



**IN THE FIRST-TIER TRIBUNAL  
GENERAL REGULATORY CHAMBER  
[INFORMATION RIGHTS]**

**Case No. EA/2013/0192**

**ON APPEAL FROM:**

**Information Commissioner's  
Decision Notice No: FS50486137  
Dated: 7 August 2013**

**Appellant: Stephen Baker**

**Respondent: The Information Commissioner**

**On the papers**

**Date of decision: 14 January 2014**

**Before  
CHRIS RYAN  
(Judge)  
and  
ALISON LOWTON  
PAUL TAYLOR**

**Subject matter:**

Meaning of Public authorities s.3 and Schedule 1 authorities to which Act has limited application s.7

**Cases:**

BBC v Sugar (No.2) [2012] UKSC 4; [2012] 1 WLR 439

**IN THE FIRST-TIER TRIBUNAL  
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**DECISION OF THE FIRST-TIER TRIBUNAL**

The appeal is dismissed.

**REASONS FOR DECISION**

1. This is an appeal from Decision Notice FS50486137 issued by the Information Commissioner on 7 August 2013 (“the Decision Notice”).
2. In the Decision Notice the Information Commissioner concluded that the BBC had been entitled to refuse the Appellant's request, made under section 1 of the Freedom of Information Act 2000 (“FOIA”), to have disclosed to him a report which it had commissioned and which was known as the Balen Report.
3. FOIA section 1 imposes on the public authorities to whom it applies an obligation to disclose requested information unless certain conditions apply or the information falls within one of a number of exemptions set out in FOIA. FOIA section 3, read with part VI of Schedule 1, has the effect that the BBC is to be regarded as a public authority falling within section 1 only in respect of “*information held for purposes other than those of journalism, art or literature*”. The focus in this appeal is on journalism, rather than art or literature.
4. The Balen Report is a report that has featured in previous proceedings, which started in this Tribunal and were the subject of appeal proceedings in the High Court, Court of Appeal, House of Lords and the Supreme Court. The report of the Supreme Court hearing (reported as *BBC v Sugar (No.2)* [2012] UKSC 4; [2012] 1 WLR 439) includes information about how the Balen Report came into existence and the use to which it was put by the BBC.
5. The Information Commissioner's reasoning, as set out in the Decision Notice, was that the Supreme Court had determined that the BBC had been entitled to refuse a request to disclose the Balen Report in 2005 because it was held at that time for journalistic purposes and that, although the purpose for which information was held may vary over time, he was satisfied that, on the basis of the information provided to him during the course of his investigation, it continued to be held for that

purpose when the Appellant submitted his request for information on 22 December 2012.

6. Appeals to this Tribunal are governed by FOIA section 58. Under that section we are required to consider whether a Decision Notice issued by the Information Commissioner is in accordance with the law. We may also consider whether, to the extent that the Decision Notice involved an exercise of discretion by the Information Commissioner, he ought to have exercised his discretion differently. We may, in the process, review any finding of fact on which the notice in question was based.
7. The Decision Notice summarised the steps that the Information Commissioner had taken to investigate the BBC's use of the Balen Report at the relevant time. The correspondence between the Information Commissioner and the BBC has been made available to us in the bundle of documents prepared for the purpose of this appeal. It supports the findings of fact set out in the Decision Notice and the Information Commissioner's conclusion that the Balen Report was still held for the purposes of journalism at the date of the Appellant's information request.
8. We have concluded, after careful consideration of the information and submissions made available to us, that the Decision Notice was in accordance with the law and that the appeal cannot therefore succeed. We reach that conclusion despite a number of arguments put forward by the Appellant. They were articulated in his Grounds of Appeal and subsequent written submissions at considerable length but were conveniently summarised in his Response to the Information Commissioner's Reply in the following terms:

*"In the Appellant's opinion a reasonable approach to determining the scope of the designation would:*

- a. Retain the approved definition of journalism.*
- b. Define the material time of the request.*
- c. Identify at least one example of work in progress at that time where the information was in use.*
- d. Consider how directly that use of the requested information is linked to BBC output at the material time of the request.*
- e. treat any purportedly continuous process such as monitoring as a series of finite works in progress that produce interim results which will eventually become archived.*
- f. Ignore any non immediate, anticipated future work as not work in progress."*

9. There is little or no scope for debate on points a. and b. in the Appellant's list. The definition of journalism has not been the subject of debate in this appeal. For the avoidance of doubt the definition on which we have based our decision is set out in *Sugar v BBC* in the judgment of Lord Wilson (at paragraph 42 - where his Lordship endorsed the detailed analysis that had been carried out by the Tribunal in that case) and that of Lord Walker (at

paragraph 70 – where it was defined, in effect, as the whole of the BBC’s output on news and current affairs). Similarly there is, as we understand it, no significant dispute between the parties that the time for assessing the purpose for which the Balen Report was held is the time when the Appellant’s information request was submitted (see the judgment of Lord Wilson in *Sugar v BBC* at paragraph 44).

10. The Appellant’s challenge in his points c. to e. reflects the final paragraph of his Grounds of Appeal in which he asserted that the BBC should be required “*to submit to the Tribunal’s test one specific journalistic purpose that the [Balen Report] was being held for at the material time of my request, failing which the Tribunal should order the request to be satisfied.*”
11. The specific test that the Appellant argues we should apply is just one way of testing the credibility of the statements made by the BBC to the Information Commissioner about the use to which the Balen Report continued to be put at the relevant time. We do not accept that it is necessarily an appropriate test to apply, let alone that it should be the only test for determining the issue. We believe that the correct approach is to carry out a broad overall assessment of the Information Commissioner’s investigation, and the credibility of the information he obtained from the BBC in the process, in the context of guidance provided by the Supreme Court. That guidance is to the effect that information remains protected until it has ceased to be held for the purpose of journalism and has become held, instead, for historical or archival purposes (Lord Phillips approving, at paragraphs 66 and 67, the approach that had been adopted by Lord Neuberger in the Court of Appeal). At that stage, disclosure would no longer entail any risk of interference with the BBC’s broadcasting function (paragraph 65 of the same judgment).
12. As we have indicated in paragraph 7 above we have carried out such an assessment and are satisfied that the Balen Report continued to be held by the BBC for journalistic purposes at the date of the Appellant’s information request.
13. Finally, as regards the Appellant’s final point, (point f.) there is no question of this Tribunal looking forward from that date and considering how the Balen Report might be used at any time later than the date of the Appellant’s information request and no party to this appeal has invited to do so.
14. For the reasons set out above we have concluded that the Appeal should be dismissed.
15. Our decision is unanimous.

**Chris Ryan**  
Judge

14<sup>th</sup> January 2013