

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 21 June 2018

Public Authority: British Broadcasting Corporation
Address: BC2 A4 Broadcast Centre
201 Wood Lane
London
W12 7TP

Decision (including any steps ordered)

1. The complainant has requested information relating to correspondence and communications between the Director General and the Secretary of State for Culture, Media and Sport. The BBC provided information in response to this request but made redactions under section 36(2)(b)(ii) and 36(2)(c) FOIA.
2. The Commissioner's decision is that the BBC correctly applied section 36(2)(b)(ii) FOIA to the redacted information.
3. The Commissioner requires no steps to be taken.

Request and response

4. On 15 May 2017 the complainant made the following request for information under the FOIA for:

"Please do treat any environmental information as a request for information under the Environmental Information Regulations (EIRs).

Please note that I am only interested in information which relates to the period 15 May 2016 to the present day.

Please note that the reference to the Secretary of State should include the Secretary of State him/herself as well as their private office.

Please note that the reference to the Director of General should include the DG himself as well as his private office.

1...During the aforementioned period has the Director General exchanged correspondence and communications with the Secretary of State for Culture, Media and Sport.

2...If the answer is yes can you please provide copies of this correspondence and communications including emails and the transcripts of any telephone conversations. Please note that I am interested in receiving both sides of the correspondence and communications. In accordance with ICO guidance please do include details of relevant documents which may have been subsequently destroyed."

5. On 21 December 2017 the BBC responded. It provided the requested information but made redactions under section 36(2)(b)(ii) and 36(2)(c) FOIA.
6. The complainant requested an internal review on 3 January 2018. On 1 February 2018 the BBC referred the complainant to its original response and confirmed that if he was dissatisfied he would need to direct his complaint to the ICO.

Scope of the case

7. The complainant contacted the Commissioner on 5 February 2018 to complain about the way his request for information had been handled.
8. The Commissioner has considered whether the BBC was correct to apply section 36(2)(b)(ii) or section 36(2)(c) FOIA to the withheld information.

Reasons for decision

Section 36

9. Section 36 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-

(2)(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, or

(2)(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.

10. In determining whether the exemption was correctly engaged, the Commissioner is required to consider the qualified person's opinion as well as the reasoning which informed the opinion. Therefore in order to establish that the exemption has been applied correctly the Commissioner must:
 - Establish that an opinion was given;
 - Ascertain who was the qualified person or persons;
 - Ascertain when the opinion was given; and
 - Consider whether the opinion was reasonable.
11. The BBC explained that the qualified person is the Chairman of the BBC, Sir David Clementi. The qualified person's opinion was provided on 19 December 2017. The qualified person's opinion was that section 36(2)(b)(ii) and (2)(c) were applicable in this case as disclosure would be likely to prejudice the free and frank exchange of views for the purposes of deliberation or would otherwise be likely to prejudice the effective conduct of public affairs. It explained that the qualified person had access to all relevant material including the withheld information. A copy of the submissions put to the qualified person were provided to the Commissioner as well as a copy of the qualified person's opinion.
12. The BBC explained that the redacted information relates to three main issues; the BBC's mid-term review, increase to the television licence fee and talent pay disclosures. The BBC has confirmed that all three matters were live and under discussion at the time of the request. Further supporting arguments are contained within the Confidential Annex attached to this Notice.
13. The Commissioner has considered the application of section 36(2)(b)(ii) in the first instance to the redacted information.
14. The BBC argued that the redacted information includes free and frank exchanges of view for the purpose of deliberation and making a decision within communications between the BBC and the Department for Digital Culture, Media and Sport (at the time of the request it was known as the Department for Culture, Media and Sport and will be referred to in this Notice as DCMS) relating to the three issues outlined at paragraph 12 above.
15. The qualified person's opinion is that disclosure of the information in question would be likely to have a "chilling effect" upon future

discussions within the BBC relating to these matters. In his opinion the qualified person explained:

"...that the relevant information provides insight into the BBC's and DCMS's competing arguments and a frank exchange of views, and disclosure would or would be likely to create in future a 'chilling effect' on such exchanges. I think it is vital that officials are able to present views and negotiate candidly and in full possession of the facts. Whilst I recognise that officials should not be easily deterred from expressing their views, I believe a chilling effect would be created, especially if information is disclosed about issues while they remain live, such as in this case with all the relevant information."

16. The Commissioner considers that the redacted information reflects candid exchanges relating to the three issues identified at paragraph 12. The issues were live at the time of the request and subject to further discussion and deliberation. Based upon this, the Commissioner does consider that the opinion of the qualified person is reasonable and therefore the exemption was correctly engaged.
17. As the Commissioner has decided that the exemption is engaged, she has gone on to consider whether the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Public interest arguments in favour of disclosing the requested information

18. The BBC acknowledged that there is a public interest in promoting transparency, accountability and public understanding and involvement in decision making, and in the public knowing whether the BBC are fulfilling their function and acting in the best interests of the organisation and of licence fee payers.

Public interest arguments in favour of maintaining the exemption

19. The BBC argued that the information at issue in this case concerned matters that were still subject to negotiation and debate between the parties at the relevant time. Disclosure of the withheld information would impact the BBC, BBC Worldwide and DCMS's ability to consider all options as disclosure would be likely to hinder the quality of discussion and deliberations, which if disclosed would be likely to cause undue external interference and distraction.

20. The BBC referred to a previous Decision Notice issued by the Commissioner under the reference FS50666452¹ which recently concluded that information pertinent to the 2016 Charter renewal should not be disclosed, while negotiations are ongoing:

"... 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 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 the future negotiations in relation to funding settlements and Charter review".

21. In alignment with this case, the BBC argued that there is a strong public interest in providing the parties the space to discuss options with relevant and informed stakeholders out of the public eye and protecting the ability of the BBC to negotiate effectively.
22. The BBC also considers that there is information already in the public domain that would meet the public interest in this case relating to the three issues to which the redacted information relates. In particular it said that there was information relating to pay disclosure within its Annual Report. It also confirmed that there have been press statements released confirming how the licence increase for 2017/2018 has been calculated. It provided the Commissioner with links to where this information can be located.

Balance of the public interest arguments

23. The withheld information contains candid discussions and exchange of views between the BBC and DCMS. The Commissioner has first considered the arguments in favour of disclosure and accepts that they carry some weight in that disclosure would provide transparency and accountability and allow the public to further understand the decision making behind the three issues to which the redacted information relates. All three matters being of national public interest.
24. The Commissioner believes it is important to emphasise the significance of the media interest in this issue, in particular relating to the licensing

¹ <https://ico.org.uk/media/action-weve-taken/decision-notices/2017/2172710/fs50666452.pdf>

fee which impacts a vast number of households nationally and more widely transparency surrounding talent fees/pay and reviews to how the BBC is governed and regulated.

25. The Commissioner is satisfied that the withheld information sheds light on reasoning and thought processes behind these matters and altogether would increase transparency on matters which could impact a significant number of the population.
26. It is likely disclosure would add to the information already available and would inform the public debate but the extent to which it would have to be balanced against the harm, at the time of the request, to the ongoing discussions.
27. Turning now to the case for withholding the information, the arguments for maintaining the exemption essentially focus on the 'chilling effect' argument, that officials would be likely to be less candid in the free and frank exchange of views for the purpose of deliberation.
28. The chilling effect argument will be strongest when an issue is still live. The BBC has confirmed that all three issues were live at the time of the request and there is further information contained within the Confidential Annex attached to this Notice explaining the significance of the redacted information in this case.
29. The Commissioner has weighed these arguments and acknowledges there is a strong public interest in disclosure of information which would demonstrate that these issues have been properly discussed and deliberated. The Commissioner recognises that disclosing any information which sheds light on these matters will be in the public interest in this case.
30. Balanced against this the Commissioner has to accept there is significant weight to the chilling effect arguments given that at the time of the request there were still discussions to be had going forward relating to these matters.
31. The Commissioner therefore considers that the public interest in favour of disclosure is outweighed by the public interest in maintaining the exemption in this case.

Right of appeal

32. 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

33. 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.
34. 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
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