



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

**Case No. EA/2012/0018**

**ON APPEAL FROM:**

**The Information Commissioner's  
Decision Notice No: FS50405124  
Dated: 15 December 2011**

**Appellant:** Angus Crawford  
**Respondent:** Information Commissioner  
**Second Respondent:** Department for Culture, Media and Sport  
**Heard at:** Field House London  
**Date of hearing:** 3 July 2012  
**Date of decision:** 10 July 2012

**Before  
John Angel  
(Judge)  
Dr Henry Fitzhugh  
and  
Richard Enderby**

**Attendances:**

For the Appellant: In person  
For the Respondent: Eric Metcalfe  
For the Additional Party: Adam Heppinstall

**Subject matter:**

s.42 FOIA Legal Professional Privilege

**Cases:**

*Mersey Tunnel Users Association v Information Commissioner and Merseytravel*  
EA/2007/0052

*DBERR v IC & Others* [2011] 1 Info LR §51

*OGC v IC* [2008] EWHC 774 (Admin)

*Bellamy v IC and DTI* EA/200/0023

*DBERR v IC & O'Brien* [2009] EWHC 164

*Three Rivers DC v Bank of England (No 6)* [2005] 1 AC 610

*DCLG v IC & WR* [2012] UKHT 103 (AAC)

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

The Tribunal upholds the Information Commissioner's Decision Notice dated 15 December 2011 and dismisses the appeal.

### **REASONS FOR DECISION**

#### **Background Facts**

1. In October 2010 the Department for Culture, Media and Sport ("DCMS") and the BBC had a series of meetings concerning the BBC licence fee. These negotiations concluded on 19 October with a settlement agreement that included a freezing of the £145.50 licence fee for six years, the BBC taking over the funding of the World Service from 2014/15 and S4C (the Welsh language TV service) from 2013/14.
2. Details of the 'BBC Funding Settlement' were set out in a letter dated 21 October written by Jeremy Hunt the Secretary of State to Sir Michael Lyons the Chairman of the BBC Trust. The same day Sir Michael replied accepting the settlement and that the "respective funding obligations.... will now need to be worked through as changes to the BBC Agreement". Both these letters have now been published.
3. The speed of the negotiations was unprecedented. The Licence Fee Settlement of 2000 took three years to negotiate. It took a similar amount of time to conclude discussions for the settlement announced in 2007, although this included a review of the BBC Charter.
4. It was reported that Jeremy Hunt stated that they "*must be the fastest negotiation in the Corporation's 83 year history*" (Guardian 21<sup>st</sup> October 2010). It was also reported that Sir Michael called the negotiations "*extraordinarily accelerated*" (Guardian 28<sup>th</sup> April 2012).

#### **The request for information**

5. By email dated 6 January 2011, Mr Crawford requested from the DCMS:
  - (i) minutes of any meetings between the Director-General of the BBC Mark Thompson and the Culture Secretary Jeremy Hunt between 13 and 20 October 2010;
  - (ii) the date, duration, location of any meetings between the two men between May 2010 and 20 October, the subjects discussed, and copies of any minutes taken;

- (iii) the dates and locations of any social meetings between the two men between May 2010 and 20 October;
  - (iv) minutes of any meetings which took place between 13 and 20 October concerning negotiations over the BBC licence fee between negotiators, seniors managers of the BBC, members of the BBC Trust, senior politicians and civil servants, together with details of the times, dates, and durations of those meetings and the names of those in attendance; and he later requested (on 11 February 2011)
  - (v) whether the DCMS obtained any legal advice concerning the final settlement with the BBC and, if so, copies of that advice.
6. On 8 February 2011, the DCMS replied to Mr Crawford's request, disclosing the information requested under (ii). In relation to (i), it said that no notes of the meetings were held other than what had been recorded in the Settlement Letter to the BBC which had already made public. In relation to (iii), it said that it did not hold the information requested. In relation to (iv), the DCMS provided the dates of the meetings together with the names of those attending. It maintained, however, that the Settlement Letter satisfied Mr Crawford's request for the minutes, on the basis that it was 'effectively the written record of what was the agreed outcome of those meetings'. In reply to (v), the DCMS relied on section 35(3) of FOIA and refused to either confirm or deny whether legal advice had been sought.
7. On 11 February 2011, Mr Crawford requested further details of the information provided in relation to (ii), together with an internal review of the DCMS's decision to withhold the minutes. He also requested any legal advice.
8. On 26 May 2011, the DCMS notified Mr Crawford of the outcome of its internal review. It found that, although there were no formal minutes taken of the settlement discussions, there was an internal DCMS email chain that summarised the main points of the meetings between Jeremy Hunt, Sir Michael and Mark Thompson (the Director General of the BBC) on 18 October 2010. Although it apologised for its previous failure to identify the material, it took the view that it was nonetheless exempt from disclosure under section 36(2)(b)(i) and (ii) FOIA (prejudice to effective conduct of public affairs) and that the public interest in the exemption being maintained outweighed that in its disclosure.
9. In relation to the legal advice, the DCMS acknowledged that it had taken legal advice 'on the logistics of introducing some of what was set out in the licence fee settlement' ("the disputed information"), and that the information should have been withheld under section 42 FOIA (legal professional privilege) rather than section 35. However, it concluded that the public interest in its disclosure was outweighed by that in the exemption being maintained.

The complaint to the Information Commissioner ('IC')

10. On 19 July 2011, Mr Crawford complained to the IC concerning the DCMS's decision under sections 36(2)(b) and 42(1) of the Act.
11. The IC's Decision Notice was issued on 15 December 2011 ("DN"). He found that:
- (i) in relation to its claim that the internal email chain was exempt under section 36(2)(b), the exemption was engaged on the basis that the DCMS had put a reasoned submission to a qualified person who had decided that disclosure 'would be likely' to inhibit the free and frank provision of advice and exchange of views, and this opinion was itself reasonable (DN, §13);
  - (ii) although there were sound general arguments in favour of disclosure of the email chain, including the presumption of openness, the importance of public confidence in official decision-making, and the setting of the licence fee itself being a matter of 'considerable public interest' (DN, §16), it was also in the public interest that officials and ministers were able to carry out 'open and frank discussions with each other and with other stakeholders such as the BBC' (DN, §17);
  - (iii) the balance of the public interest favoured the disclosure of the email chain, save for one section of the emails which concerned 'an ongoing matter, the disclosure of which would be premature' (DN, §20);
  - (iv) the legal advice received by the DCMS was exempt under section 42 as it was covered by legal professional privilege (Decision, §22);
  - (v) in addition to the usual factors in favour of disclosure of the legal advice such as transparency and accountability, 'the fact that the BBC licence fee is a significant sum of money which is paid annually by the great majority of households' was also taken into account (DN, §25);
  - (vi) in addition to such factors against disclosure as the strong public interest in-built into the legal professional privilege exemption, 'the advice given was still recent, at the time of the request and the internal review, and its contents were still live and relevant for the DCMS' (DN, §28);
  - (vii) although 'the sums of money involved are significant' and impose 'a financial burden ... on a very large majority of UK households', there was 'no lack of transparency' given that the licence fee decision was 'announced openly' with 'explanations given of the reasons for the decisions reached' (DN, §§31-32). The IC found that the arguments in favour of disclosure were 'not sufficiently strong to overturn the very strong inherent public interest in a client being able to obtain legal advice and weigh his options freely, frankly and in private with his chosen legal advisers' (DN, §32).

12. The IC, however, directed the DCMS to disclose to Mr Crawford the email chain dated 18 October 2010 subject to the redactions contained in a confidential annex (DN, §3).
13. This email chain was later disclosed to Mr Crawford with some redactions of personal information.

### The appeal to the Tribunal

14. Mr Crawford lodged a notice of appeal with the First-tier Tribunal (“FTT”) on 13 January 2012. The Tribunal allowed the appeal to be accepted out of time.
15. The FTT joined the DCMS as a party and issued directions for the case management of the appeal on 28 March 2012.
16. By the date of the hearing it was clear that Mr Crawford’s appeal was limited to challenging the IC’s assessment of the public interest balance in relation to the legal advice on the following grounds:
  - (i) The IC gave insufficient weight to the fact that the Licence Fee is ‘unique’, in that it applies to every eligible household in the UK and non-payment results in prosecution. The Licence Fee funds a ‘truly national service’ reaching 95.9% of the adult population in the UK. Any change in the licence fee had a ‘knock-on effect on services provided by the BBC to every citizen in the UK’;
  - (ii) The IC failed to give due weight to the ‘large sums of money involved’, e.g. the BBC’s annual income of ‘more than £3 billion per year’;
  - (iii) The negotiations over the licence fee settlement took place behind closed doors over a period of less than a week, with no verbatim record of how the settlement was reached and many unminuted meetings. The settlement itself was ‘communicated to the public in letter form’, and provided no background on the negotiations nor the legal basis on which it was included;
  - (iv) The legal advice obtained by the DCMS does not attract the same in-built weight against disclosure as it was not sought ‘in pursuance of litigation or a public inquiry’;
  - (v) The IC failed to assess the extent of any harm or prejudice to the DCMS were its legal advice disclosed. Mr Crawford claims that no harm is likely to come to the DCMS in this case, ‘given that it is a government department’;
  - (vi) The settlement resulted in ‘major changes’ to the BBC’s services, including cuts to ‘local radio, BBC 2, BBC News Online and

elsewhere', the likely loss of 2000 jobs as well as a 'radically altered licence fee environment'. Given that there has been 'no public scrutiny about the legality of that decision', the balance of the public interest favours disclosure of the DCMS's legal advice;

- (vii) The IC gave no weight to the BBC Trust's stated aims of 'openness and transparency';
- (viii) Other than the 'passage of time', the factors in favour of disclosure of legal advice identified by the Tribunal in *Mersey Tunnel Users Association v Information Commissioner and Merseytravel* EA/2007/0052 ("*Mersey Tunnel*"), i.e. 'the amounts of money involved and numbers of people affected ... the absence of litigation, and crucially the lack of transparency in the authority's actions and reasons' apply equally in the case of the legal advice on the BBC Settlement.

17. Mr Crawford is not pursuing any complaint in relation to the redacted portions of personal information of the email chain withheld under section 36(2)(b).

#### The questions for the Tribunal

18. Therefore the only issue before the FTT is whether the disputed information was properly withheld under section 42 FOIA. We need to decide whether:

- a. the exemption is engaged, and if it is engaged
- b. where does the public interest balance lie.

19. The parties accept that the exemption is engaged, albeit Mr Crawford not having seen the disputed information. We agree with the parties that the exemption is engaged in this case and note that it is class based qualified exemption which means that there is no need "to demonstrate any specific prejudice or harm from the specific disclosure of the documents in question."<sup>1</sup>

20. At the commencement of the proceedings Mr Crawford applied to admit new evidence. Firstly the Guardian articles referred to in §4 above. There was no objection from the other parties so the articles were admitted. Secondly he applied to admit the House of Commons Culture, Media and Sports Select Committee report on the BBC Licence Fee Settlement and Annual Report in 2011 ("Select Committee"). Ms Parker had already exhibited the annex to the report as part of her evidence. As a result there was no objection from the

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<sup>1</sup> *DBERR v IC & Others* [2011] 1 Info LR §51.

other parties to admitting the part of the report that related to historical facts. However there was objection to the other parts of the report on the basis they were subject to Parliamentary Privilege. Bearing in mind the judgment of Burnton J (as he then was) in *OGC v IC* [2008] EWHC 774 (Admin) we were not prepared to admit the rest of the report.

21. Because of the nature of the FTT's proceedings in FOIA cases evidence relating to the disputed information was heard in closed session.
22. Mr Crawford explained that he is a BBC journalist who covers such matters as licence fee and charter negotiations, hence his request in this case. We would like to record that despite being a litigant in person he presented his evidence and submissions extremely well and professionally.
23. Other than Mr Crawford there was only one other witness, Ms Wendy Frances Parker, who was Head of Public Service Broadcasting at the DCMS at the time of the Licence Fee negotiations and during the period of the request and internal review. Ms Parker produced both open and closed witness statements. During the course of the proceedings the full closed witness statement was disclosed to Mr Crawford.

#### The legal framework

24. Section 42(1) FOIA provides materially as follows:

Information in respect of which a claim to legal professional privilege ... could be maintained in legal proceedings is exempt information.

25. The LPP exemption is qualified, and therefore subject to the public interest balancing test in section 2(2)(b) FOIA. This requires the FTT to determine whether:

in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

26. The FTT has a long line of jurisprudence starting with *Bellamy v IC and DTI* EA/200/0023 where it is well established that "there is a strong element of public interest inbuilt into the privilege itself. At least equally strongly countervailing considerations would need to be adduced to override that inbuilt public interest" §35. This jurisprudence was accepted by the High Court in *DBERR v IC & O'Brien* [2009] EWHC 164 at [35-40]. It has also been accepted that LPP applies to both legal advice privilege and litigation privilege.<sup>2</sup> We adopt the *Bellamy* approach but not so far as to allow the exemption to be regarded, in effect, as an absolute exemption.

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<sup>2</sup> E.g. *Three Rivers DC v Bank of England (No 6)* [2005] 1 AC 610 and *DCLG v IC & WR* [2012] UKHT 103 (AAC).



27. Mr Crawford refers us to the Tribunal decision in *Mersey Tunnel* which considered in relation to LPP that questions of pure public administration where no significant personal interests are involved are at the opposite spectrum of importance to say cases concerning criminal and childcare matters. That Tribunal considered factors to take into account could include whether the legal advice was live at the time of the request, the passage of time since the advice was produced, that large amounts of money are involved and large numbers of people affected, that there is no litigation in prospect, and that there has been a lack of transparency in the public authority's actions and reasons.
28. We are not bound by decisions of other FTTs. However we are required to consider all the circumstances of this particular case in order to determine the public interest balance and the factors identified in *Mersey Tunnel* may be relevant but only to the extent they apply to the facts in this particular case.

### Evidence

29. The Select Committee report set out the summary of events. These show that on 11 October 2010 the BBC was advised (both the Trust and Executive) that as part of the Comprehensive Spending Review ("CSR") the Government was actively considering the funding of free TV licences for the over-75s and the funding of the World Service, and was considering transferring funding responsibility for both from the Government to the Licence Fee. The following day the Director General had an explanatory telephone conversation with the Secretary of State. On 13<sup>th</sup> they met to discuss the CSR implications for the BBC. The Director General expressed outright opposition to the over 75s proposal but signalled that the BBC might be willing to agree to absorb the World Service costs if that could be part of a full licence fee settlement running to the end of the Charter period.
30. The discussions continued over the next few days and the Trustees of the BBC Trust were also consulted.
31. On 18 October the Secretary of State met the Chairman of the Trust and then the Director General and talks continued through the night where a set of draft proposals was prepared for review by the Executive Board of the BBC and the Trustees. The Executive Board met on 19<sup>th</sup> and agreed that it would be possible to implement the settlement. The Trustees held a teleconference and agreed to the settlement.
32. On 20 October the Chairman of the Trust, the Director General and the Director of the World Services met with the Foreign Secretary to discuss the implications of the settlement on the World Service.
33. On 21 October an exchange of letters between the Secretary of State and the Chairman formally recorded the Licence Fee settlement reached. These were published as were several other documents including a letter from the Chairman to the Prime Minister and the Trust minutes of the teleconference on 19 October. The Secretary of State made an announcement on the DCMS

website on 20 October setting out the substance of the agreement finally reached.

34. Ms Parker explained that no minutes of the various meeting including the overnight meeting on 18/19 October were taken by DCMS except the information already disclosed. The agreement was recorded in a draft of the Secretary of State's letter of 21 October. It went through a couple of iterations following, among other things, the taking of legal advice.
35. On 19 October after the meeting Ms Parker outlined the nature of the proposed agreement to several members of the Department's legal team who later provided a one page legal advice on the matters discussed. She describes the advice as containing

"nothing of particular controversy, either within the Department or outside, and I can confirm that the Department did not ignore any aspect of the advice, in finalising the agreement with the BBC or otherwise.....did not raise any queries about the fundamental nature of the agreement reached.....[it] simply raised some ways in which the agreement could be implemented, and some matters to be borne in mind.. ...lawyers indicated that there was practical detail to be worked through simply in order to implement the agreement."

36. Ms Parker considers that the public interest would not be greatly assisted in understanding the information already in the public domain, nor the underlying agreement reached by disclosure of the legal advice. She says it

"is on very narrow points of implementation, and does not substantially go to the issue in relation to the substance of the agreement at all, and nor does it illuminate the agreement."

37. Ms Parker maintains that

"The legal advice remains a very live issue for the Department. The agreement between S4C and the BBC is not due to commence until 2013. Until that time, although S4C and the BBC have reached agreement as to how it will operate, there may still be issues to be considered, including legal issues about the practical operation of that agreement. Moreover the Department has (on 4<sup>th</sup> May 2012) concluded a public consultation on the making of an Order under the Public Bodies Act 2011 in order to implement some parts of the agreement between S4C and the BBC."

38. Ms Parker provided us with a copy of the Public Bodies Act which came into force in 2012 amending section 61 of the Broadcasting Act so as to facilitate the implementation of the new partnership arrangements between the BBC and S4C.
39. Mr Crawford reiterated the facts he had relied on in his grounds of appeal as set in §16 above, in particular:

- c. The speed of the negotiations on the Licence fee in 2010 was unprecedented;
- d. The negotiations were conducted in secrecy, few minutes were taken and there was a lack of transparency;
- e. There was no consultation with the public or competitors or other stakeholders as in previous rounds;
- f. The negotiations involved approximately £20.4 billion of licence fee payer's money over a period of six years. The licence fee would be frozen at £145.50 until March 2017;
- g. Between April and June 2011 BBC services reached 95.9% of the adult population or 46.3 million people;
- h. The licence fee settlement resulted in the BBC taking over the funding for World Services and S4C which had previously been funded by the tax payer and the Government which he describes as a "change of constitutional significance".
- i. The budget cuts to the BBC as a whole of approximately 16% will result in cuts of approximately 2000 jobs or roughly 10% of the BBC workforce.
- j. The cuts will affect every part of BBC services including cuts in programming on BBC Local Radio, BBC2, BBC Online, BBC National Radio and BBC News and BBC Sport which in turn will affect 46.3 million viewers, listeners and readers.

40. He points out to us the 2010 Settlement lasts until 2016/17 and that the contemporaneous record of the direct negotiations between the DCMS and the BBC consists of three emails on one and a half sides of A4.

### Public Interest Test

41. The inbuilt public interest in withholding information to which LPP applies is acknowledged to command significant weight. In this case it allowed the DCMS to obtain full and frank legal advice on those matters for which it was responsible. In fact we learnt from Ms Parker that advice was only obtained on a limited part of the agreement and mainly involved implementation.
42. We also learnt that the Settlement Agreement was still being finalised and would not be entered into until 2013. New legislation<sup>3</sup> had been laid before Parliament in February 2012 to enable the BBC to take on its new responsibilities but Orders might be required. Therefore implementation is still continuing to this day. As a result the Respondents say the advice is still live and not yet diminishing.
43. Although it was reported in the press in 2010 that the S4C might seek to judicially review the Settlement Ms Parker informed us that to her knowledge no such action had been brought. Also there was no evidence that other legal action had commenced or was in the offing.

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<sup>3</sup> An amendment to s.61 of the Broadcasting Act 1990 introduced under the provisions of the Public Bodies Act 2011 which came into force on 14 February 2012.

44. We have had the opportunity to review the disputed information and have come to the conclusion that some of the advice is still very much live. We would confirm that that most of the advice covers only one particular part of the Settlement which is clearly still being implemented. There is no evidence to suggest that the advice has been ignored and it does not in our view disclose or suggest any wrongdoing. We would also endorse what Ms Parker says that it does not contain in itself anything of a particular controversial nature.
45. Also although there is no evidence of possible litigation it is not possible to rule this out before the Agreement is operational in 2013 or beyond.
46. In our view this means that the inherent weight of the LPP exemption in this case is not diminished. Therefore the weight of the public interest in maintaining the exemption is significant.
47. However the circumstances of this Settlement were unprecedented. Rather than years, the negotiations took days without the usual extensive consultation. But, there were exceptional circumstances at the time in that the new government's Current Spending Review ("CSR") was necessitating major cuts in public spending at speed. Also we should bear in mind that only the Licence Fee was being negotiated, not the Charter, although as Mr Crawford points out the envisaged changes were of Charter-type proportions.
48. In addition to the speed of reaching a settlement and lack of public consultation there seems to be a dearth of recorded information around the negotiations, which is surprising considering the large numbers of viewers affected, the extent of job losses, the quantum of licence fees and the significant changes to funding of areas of public broadcasting.
49. Moreover the lack of public consultation seems to put competitors at a disadvantage as there was no apparent way for them to argue, for example, that the licence fee should be reduced.
50. These are weighty factors in favour of disclosure of any information which can shed light on how this speedy Settlement which affects so many people was reached. In other words there is a significant public interest in transparency and accountability in this case.
51. However would the legal advice in question shed any light on this public interest? Ms Parker says it would not. Having seen the disputed information we consider it would provide limited support to this factor. As Ms Parker explains it is largely about implementation of a particular aspect of the Agreement. In our view the legal advice would provide little help to Mr Crawford in his reporting of the negotiations. As a result we consider the weight in the public interest of disclosure to be less than it might otherwise have been if the advice had been more relevant to what Mr Crawford is seeking in relation to the transparency of the negotiations generally.

52. In coming to this conclusion we have considered whether it would have been possible to redact parts of the advice so that other parts could be disclosed but find this is not information easily capable of such treatment and in our view must be treated as a whole.

53. We therefore find that in all the circumstances of this case the public interest in maintaining the exemption outweighs the public interest in disclosure.

54. We would observe that we can understand why Mr Crawford has pursued this matter to a hearing despite disclosure of most of the information originally requested. It seems to us, that despite the exceptional nature of the CSR, the haste of the negotiations and lack of record of what took place means that Mr Crawford has quite understandably had to challenge the DCMS into providing whatever contemporaneous record there might be to help him in his journalist pursuit to provide the public with the facts of this unprecedented Licence Fee Settlement with its far reaching effects.

### Conclusion

55. We therefore uphold the Information Commissioner's Decision Notice and dismiss this appeal.

56. Our decision is unanimous.

[Signed on original]

**Professor John Angel**  
Tribunal Judge

10 July 2012

*Paragraphs 38, 42 and 45 and Footnote 3 amended on 12 July 2012 under Rule 40 of The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009*