

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

Date 22 February 2007

**Public Authority:** British Broadcasting Corporation  
**Address:** Media Centre  
Media Village  
201 Wood Lane  
London  
W12 7TQ

### Summary

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The complainant requested information concerning legal advice received by the public authority on the issue of whether the television licence fee is compliant with the Human Rights Act 1998. The public authority confirmed that information falling within the scope of this request is held by it. However, this information was withheld on the grounds that it attracted legal professional privilege and thus that the exemption provided by section 42 applied. The public authority also found that the public interest in maintaining this exemption outweighed the public interest in disclosure. The Commissioner finds that the exemption provided by section 42 applies to the information requested in this case. The Commissioner further finds that in this case the public interest in maintaining the exemption outweighs the public interest in disclosure. However, the Commissioner also found that the public authority did not comply with its obligations under section 17 of the Act pertaining to refusal notices.

### The Commissioner's Role

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1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 ('the Act'). This Notice sets out his decision.

### The Request

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2. On 6 March 2005, the complainant made the following information request:

"The BBC letter to me dated 5 May 2004 states 'You have mentioned the Human Rights Act 1998 and I can confirm that all our policies and procedures have been reviewed against the Act and we are satisfied that

we are fully compliant with prevailing Human Rights legislation.’  
Please provide full written details of the above review and all and any other legal advice you have paid for and received in respect of the above statement, and in respect of HR legislation generally.”

3. This matter has been progressed on the basis that the complainant wished to access information related to the legality of the Television Licence fee. A strict interpretation of the scope of the request would indicate that it is for information related to the compliance with the Human Rights Act of the public authority in its entirety. However, the Commissioner notes that the complainant has repeatedly made it clear in his correspondence with both the public authority and the Commissioner that his interest is in the legality of the Television Licence fee.
4. The public authority responded to this request on 22 March 2005. This reply confirmed that information falling within the scope of the request is held by the public authority, but that this information was being withheld because it is subject to legal professional privilege and therefore exempt under section 42 of the Act. This reply did not include any mention of the public interest.
5. The complainant contacted the public authority on 5 April 2005 and requested that the public authority carry out an internal review of its handling of his information request.
6. The public authority responded, outlining the findings of its internal review, in a letter dated 12 May 2005. The review upheld the initial decision to withhold the requested information under section 42. Again, the public authority did not refer to its consideration of the public interest test.

## The Investigation

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### Scope of the case

7. On 21 June 2005, the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the following points:
  - The quality of the refusal notice.
  - The application of section 42.
8. In support of his stance that the information withheld should be disclosed, the complainant advanced the following arguments:
  - Legal professional privilege is a common law concept, rather than being enshrined in an Act of Parliament and thus any argument based on a claim of legal professional privilege is not valid.
  - Legal professional privilege applies only where a legal professional is retained by an individual; it does not apply where a legal professional is retained by a corporate body.

- The status of the public authority; specifically that it is compulsorily publicly funded, means that it is not entitled to any claim of confidentiality in relation to information that it holds.
  - The Government's decision to disclose legal advice provided by the Attorney General on the subject of the Iraq conflict demonstrates the lack of merit in any argument favouring withholding information due to legal professional privilege.
9. When the public authority initially responded to the Commissioner, it stated that it believed that the request should have been interpreted more widely than it was at the time that it was received. Due to the reinterpretation of the scope of the request by the public authority, a greater volume of information was considered to fall within the scope of the request. The public authority therefore cited section 12 as it believed that the cost of complying with the request when considering the wider scope would exceed the cost limit.
10. The Commissioner did not agree with this approach and believed that the public authority had interpreted the scope of the request correctly when initially responding to the request. In particular the Commissioner noted the complainant's explanation of the scope of his request as outlined in his letter of complaint to the Commissioner of 21 June 2005 and further that the complainant had not included amongst the grounds to his complaint any objection to the public authority's original interpretation of the scope of his request.
11. The Commissioner contacted the public authority and advised that given the background to the request it did not appear necessary to reinterpret the scope of the request. Following this, the public authority withdrew its argument concerning section 12 of the Act. The public authority confirmed that it also considered its interpretation of the scope of the request at the time that the request was made was correct.
12. The Commissioner's decision in this case therefore focuses on the issues raised by the complainant in his letter to the Commissioner of 21 June 2005.

### **Chronology**

13. The Commissioner contacted the public authority on 14 August 2006. The public authority was asked to provide copies of the withheld information, any further arguments as to why it believed section 42 applies and any arguments it wished to advance as to why the public interest favoured maintaining the exemption in this instance.
14. The public authority responded by letter dated 18 September 2006. In its response, the public authority confirmed that legal advice falling within the scope of the request had been provided to it and that documents recording this advice were held.
15. The public authority acknowledged that its refusal notice had failed to make any reference to its considerations of the public interest test. The public authority confirmed that it is aware that section 17 requires that where a qualified

exemption is applied, a refusal notice should include an explanation of the public authority's consideration of the public interest test.

16. The public authority supplied to the Commissioner copies of 2 documents. The public authority stated that these documents constituted all information held by it that fell within the scope of the request and that these had been withheld.
17. The public authority cited the following arguments as to why it believes that section 42 applies to the information withheld:
  - Contrary to the assertion of the complainant, legal professional privilege applies to corporate bodies as well as to individuals.
  - That the complainant's request was for legal advice and therefore the information withheld was, by definition, created for the dominant purpose of a professional legal adviser providing legal advice to their client and attracts advice privilege.
  - Other advice was provided in relation to court cases and thus would attract litigation privilege.
  - Whether subject to advice or litigation privilege, if subject to discovery of document requests in litigation, these documents would be privileged from disclosure.
18. The public authority provided the following arguments as to why the public interest favours maintaining the exemption under section 42:
  - There is a strong public interest in maintaining the confidentiality of communications between lawyer and client. In support of this, the public authority included the following quote from guidance produced on this subject by the Department for Constitutional Affairs:

*"Given the very substantial public interest in maintaining the confidentiality of LPP material, it is likely to be only in exceptional circumstances that it will give way to the public interest in disclosure."*
  - Maintaining the confidentiality of legal advice will ensure that a lawyer gives comprehensive advice. The fear that advice may be disclosed may lead to a lawyer not giving comprehensive advice as they would not want this advice to be disclosed to a third party.
19. The public authority acknowledged that a public interest argument could be made in favour of disclosure in so far as the information may demonstrate that in respect to the Television Licence fee the public authority is compliant with the Human Rights Act.
20. The public authority countered this argument by referring to a number of court cases where it has been established that the licence fee is compliant with the Human Rights Act (*Marmont v. SoS for Culture, Media & Sport, BBC and Capita Business Services and TV Licence Enquiry Office v. Jonathan Miller*). The public authority believes that the issue of whether the licence fee is compliant with the Human Rights Act has been established through these court rulings. Therefore,

further clarification of this issue through releasing information about the legal advice that it had received on this subject was not in the public interest.

21. The Commissioner contacted the complainant on 14 August 2006 and advised him that his complaint had been allocated to a case officer and that the public authority had been contacted in connection with his complaint. The complainant was also advised that he would be contacted further in connection with this matter in due course.
22. The Commissioner contacted the public authority again on 18 January 2007 in order to clarify the issue of what recorded information was held by the public authority that fell within the scope of the request. In this letter, the Commissioner noted that the public authority had stated that it held only 3 documents that would fall within the scope of the request, yet it had stated previously, in its letter to the Commissioner dated 18 September 2006, that it held 5 files on information relating to the application of the Human Rights Act.
23. In response to this, the public authority stated that it now considered the scope of the request covered information relating to its review of the compliance of TV Licensing procedures in relation to the Human Rights Act. The public authority went on to state that, under this definition of the scope of the request, there were 2 documents held by it, rather than 3. The public authority clarified that these 2 documents were amongst the 3 provided with its letter dated 18 September 2006.
24. The public authority described the remaining contents of the five files it had referred to previously as follows:  
  
*"The remaining documents relate either to court actions, or to consideration of the legality of the BBC's journalistic functions in relation to the Human Rights Act."*
25. The public authority advised that it does not believe that documents relating to court actions or to journalistic functions fall within the scope of the request as they do not relate to its review of the compliance of TV Licensing procedures with the Human Rights Act. The public authority clarified that the third document it had previously described as falling within the scope of the request related to court action and was included in error.

### **Findings of fact**

26. The public authority holds recorded information falling within the scope of the complainant's information request. This information has not been provided to the complainant as it is considered exempt under section 42 and the public authority considers that the public interest favours maintaining the exemption under section 42.
27. When responding to the information request, the public authority did not make any reference to its consideration of the public interest test.
28. The complainant does not believe that the public authority is entitled to any claim of legal professional privilege and that any argument that this applies to

information held by the public authority is not valid.

## Analysis

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### Procedural matters

29. Section 17(3)(b) requires that, when citing an exemption that is subject to consideration of the public interest, a public authority shall state its reasons for claiming that the public interest in maintaining the exemption outweighs the public interest in disclosing the information. The public authority in this instance did not refer to its consideration of the public interest when responding to the information request.

### Exemption

30. The Commissioner considered whether the public authority correctly applied the exemption under section 42. In this case, where section 42 has been cited, the issue is whether a claim of legal professional privilege could be maintained in respect of the information withheld.
31. The 2 documents provided to the Commissioner by the public authority comprise confidential communications made between a client (the public authority) and professional legal adviser (the public authority's in-house lawyer and counsel). The Commissioner is satisfied that a claim of legal professional privilege could be maintained in respect of the information withheld.
32. The Commissioner also considered whether the public interest favoured maintaining the exemption. In doing so the Commissioner considered that there is a strong element of public interest built into legal professional privilege, which must be taken account of when considering the application of section 42.
33. In the case of *Bellamy v the Information Commissioner and the DTI*, the Information Tribunal observed that "there is no doubt that under English law the privilege is equated with, if not elevated to, a fundamental right at least insofar as the administration of justice is concerned." (paragraph 8)
34. In summing up, the Information Tribunal stated that "there is a strong element of public interest inbuilt into the privilege itself. At least equally strong countervailing considerations would need to be adduced to override that inbuilt public interest". It concluded that "it is important that public authorities be allowed to conduct a free exchange of views as to their legal rights and obligations with those advising them without fear of intrusion, save in the most clear cut case..." (paragraph 35)
35. The public interest in disclosing the information must therefore, at the least, match the public interest in maintaining the exemption before privilege will be overturned, and it is recognised by the Information Tribunal that the public interest in protecting the doctrine of legal professional privilege is strong.

36. The concept of legal professional privilege has developed to ensure that clients are able to receive advice from their legal advisors in confidence. This is an underlying principle of the justice system and there is a strong public interest in maintaining confidentiality. The concept of legal professional privilege ensures that advice provided is based upon a full exchange of information pertinent to the case. Eroding that concept would damage the degree of certainty that parties have that the advice they obtain will be confidential. This could be detrimental to the ability of parties to provide or receive legal advice on a full and frank basis, thereby damaging the parties' ability to effectively determine their legal options, or to defend, or seek legal restitution against other parties in accordance with their rights. It could also lead to public authorities basing significant decisions on incomplete or defective legal advice - this would not be in the public interest.
37. The Commissioner's view is that there are strong public interest arguments against the disclosure of the requested information if this would allow those wishing to challenge the TV Licence fee to obtain privileged advice which would be directly relevant to any case he or she chooses to bring against the public authority. This could damage the ability of the public authority to defend itself against any such legal challenge, and would undermine the concept of legal professional privilege. Although the legality of the Licence fee has been established by the Courts, that issue remains contentious and the legality of the Licence fee may again be challenged in future. The advice is therefore still "live" and this strengthens the argument against its disclosure.
38. A public authority must be able to seek legal guidance on whether it is compliant with relevant legislation. In this way it can assure itself that its position is both robust and legally defensible. Such guidance, although informing the legality of the practices of the public authority, should not generally be open to disclosure. If it were, this may weaken or compromise the public authority's position should the practices based on such legal advice be questioned later. Such advice may contain a detailed exposition of the weaknesses in a client's argument. Indeed the advice may first have been sought to examine such weaknesses. There is a risk that disclosure of such material may lead to a less than full and frank approach being taken by clients and advisers in the future, thereby devaluing the quality of the legal debate taking place between them.
39. To reiterate the Tribunal's arguments, legal advice should be free from the threat of interference except in the most clear of circumstances. The strong arguments supporting the maintenance of privilege should only therefore be overruled where the public interest arguments in favour of disclosing the information are equally as strong or override these arguments.
40. The Commissioner recognises that there are arguments in favour of disclosure in this case. Not least of these is the fact that the public authority is subject to the provisions of the HRA and thus the issue of whether the licence fee is compliant with the HRA is relevant.
41. Turning to the complainant's arguments as to why he believes that the information withheld should be disclosed, the Commissioner considered the following:

42. Firstly, the complainant's assertion that a claim of legal professional privilege is not available to a corporate body is incorrect. Whilst it is correct that legal professional privilege is a common law concept rather than being enshrined in legislation, it is a well established legal principle. This principle relates to communications between a legal adviser and client; no distinction is made between individual clients and corporate clients.
43. The complainant argued that the status of the public authority as a compulsorily publicly funded body meant that any claim of legal professional privilege would be invalid. Whilst recognising that the public authority is publicly accountable, the Commissioner does not believe that this would in itself override its right to privilege when taking legal advice. The Commissioner also notes that being prevented from accessing the public authority's legal advice on the HRA would not prevent the complainant from seeking similar advice himself, or from pursuing legal action on the basis of such advice.
44. The complainant also refers to the release of legal advice provided to the Government concerning the legality of the Iraq conflict. This is relevant in that, in that case, the Commissioner found that the public interest in releasing the information outweighed the right to legal professional privilege. In that case, the Commissioner found that the public interest in the release of information containing legal advice was so strong that it should be released. This reinforces the Commissioner view that the Act, in qualifying section 42 by making it subject to the public interest test, allows for the possibility that in certain circumstances the public interest in disclosing legal advice may outweigh the public interest in maintaining legal professional privilege.
45. Whilst the Commissioner recognises the arguments in favour of disclosure of the information in this case, he does not believe that these arguments are sufficiently strong to override the public interest in maintaining the exemption in section 42 of the Act.
46. Accordingly, the Commissioner's decision is that the public interest in maintaining the exemption in this case outweighs the public interest in disclosure.

## The Decision

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47. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:  
  
Section 1(1) in that the public authority correctly applied section 42 of the Act.  
  
However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:
48. Section 17(3)(b) in so far as in refusing the request the public authority failed to state its reasons for claiming that the public interest in maintaining the exemption



outweighs the public interest in disclosure.

## Steps Required

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49. Although the public authority failed to refer to the public interest when responding to the information request, this breach has been superseded by the outcome of this notice. The Commissioner does not, therefore, require the public authority to take any steps.

## Right of Appeal

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50. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal  
Arnhem House Support Centre  
PO Box 6987  
Leicester  
LE1 6ZX

Tel: 0845 600 0877  
Fax: 0116 249 4253  
Email: [informationtribunal@dca.gsi.gov.uk](mailto:informationtribunal@dca.gsi.gov.uk)

51. Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

**Dated the 22<sup>nd</sup> day of February 2007**

**Signed .....**

**Graham Smith  
Deputy Commissioner**

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