism and fall within the third limb of the definition of "journalism" endorsed by the Supreme Court in *Sugar v British Broadcasting Corporation (No. 2)* [2012] 1 WLR 439. This is consistent with the Tribunal's decisions in *Williams v ICO (EA/2021/0065P)* and *Keighley v Information Commissioner (EA/2021/0220)*. Complaints about impartiality, and the responses to them, are retained by the Second Respondent for the purposes of reviewing editorial standards and the quality of journalistic content with a view to further enhancing them.

[57] The Second Respondent submitted that there is no basis for impugning the nature and quality of the searches undertaken by the BBC. Very considerable resources have been devoted to responding to the Appellant's requests, and the Second Respondent has always sought to act transparently and consistently with its obligations under the FOIA.

Conclusions:

[58] In respect of part 1 of the Appellant's information request, this Tribunal is satisfied on the evidence before us that the closed material provided by the BBC

is directly linked to the BBC's journalistic output and is held by the BBC for the purposes of journalism.

[59] In respect of part 2 of the Appellant's information request, this Tribunal is satisfied on the evidence before us that the closed material provided by the BBC in respect of complaints made to the BBC and its handling of such complaints is sufficiently linked to journalistic output and is held by the BBC for the purposes of journalism.

[60] In respect of part 3 of the Appellant's request, and in the light of the BBC's evidence and explicit confirmation at the hearing before us that it believes it has now provided all of the relevant information in its possession, the Appellant is content that this part of his request has now been complied with (albeit belatedly and thanks only to his appeal to the Tribunal). However, the Appellant objects to redactions made from an invoice provided by the BBC which the Appellant maintains are not warranted. The invoice in question relates to the Appellant's request for:

“All relevant documents including memoranda and minutes relating to the decision to recruit a person to fulfil the role now occupied by Professor Richard Sambrook including but not limited to... all communications between the BBC, its recruitment agency (if used) and Cardiff University relating to the appointment”.

[61] The invoice disclosed by the BBC does not reflect any payment made to Professor Sambrook but reflects a payment made by the BBC to the University in respect of the cost of researchers. Redactions have been applied to a breakdown of the number of hours worked by the researchers and their hourly rates.

[62] While the BBC maintains that the invoice is not within the scope of the Appellant's request, it says that it provided a copy to the Appellant in the spirit of cooperation.

[63] The Tribunal agrees that the information redacted from the invoice is not within the scope of the Appellant's request, because information relating to the recruitment or appointment of a person to fulfil the role of Professor Sambrook cannot reasonably be interpreted to also include information relating to the appointment of researchers or to a breakdown of their hours worked or their hourly rates.

[64] Accordingly, and for the reasons set out above, the Tribunal allows the Appeal in relation to Part 3 of the request.

Brian Kennedy KC

15 December 2022.