

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 15 December 2011

Public Authority: Department for Culture, Media and Sport
Address: 2 – 4 Cockspur Street
London
SW1Y 5DH

Decision (including any steps ordered)

1. The complainant requested minutes of meetings which took place between 13 and 20 October 2010 between senior BBC negotiators and senior politicians and civil servants concerning negotiations over the BBC licence fee. He also requested related Department for Culture, Media and Sport (DCMS) legal advice.
2. The Commissioner's decision is that DCMS correctly withheld the legal advice relying on section 42(1) FOIA and acted partially correctly in withholding information about the meetings relying on section 36(2)(b) FOIA.
3. The Commissioner requires DCMS to take the following steps to ensure compliance with the legislation. DCMS should disclose emails dated 18 October 2010 subject to redactions as set out in the confidential annex to this notice which has been sent to DCMS only.
4. DCMS 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 (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 6 January 2011, the complainant wrote to the Department for Culture, Media and Sport (DCMS) and requested information. Parts of his request were not included within the Commissioner's investigation

but the requests which were investigated were couched in the following terms:

*"Please could you provide me with minutes of any meetings which took place between 13th October 2010 and 20th October 2010, involving negotiators/ senior managers of the BBC/ members of the BBC Trust and negotiators/ senior politicians/ civil servants concerning negotiations over the licence fee. Please state times, dates and duration of meetings. Please also state who was present at such meetings.
Did the DCMS request legal advice about the final settlement with the BBC? If yes, please provide copies of that advice."*

6. DCMS responded on 8 February 2011. It stated that the licence fee settlement letter to the BBC, which had been published at the time, was effectively the written record of what had been agreed at those meetings. DCMS also said, relying on section 35(3) FOIA, that it could neither confirm nor deny whether legal advice had been sought.
7. Following an internal review DCMS wrote to the complainant on 26 May 2011. It stated that further investigation had identified a summary of one of the relevant meetings, which had previously been overlooked. The meeting had been held on 18 October 2010 and the information took the form of an internal email chain (the email chain). DCMS withheld all of the information in the email chain relying on section 36(2)(b) (i) and (ii) FOIA on the grounds that disclosure would be likely to inhibit the free and frank provision of advice and the free and frank exchange of views for the purposes of deliberation. DCMS said that the public interest balance lay in withholding the information.
8. In addition DCMS now said that legal advice was held but withheld it relying on the section 42 FOIA exemption.

Scope of the case

9. The complainant contacted the Commissioner to complain about the way his request for information had been handled; he asked the Commissioner to investigate the withholding of the information in the email chain and the legal advice.
10. The Commissioner considered the application of the section 36(2)(b) and section 42(1) exemptions.
11. The Commissioner has reviewed the content of the withheld information and has taken full account of representations he has received from DCMS and the complainant.

Reasons for decision

Prejudice to effective conduct of public affairs (section 36)

12. Section 36(2) FOIA provides that –

“Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act-

...

(b) would, or would be likely to, inhibit-

(i) the free and frank provision of advice, or

(ii) the free and frank exchange of views for the purposes of deliberation...”.

13. The Commissioner has seen that, between the time of the refusal notice and the internal review, DCMS officials had put a reasoned submission to the qualified person who decided that disclosing the information would be likely to inhibit the free and frank provision of advice and exchange of views. The Commissioner decided that the qualified person had given a reasonable opinion and that the exemption was engaged at the lower level of ‘would be likely to’ inhibit.

14. The exemption is qualified and the Commissioner proceeded to consider the balance of the public interest with regard to the withheld information.

15. He considers that there are sound general arguments in favour of **disclosure**. These include the presumption in favour of openness in government and fostering trust and engagement between citizens and government. In addition there is the desirability of the public being able to have confidence that decisions that affect them have been taken on the basis of full information and that public authorities are demonstrating that they have nothing to hide.

16. In addition he had regard for the fact that the BBC licence fee is paid by the great majority of households and that its level and the manner in which it is arrived at are matters of considerable public interest.

17. He also considered the arguments for **withholding** the information. It is in the public interest for officials and ministers to be able to carry out open and frank discussions with each other and with other stakeholders,

such as the BBC in this case, in order to achieve the best possible outcome for the public.

18. The test applied in this matter by DCMS, and subsequently by the Commissioner himself, is the lower level test of 'would be likely to' inhibit rather than the higher test of 'would' inhibit.
19. The Commissioner considered whether or not the balance of the public interest favoured maintaining the exemption. His detailed decision is recorded in the form of a confidential annex to this decision notice.
20. For the sections of the information he decided should be disclosed, the Commissioner saw that the subject matter of one section of the information contained within the email chain did not form part of the settlement letter or other public announcements about the licence fee settlement. He decided that this was in principle a matter that was ongoing, the disclosure of which would be premature. He decided that this information, and only this information, should be withheld with the remainder of the information in the email chain being disclosed.

Legal professional privilege (section 42)

21. Section 42(1) of FOIA 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."

22. DCMS said, and the Commissioner agreed, that the legal advice information it was withholding should be exempt as it was legally professionally privileged.
23. The exemption is qualified and the Commissioner proceeded to consider the balance of the public interest with regard to the withheld information.
24. Factors favouring **disclosure** include: the general presumption of openness, the benefits of transparency in government, and the need to ensure accountability of public authorities.
25. In this matter the Commissioner additionally had regard for the fact that the BBC licence fee is a significant sum of money which is paid annually by the great majority of households and that its level, and the manner in which it is arrived at, is a matter of considerable public interest.
26. The complainant drew attention to what he said was a precedent in disclosing legal advice which was the disclosure of the then attorney general's advice to the government on the legality of the war in Iraq.

27. The Commissioner considered the factors favouring **withholding** the information and that there will always be a strong element of public interest inbuilt into the legal professional privilege exemption. However, it is not an absolute exemption and where there are equal or weightier countervailing factors, then the public interest in maintaining the exemption does not outweigh the public interest in disclosing the information.
28. The concept of legal professional privilege and the rationale behind the concept of ensuring frankness between lawyer and client serves the wider administration of justice. In this matter 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 DCMS.
29. On only one occasion has the Commissioner found that the factors in favour of maintaining the legal professional privilege exemption were not at least matched by those in favour of disclosure - this being in respect of an enforcement notice request relating to requests for the then attorney general's advice on the legality of the war in Iraq.
30. The only case to date where the Tribunal has found that the public interest factors in maintaining the exemption did not outweigh those in favour of disclosure is the case of the *Mersey Tunnel Users Association and the Information Commissioner and Merseytravel (2008)*. The *Mersey Tunnel* case concerned the application of a tax which was widely levied on members of the public travelling within the Merseyside area and the Commissioner has had regard to it.
31. In this matter, the Commissioner has seen that the sums of money involved are significant and affect much of the British public. However, he has also seen that there was no lack of transparency in that the licence fee decision taken was announced openly at the end of the decision taking process with explanations given of the reasons for the decisions reached.
32. In determining where the balance of the public interest lies, the Commissioner has had regard for all of the above considerations and is mindful of the financial burden imposed on a very large majority of UK households by the licence fee. However, he decided on balance that the arguments favouring 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. The Commissioner therefore decided that the information should continue to be withheld.

Other matters

33. The complainant asked for an internal review of the refusal notice on 11 February 2011 but it took DCMS until 26 May 2011 to respond. This was far too long. As he has made clear in his 'Good Practice Guidance No 5', the Commissioner considers that internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by the Act, the Commissioner has decided that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may be reasonable to take longer but in no case should the time taken exceed 40 working days, and as a matter of good practice the public authority should explain to the requester why more time is needed. The Commissioner is concerned that it took over three months for an internal review to be completed and reminds the public authority of its responsibilities in this respect.

Right of appeal

34. 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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

35. 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.
36. 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

Jon Manners
Group Manager

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