

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 26 October 2017

Public Authority: British Broadcasting Corporation

Address: White City, Wood Lane
201 Wood Lane
London
W12 7TP

Decision (including any steps ordered)

1. The complainant requested copies of minutes and notes of meetings between the public authority and officials in relation to the government's decision to cease funding the over 75s TV licence concession, and for the public authority to take over the responsibility. The public authority withheld the information held within the scope of the request in reliance on the exemptions at sections 36(2)(b)(i) and (ii), and 36(2)(c) FOIA.
2. The Commissioner has concluded as follows:
 - The public authority was entitled to conclude that some of the information in the correspondence containing the withheld information does not fall within the scope of the request, and
 - The public authority was entitled to conclude that the withheld information was exempt from disclosure on the basis of section 36(2)(b)(i) and (ii).
3. No steps required.

Request and response

4. The complainant submitted a request for information to the public authority on 29 April 2016 in the following terms:

"Please provide the following information, whether contained in documents or otherwise recorded, in relation to: (i) the decision that the Government will cease to fund the provision of free television licences to persons aged 75 and over (the "Policy Decision"); and (ii) the arrangements with the British Broadcasting Corporation ("BBC") by which the Policy Decision is to be implemented (the "Implementing Measures"):

1. Copies of minutes and/or notes of meetings between the BBC and Government officials at which the Policy Decision and/or the Implementation Measures were discussed, including but not limited to:
 - a. the meetings on 29 and 30 June 2015 between the BBC officials and officials from the Department for Culture, Media and Sport and Her Majesty's Treasury; and
 - b. meetings between 1 and 3 July 2015 between Lord Hall (Director General of the BBC), Rhona Fairhead (Chairman of the BBC), the Culture Secretary and the Chancellor of the Exchequer.

Please note that this limits your searches to minutes and/or notes of meetings within the categories of information set out in our request of 27 January (in other words, it excludes 'correspondence' from the scope of your searches)."

5. On 3 October 2016 the Commissioner issued a decision notice finding the public authority in breach of section 10(1) FOIA for failing to provide a substantive response to the request.¹
6. On 7 November 2016, in compliance with that notice, the public authority provided the complainant with its response to the request. It provided limited disclosure in the form of two redacted emails. Information redacted from the disclosed emails along with additional information within the scope of the request was withheld by the public

¹ The decision notice can be found at: <https://ico.org.uk/media/action-weve-taken/decision-notices/2016/1625154/fs50646351.pdf>

authority in reliance on the exemptions at sections 36(2)(b)(ii), 36(2)(c) and 40(2) FOIA.

7. The public authority waived its right to conduct an internal review and advised the complainant that he could appeal directly to the Commissioner in the event he was dissatisfied with the authority's decision.

Scope of the case

8. The complainant contacted the Commissioner on 6 February 2017 to complain about the decision to withhold the information requested.
9. During the course of the investigation, the public authority revealed it had also concluded that some of the information contained in the relevant correspondence² does not fall within the scope of the request. It also became clear that the public authority had additionally relied on the exemption at section 36(2)(b)(i).
10. Consequently, the complainant asked the Commissioner to consider whether the public authority was entitled to redact information on the basis that it fell outside the scope of the request³, in addition to whether it was entitled to rely on the exemptions at sections 36(2)(b)(i), 36(2)(b)(ii) and 36(2)(c).
11. The complainant also advised that he was not seeking to challenge the application of the exemption at section 40(2).

Reasons for decision

Information deemed out of scope

12. As mentioned above, the complainant has asked the Commissioner to determine whether the public authority was entitled to conclude that
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² ie - the emails containing the withheld information.

³ To be clear, the complainant did not specifically question the public authority's interpretation of the scope of his request while it was being considered by the authority. For the avoidance of doubt, the Commissioner has limited her consideration to whether information redacted from the correspondence containing the withheld information relates to the policy decision and/or implementing measures.

some of the information contained in the relevant correspondence does not fall within the scope of his request.

13. The public authority submitted that the information considered out of scope goes beyond the scope of the request and contains discussions and analysis of issues wider than the Policy Decision and/or Implementing Measures.
14. The Commissioner notes that the request was limited to copies of minutes and/or notes of meetings between the BBC and Government officials at which the Policy Decision and/or the Implementation Measures were discussed.
15. Having inspected the relevant information, the Commissioner is satisfied the public authority was entitled to conclude that the information does not fall within the scope of the request for the reasons it has given.

Application of exemptions

16. The public authority considers the withheld information is exempt on the basis of the exemptions at sections 36(2)(b) and (c). The Commissioner first considered whether the public authority was entitled to rely on section 36(2)(b).⁴

Section 36(2)(b)

17. The relevant provisions in section 36 state:

“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—

- a) would, or would be likely to, prejudice-
 - i. the maintenance of the convention of the collective responsibility of Ministers of the Crown, or
 - ii. the work of the Executive Committee of the Northern Ireland Assembly, or
 - iii. the work of the Cabinet of the Welsh Assembly Government.
- b) would, or would be likely to, inhibit-

⁴ Refers to sections 36(2)(b) (i) and (ii) wherever it is used in this notice.

- i. the free and frank provision of advice, or
 - ii. the free and frank exchange of views for the purposes of deliberation.
- c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.”

The Qualified Person's Opinion

18. The exemptions at section 36(2)(b) can only be engaged on the basis of the reasonable opinion of a qualified person. The qualified person in this case was the then Chairman of the BBC Trust. The Commissioner is satisfied that at the time of the request, the former Chairman of the BBC Trust was the qualified person by virtue of section 36(5)(o)(iii) FOIA.⁵
19. A copy of the qualified person's opinion was provided to the complainant at the time of his request.
20. The qualified person was of the opinion that the withheld information would be likely to have a 'chilling effect' on both advice and discussions within the public authority for the reasons summarised below.
21. Individuals are unlikely to express themselves freely and completely if they are aware that their views could be made public, particularly to government and others with a stake in the debate about the future of the public authority. This could damage the quality of the public authority's deliberations with government and decision-making on both sides.
22. Disclosure would also be likely to inhibit free and frank discussions between the public authority and the government, undermining the process by which the government tests and develops its policy in conjunction with the stakeholders in the debate.
23. The qualified person also submitted that the chilling effect was likely to last for some time due to the nature of the withheld information, and would likely have an impact upon the public authority's new board once the existing structure is disbanded. She explained that the public authority will continue to have various types of interaction and negotiation with government in the future. For example, the mid-term

⁵ Section 36(5)(o)(iii) states that a qualified person not already so designated by virtue of sections 36(5)(a) to (n) is any officer or employee of the public authority who is so authorised by a Minister of the Crown.

review of its 2016 Charter, and the next funding settlement as well as the fact that the Charter review process is a recurring event.

24. She further explained that although the current Charter review process was drawing to a close, the new Charter had not yet been approved, and the agreement had yet to be signed. Furthermore, important issues relating to the practical, detailed implementation of the structures established by the Charter and agreement remain to be considered and consulted on by the public authority and OFCOM. In addition, the Digital Economy Bill, which contains a clause to allow the public authority to give licence fee concessions based on age, was still being scrutinised by Parliament.

Complainant's submissions

25. The complainant pointed out that the public authority had not disclosed to him details of any evidence that the qualified person considered in order to reach her opinion. Rather, in his view, the qualified person made general statements to support the application of the exemptions. He noted that the Commissioner has stated in her guidance on section 36 that she would also expect to see evidence of how the qualified person's opinion was reached including, ideally, submissions made to the qualified person.

Commissioner's position

26. The Commissioner has been able to reach her decision in this case on whether the qualified person's opinion was reasonable on the basis of the submissions made to the qualified person, her opinion, and the withheld information.
27. In doing so the Commissioner has considered all of the relevant factors including:
28. Whether the prejudice relates to the specific subsection of section 36(2) that is being claimed. If the prejudice or inhibition envisaged is not related to the specific subsection, the opinion is unlikely to be reasonable.
29. The nature of the information and the timing of the request, for example, whether the request concerns an important ongoing issue on which there needs to be a free and frank exchange of views or provision of advice.
30. The qualified person's knowledge of, or involvement in, the issue.
31. Further, in determining whether the opinion is a reasonable one, the Commissioner takes the approach that if the opinion is in accordance

with reason and not irrational or absurd – in short, if it is an opinion that a reasonable person could hold – then it is reasonable. This is not the same as saying that it is the only reasonable opinion that could be held on the subject. The qualified person's opinion is not rendered unreasonable simply because other people may have come to a different (and equally reasonable) conclusion. It is only unreasonable if it is an opinion that no reasonable person in the qualified person's position could hold. The qualified person's opinion does not have to be the most reasonable opinion that could be held; it only has to be a reasonable opinion.

32. Taking all of these factors into account, the Commissioner is satisfied that the qualified person's opinion was reasonable in the circumstances. She accepts that disclosing the withheld information would have likely had a chilling effect on advice and discussions relating to the next funding settlement for the public authority as well as the ongoing Charter review. She also accepts that disclosure whilst the Digital Economy Bill was still being scrutinised by Parliament could have had a similar effect on further discussions and/or negotiations as a consequence of the ongoing Parliamentary scrutiny of the Bill.
33. The Commissioner has therefore concluded that the public authority was entitled to rely on the exemption at sections 36(2)(b)(i) and (ii).

Public interest test

34. The exemptions at section 36(2)(b) are subject to the public interest test set out in section 2(2)(b) FOIA. Therefore, the Commissioner must consider whether in all the circumstances of the case, the public interest in maintaining the exemptions outweighs the public interest in disclosing the withheld information.

Complainant's submissions

35. The complainant's submissions in support of his view that there is a stronger public interest in disclosing the withheld information are summarised below.
36. He submitted that the policy decision was immediately controversial, attracting significant media attention, as well as questions to the then Secretary of State in Parliament. There was specific concern that the policy decision deal was done behind closed doors suggesting that the BBC's independence from government had been compromised. He pointed out that it is clear from Parliamentary and public record that the concern was mostly about the process rather than the substantive merit of the decision. However, the issue in his view was whether the public authority acted in a sufficiently robust manner in its negotiations with

government so as to properly serve its public functions. There was in his view a strong presumption in favour of disclosure for these reasons alone.

37. The complainant further argued that the public interest in maintaining a safe space for discussions was no longer strong given that in his view the policy decision had been finalised at the time of the request. He noted that the decision was taken in July 2015, nearly a year prior to his request.⁶ There was in any event a strong public interest in public scrutiny of the withheld information given the genuine questions regarding the manner that the policy decision was reached.
38. For the same reasons as above, he did not consider that disclosure would lead to a chilling effect. Finally, he noted that the qualified person had relied on the lower threshold of prejudice (ie 'would be likely to prejudice'). Consequently, he submitted that the Commissioner should "pay less weight" to her opinion than if she had relied on the higher threshold of 'would prejudice.'⁷

Public authority's submissions

39. The public authority's submissions in support of maintaining the exemptions are summarised below.
40. It noted from the outset that when carrying out the public interest test, it is the circumstances at the time of the request which should be considered. Furthermore, that the public interest means the public good, not what is of interest to the public, and not the private interests of the applicant.
41. In favour of disclosing the withheld information, the public authority acknowledged that there is a public interest in licence fee payers and the public being able to understand, assess the merits of and participate in the debate about its funding.
42. Furthermore, there is a public interest in licence fee payers and the public understanding the process by which decisions around the future

⁶ The complainant actually suggested that the relevant period was over two years ago in his submissions to the Commissioner. However, the relevant period for the purposes of determining whether the matter was still live starts at the time the request was submitted. In this case, the request was made in April 2016 though the public authority only became aware of it in June 2016.

⁷ He drew support for this view from the Commissioner's published guidance on section 36.

funding of the public authority are made, particularly given the speed with which the recent settlement was conducted and the concerns raised about the process. It acknowledged that this was a compelling public interest.

43. Finally, there is a public interest in knowing whether the BBC Executive and BBC Trust are fulfilling their respective functions and acting in the best interests of the organisation and of licence fee payers.
44. In acknowledgement of these strong arguments, it had published:
 - i. Information about the process in the Trust's minutes⁸,
 - ii. Sufficient details set out in published correspondence⁹,
 - iii. High level analysis of the financial implications of the decision and the public authority's proposals¹⁰,
 - iv. The proposals set out in the Government White Paper 'A BBC for the future: a broadcaster of distinction' published on 12 May after the date of the request but within the time for compliance¹¹, and

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http://www.bbc.co.uk/bbctrust/who_we_are/meetings_and_committees/minutes_2015.html

⁹ For example,

i. "BBC Director-General's statement regarding today's agreement with the Government", 6 July 2015 accessed at: <http://www.bbc.co.uk/mediacentre/statements/tony-hall-government>

ii. James Heath's blog post 'BBC funding arrangements', 9 July 2015 accessed at: <http://www.bbc.co.uk/blogs/aboutthebbc/entries/efa49056-e32f-4e8a-b2b4-cb215e6a0bc1>

iii. Letter received by Tony Hall from Rt. Hon George Osborne MP, Chancellor of the Exchequer and First Secretary of State, and Rt. Hon John Whittingdale MP, Secretary of State for Culture, Media and Sport, received on 3 July 2015 accessed at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/443735/Letter_from_George_Osborne_and_John_Whittingdale_to_Tony_Hall_FINAL.PDF

iv. Tony Hall's letter to Rt. Hon George Osborne MP, Chancellor of the Exchequer and First Secretary of State, and Rt. Hon John Whittingdale MP, Secretary of State for Culture, Media and Sport, 6 July 2015 accessed at: <http://downloads.bbc.co.uk/mediacentre/tony-hall-letter-coe-sscms.pdf>

¹⁰ <http://www.bbc.co.uk/blogs/aboutthebbc/entries/efa49056-e32f-4e8a-b2b4-cb215e6a0bc1>

- v. The specific terms of the proposals as set out in the Digital Economy Bill¹².
45. It submitted that the information already in the public domain including the published information above addresses the public interest in disclosure.
 46. In favour of maintaining the exemptions, the public authority argued that there is a powerful public interest in ensuring that it is able to represent its interests and those of licence fee payers zealously in negotiations with the government, during the Charter review process and beyond.
 47. Equally, the government is entitled to safe space in which to test and develop effective policy.
 48. There is a public interest in allowing the public authority and the government the private space to conduct candid conversations about the operation, funding and future of the authority, as well as the process of negotiations.
 49. There is a public interest in ensuring that the Executive and Trustees receive full and proper advice from staff, so that they are able to properly represent the interests of the public authority and licence fee payers.
 50. There is a public interest in the public authority having a safe space in which to prepare for external regulation.
 51. There is a strong public interest in the public authority being able to analyse and plan for the implications of new funding arrangements and to present its proposals without external interference during the process.
 52. The withheld information was less than a year old at the time of the request, and the Charter and funding arrangement and discussions were ongoing *live* issues. Disclosure would have likely had a particularly damaging impact on the public authority's ability to complete effectively the Charter review process and consider all options.

¹¹ <https://www.gov.uk/government/publications/a-bbc-for-the-future-a-broadcaster-of-distinction>

¹² <http://services.parliament.uk/bills/2016-17/digitaleconomy.html>

Balance of the public interest

53. In relation to the lower threshold of prejudice, the Commissioner considers that the chance of prejudice occurring must be more than a hypothetical possibility; rather there must be a real and significant risk. With regard to the higher threshold, the Commissioner considers that this places a stronger evidential burden on the public authority. The anticipated prejudice must be more likely than not.
54. The Commissioner has therefore given the appropriate weight to the public authority's arguments in support of the qualified person's opinion that the likelihood of prejudice was real and significant.
55. The Commissioner shares the view that there is a public interest in licence fee payers and the public being active participants in debates regarding the public authority's funding. She accepts, as the complainant has clearly explained, and the public authority has acknowledged, that this public interest is strong in the circumstances of this case.
56. Furthermore, she considers that the withheld information would increase public understanding about the process leading up to the policy decision. That is not to say the information published by the public authority is lacking. However, it is more relevant with respect to the substance of the policy decision rather than in relation to the process, the pertinent issue in this case.
57. The Commissioner notes that in further support of his position, the complainant has referred to the following statement contained in a letter from the then Chairman of the BBC to the then Chancellor of the Exchequer and Culture Secretary on 6 July 2015:

"We accept that [the Policy Decision] is a legitimate one for the Government to take, although we cannot endorse the process by which it has been reached."
58. Therefore, the Commissioner has specifically considered whether concerns about the process through which the policy decision was reached increased the public interest in disclosing the withheld information to the extent that it outweighed the public interest in maintaining the exemption.
59. As always, the withheld information will be the most decisive factor. Therefore, in inspecting the withheld information, the Commissioner was particularly mindful of the suggestion that the public authority's independence from government had been compromised to enable the policy decision and/or that it had not acted in a sufficiently robust manner in its negotiations with government so as to properly serve its

public functions. In her view, there would be a significant public interest in disclosing evidence from the withheld information which supports these concerns.

60. The Commissioner is not persuaded that there is. To be clear, she is not dismissing concerns regarding the process by which the policy decision was reached given that the then Chairman of the public authority publicly expressed reservations about the process. Rather, from her examination of the withheld information, she is not persuaded that there was a significant public interest in disclosing it precisely in order to give credence to concerns that the BBC's independence could have compromised. Conversely, this means there is a public interest in disclosure in order for the public to form their opinion on the matter. However, this has to be balanced against the strong public interest in maintaining the exemptions.
61. The Commissioner accepts that there was a strong public interest in maintaining a safe space for policy deliberations at the time of the request. She accepts that the policy decision had been made in July 2015, prior to the request in April 2016. However, discussions pertaining to the renewal of the Charter also appear to have been well under way in July 2015. For example, it was reported that on 16 July 2015, the Culture Secretary laid before Parliament the BBC Charter Review consultation paper, and issued a press release titled "Government begins debate on the future of the BBC".¹³ The draft BBC Charter and draft Framework Agreement was laid before Parliament on 15 September 2016, and on 16 December 2016, a new Charter for the BBC to run from January 2017 was published. In addition, the Digital Economy Bill was still being scrutinised by Parliament. The Bill contains the clause that provides for the BBC to determine TV licence fee concessions by reference to age. The Bill was announced in the Queen's Speech on 18 May 2016. Therefore, disclosure of the withheld information would have been likely to cause undue external interference and distraction during sensitive negotiations.
62. For the same reason, the Commissioner accepts that there was a strong public interest in ensuring that officials could be as candid as possible during the negotiations. Disclosure could have had a 'chilling effect' on advice and discussions pertinent to Charter renewal. It is likely that officials would have become more restrained in expressing their advice and opinions for fear that they could be disclosed during the course of

¹³ <https://www.gov.uk/government/news/government-begins-debate-on-the-future-of-bbc>

the negotiations with the BBC. Clearly, there was a very strong public interest in not disclosing information that could have been damaging to the Charter renewal process and could also have a prejudicial effect on future negotiations in relation to funding settlements and Charter review.

63. She has therefore concluded that on balance, in all the circumstances of the case, the public interest in maintaining the exemptions outweighed the public interest in disclosing the relevant withheld information.
64. She has not considered the application of section 36(2)(c) in light of her decision.

Right of appeal

65. 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@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

66. 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.
67. 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

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