

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** **23 February 2022**

**Public Authority:** **British Broadcasting Corporation**  
**Address:** **Room BC2 B6 Broadcast Centre**  
**White City**  
**Wood Lane**  
**London**  
**W12 7TP**

### **Decision (including any steps ordered)**

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1. The complainant made a request for information for documents that exist relating to email or other correspondence between BBC managers and the BBC Information Office, between September 2020 and November 2020, which has any bearing on the November 1995 Panorama programme with the Princess of Wales. The BBC refused to disclose the requested information under section 42 and 43(2) FOIA.
2. The Commissioner considers that the BBC was correct to apply section 42 FOIA to the information withheld under this exemption but was incorrect to apply section 43(2) FOIA to the information withheld under this exemption.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
  - Disclose the information withheld under section 43(2) FOIA.
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

## Request and response

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5. On 4 June 2021 the complainant requested information of the following description:

"I would like to request all documents that exist relating to email or other correspondence between BBC managers and the BBC Information Office, between September 2020 and November 2020, which has any bearing on the November 1995 Panorama programme with the Princess of Wales.

I can see from your published list of exclusions, below, that this correspondence is not exempt from disclosure and would therefore be glad to receive it at your earliest convenience.

<https://www.bbc.co.uk/foi/about/exemptions>

For your information, we were contacted by [named individual] at the BBC on 19 10 2020 to say that the BBC IO would shortly be writing to us, indicating that she at least had some sort of advance knowledge of your intentions.

It is the correspondence underpinning that kind of knowledge which we would be most interested to see."

6. On 16 July 2021 the BBC responded. It refused to disclose the requested information under section 42 and 43(2) FOIA.
7. The complainant requested an internal review on 21 July 2021. The BBC sent the outcome of its internal review on 20 August 2021. It upheld its original position.

## Scope of the case

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8. The complainant contacted the Commissioner on 21 July 2021 as he was dissatisfied with the application of the exemptions.
9. The Commissioner has considered whether the BBC was correct to apply section 42 and section 43(2) FOIA to withhold the requested information.

## Reasons for decision

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### Section 42 – Legal professional privilege (LPP)

10. Section 42(1) states that: “Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information.”
11. The Commissioner has not been provided with the information withheld under this exemption. This is because the BBC has explained that the withheld information is legally privileged information where the advice relates to the BBC’s rights and duties under FOIA. Under section 51(5)(a) and (6) FOIA a public authority cannot be compelled to provide the Commissioner with legally privileged information where the advice relates to a public authority’s rights or duties under FOIA. However the BBC did provide the Commissioner with a witness statement of a senior lawyer at the BBC dated 12 January 2022 confirming why the information falls within scope of the exemption. The withheld information comprises solely of communications between a professional legal adviser and their client in connection with the giving of legal advice to the client with respect to the BBC’s obligations, liabilities or rights under FOIA. The Commissioner’s decision is therefore based upon the witness statement provided by the BBC rather than viewing the withheld information.
12. In *Bellamy v the Information Commissioner and the Secretary of State for Trade and Industry EA/2005/0023*, the FTT described LPP as [9]: “a set of rules or principles which are designed to protect the confidentiality of legal or legally related communications and exchanges between the client and his, her or its lawyers, as well as exchanges which contain or refer to legal advice which might be imparted to the client, and even exchanges between the clients and [third] parties if such communications or exchanges come into being for the purposes of preparing for litigation.”
13. LPP protects an individual’s ability to speak freely and frankly with their legal adviser to obtain legal advice. During these discussions the weaknesses and strengths of a position can be properly considered. For these reasons LPP evolved to make sure communications between a lawyer and their client remained confidential.
14. Section 42 is a class based exemption. The requested information only has to fall within the class of information described by the exemption

for it to be exempt. This means that the information simply has to be capable of attracting LPP for it to be exempt. There is no need to consider the harm that would arise by disclosing the information. However, this exemption is subject to the public interest test.

15. There are two categories of LPP – litigation privilege and legal advice privilege. Litigation privilege applies to confidential communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation. Legal advice privilege may apply whether or not there is any litigation in prospect but legal advice is needed. In both cases, the communications must be confidential, made between a client and professional legal adviser acting in their professional capacity and made for the sole or dominant purpose of obtaining legal advice.
16. The BBC has confirmed that the BBC interpreted the request to include emails between BBC staff who worked in the BBC's Information Rights Team (this Team comprises of the senior lawyer who provided the witness statement, other lawyers and non-legal advisors) and senior internal stakeholders. The withheld communications are between a lawyer (in most cases the senior lawyer who provided the witness statement) and senior BBC employees. The senior BBC employees being regarded as the client.
17. The BBC confirmed that each communication was made for the dominant purpose of seeking or giving legal advice regarding FOIA law. It said that some of these emails involved threads, where the communication was in furtherance of a function essential to the lawyer and client relationship, or the continuum of legal advice provided by the lawyer. It confirmed that all enclosures and attachments were also covered by LPP.
18. Based upon the submissions of the BBC, in particular the witness statement dated 12 January 2022, the Commissioner considers that the withheld information consists of confidential communications between client and lawyer made for the dominant purpose of seeking or giving legal advice.
19. However, section 42 is a qualified exemption and therefore the Commissioner must consider the public interest test and whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

## **Public interest test**

### **Public interest in favour of disclosure**

20. The BBC recognises that there is a public interest in transparency surrounding how the BBC handles FOI requests, particularly concerning matters of significant public scrutiny like the findings of Lord Dyson's investigation into the 1995 Interview. The BBC said that it has disclosed a significant amount of information relating to the Dyson Investigation and the work of its FOI Team which is not subject to LPP.
21. The complainant alleges that the BBC may have mishandled a FOIA response to him dated 19 October 2020 due to information that has come to light as a result of a separate FOIA disclosure made to him on 3 December 2021. The complainant considers that this evidence provides a strong public interest to disclose the background material concerning the handling of the 19 October 2020 response to a previous FOIA request made relating to the November 1995 Panorama programme with the Princess of Wales.
22. In his Guidance<sup>1</sup> on section 42, the Commissioner acknowledges that there is a general public interest in openness and transparency and the following factors may add weight to arguments in favour of disclosure:
  - large amount of money involved;
  - large number of people affected;
  - lack of transparency in the public authority's actions;
  - misrepresentation of advice that was given;
  - selective disclosure of only part of advice that was given.
23. In this case the BBC has said that the issues are not financial, only a few people are affected, there has been no selective disclosure and it has confirmed that there has been no misrepresentation of the withheld legal advice.

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<sup>1</sup> [https://ico.org.uk/media/for-organisations/documents/1208/legal\\_professional\\_privilege\\_exemption\\_s42.pdf](https://ico.org.uk/media/for-organisations/documents/1208/legal_professional_privilege_exemption_s42.pdf) (ico.org.uk)

### **Public interest in favour of maintaining the exemption**

24. The BBC denies any mishandling of the 19 October 2020 request referred to at paragraph 21 above and does not accept that the factual evidence presented by the complainant in the form of information he obtained in response to a separate FOIA request on 3 December 2021 has any bearing on the public interest test in this case. It did however provide the Commissioner with an explanation as to why the information disclosed to the complainant on 3 December 2021 is not incompatible with its handling of the previous FOIA request response dated 19 October 2020.
25. The BBC has argued that disclosure would risk seriously undermining the important confidential space in which the BBC (like any other organisation) is able to seek advice from its lawyers in private. It argued that LPP is a fundamental right. It said that safeguarding openness in all communications between a client and a lawyer ensures access to full and frank legal advice, which is fundamental to the administration of justice. Such openness would be undermined if the disclosure of those communications became routine.
26. The BBC explained that the fact the withheld legal advice is both live and recent also strengthens the public interest in maintaining the exemption. It confirmed the advice is from 2020 and relates to the way in which the BBC FOI team responds to FOI requests.

### **Balance of the public interest test**

27. In *Bellamy v Information Commissioner & Secretary of State for Trade and Industry* (EA/2005/0023), which was endorsed by Wyn Williams J in *DBERR v O'Brien v IC* [2009] EWHC 164 (QB) the general importance of LPP communications was acknowledged [41 and 53]:

“the in-built public interest in non-disclosure itself carries significant weight which will always have to be considered in the balancing exercise once it is established that legal professional privilege attaches to the document in question... [it] is acknowledged to command significant weight”

28. However it was established in *Boyce v IC and PHSO* EA/2019/0032 that the public interest in disclosure does not need to be exceptional [89]:

"In our view every case must be considered on its own merits, and it would be an error to seek to limit the application of the public interest test in relation to LPP material so as to give rise to a presumption that only in very exceptional cases would the public interest be in favour of disclosure."

29. The Commissioner does not consider it is appropriate to consider the BBC's handling of a previous FOIA request within this section 50 investigation and in particular when considering the public interest test in relation to the application of this exemption.
30. The Commissioner considers that there is a strong public interest in protecting the BBC's ability to access full and frank legal advice and the fact that in this case the withheld advice is live and fairly recent adds significant weight. Whilst there is a public interest in transparency behind the BBC's FOIA request handling, it has confirmed that none of the potential factors in favour of disclosure set out at paragraph 22 in relation to this exemption are relevant to the withheld legal advice in this case. On balance, the public interest in favour of disclosure is outweighed by the public interest in favour of maintaining the exemption.

### **Section 43(2) – Commercial Interests**

31. Section 43(2) of the FOIA states that: 'Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it)'
32. The Commissioner's Guidance on Section 43 explains that:

"A commercial interest relates to a legal person's ability to participate competitively in a commercial activity. The underlying aim will usually be to make a profit. However, it could also be to cover costs or to simply remain solvent."
33. The information withheld under this exemption is correspondence between a non-legal FOI adviser and a BBC stakeholder.
34. The BBC has argued that its commercial interests in this case relate to sensitive internal processes and know-how about how the BBC applies FOI law to the unique environment of the BBC.
35. The Commissioner does not consider that know-how about how the BBC applies FOI law or internal processes in this regard could be

classed as a commercial interest. It doesn't relate to its ability to participate competitively in a commercial activity. The Commissioner does not therefore accept that this exemption is engaged.



## **Right of appeal**

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36. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from: First-tier Tribunal (Information Rights)

GRC & GRP Tribunals,  
PO Box 9300,  
LEICESTER,  
LE1 8DJ

Tel: 0300 1234504

Fax: 0870 739 5836

Email: [grc@Justice.gov.uk](mailto:grc@Justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

37. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
38. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

**Signed**.....

**Gemma Garvey**  
**Senior Case Officer**

**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**