

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 1 July 2019

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 all communications between the BBC and a particular company. The BBC refused to comply with part of the request as it was for information excluded from FOIA as it was held for the purposes of journalism, art or literature. For the remaining information it refused to disclose the requested information citing section 42(1) and 43(2) FOIA.
2. The Commissioner's decision is that the BBC was correct to refuse to comply with the request in part because the information is excluded from FOIA as it was held for the purposes of journalism, art or literature. She also considers that the BBC is entitled to refuse to disclose the remaining requested information under section 42(1) and 43(2) of the FOIA. She therefore does not require any further action to be taken.

Request and response

3. On 15 January 2019 the complainant made the following request for information under the FOIA for:

"Please forward all communications between the BBC and Phil McIntyre/Phil McIntyre Entertainments Ltd since 2014."
4. The BBC responded on 11 February 2019 and confirmed that the information requested was excluded from FOIA as it was held for the purposes of journalism, art or literature.

Scope of the case

5. The complainant contacted the Commissioner on 12 March 2019 to complain about the way her request for information had been handled.
6. During the Commissioner's investigation the BBC confirmed that some of the requested information does not fall within the derogation. Part of this information was however withheld under section 42(1) FOIA and part was withheld under section 43(2) FOIA.
7. The Commissioner considers the scope of her investigation to be to determine whether some of the requested information is excluded from FOIA because it would be held for the purposes of 'journalism, art or literature'. For the remaining information she has considered whether the BBC is entitled to rely on section 42(1) and 43(2) FOIA to refuse to disclose this information.

Background

8. Phil McIntyre is a talent agent who represents television and other talent in Britain including comedians who have worked from time to time on BBC productions. Phil McIntyre Entertainment Ltd is a production company that is, from time to time, engaged by the BBC to produce programs.

Reasons for decision

Information held for the purposes of journalism, art or literature

9. Schedule One, Part VI of FOIA provides that the BBC is a public authority for the purposes of FOIA but only has to deal with requests for information in some circumstances. The entry relating to the BBC states:

"The British Broadcasting Corporation, in respect of information held for purposes other than those of journalism, art or literature."
10. This means that the BBC has no obligation to comply with part I to V of the Act where information is held for 'purposes of journalism, art or literature'. The Commissioner calls this 'the derogation'.
11. The scope of the derogation was considered by the Court of Appeal in the case *Sugar v British Broadcasting Corporation and another* [2010] EWCA Civ 715, and later, on appeal, by the Supreme Court (*Sugar (Deceased) v British Broadcasting Corporation* [2012] UKSC 4). The

leading judgment in the Court of Appeal case was made by Lord Neuberger of Abbotsbury MR who stated that:

“ once it is established that the information sought is held by the BBC for the purposes of journalism, it is effectively exempt from production under FOIA, even if the information is also held by the BBC for other purposes.” (paragraph 44), and that *“....provided there is a genuine journalistic purpose for which the information is held, it should not be subject to FOIA.”* (paragraph 46)

12. The Supreme Court endorsed this approach and concluded that if the information is held for the purpose of journalism, art or literature, it is caught by the derogation even if that is not the predominant purpose for holding the information in question.
13. In order to establish whether the information is held for a derogated purpose, the Supreme Court indicated that there should be a sufficiently direct link between at least one of the purposes for which the BBC holds the information (ignoring any negligible purposes) and the fulfilment of one of the derogated purposes. This is the test that the Commissioner will apply.
14. If a sufficiently direct link is established between the purposes for which the BBC holds the information and any of the three derogated purposes – i.e. journalism, art or literature - it is not subject to FOIA.
15. The Supreme Court said that the Information Tribunal’s definition of journalism (in *Sugar v Information Commissioner (EA/2005/0032, 29 August 2006)*) as comprising three elements, continues to be Authoritative.

“1. The first is the collecting or gathering, writing and verifying of materials for publication.

2. The second is editorial. This involves the exercise of judgement on issues such as:

* the selection, prioritisation and timing of matters for broadcast or publication,

* the analysis of, and review of individual programmes,

* the provision of context and background to such programmes.

3. The third element is the maintenance and enhancement of the standards and quality of journalism (particularly with respect to accuracy, balance and completeness). This may involve the training and development of individual journalists, the mentoring of less experienced journalists by more experienced colleagues, professional supervision and guidance, and reviews of the standards and quality of particular areas of programme making.”

16. However, the Supreme Court said this definition should be extended to include the act of broadcasting or publishing the relevant material. This extended definition should be adopted when applying the 'direct link test'.
17. The Supreme Court also explained that "journalism" primarily means the BBC's "output on news and current affairs", including sport, and that "journalism, art or literature" covers the whole of the BBC's output to the public (Lord Walker at paragraph 70). Therefore, in order for the information to be derogated and so fall outside FOIA, there should be a sufficiently direct link between the purpose(s) for which the information is held and the production of the BBC's output and/or the BBC's journalistic or creative activities involved in producing such output.
18. The BBC has said that the requested information falling within the derogation includes some correspondence with Phil McIntyre Entertainment Ltd concerning negotiations about a television production to be commissioned by the BBC. This information includes negotiations about editorial issues including but not limited to; the content and budget of the programme. This information is editorial in nature.
19. It went on that this information relates to idea development for a new television programme that is not yet in the public domain. The information includes conversations around the commissioning specification for such a programme – a document used by the BBC to commission content from third parties like production companies and includes a significant amount of editorial information about the type of programme, number of participants, content, duration and other matters. It also includes financial information about the possible budget and costs associated with producing the programme. The programme is in development and therefore subject to significant change through the creative process.
20. The BBC further explained that the information requested relates to how the BBC seeks to produce its output and increase the number of people watching and listening to BBC programmes. Therefore, the requested information is closely associated with the BBC's creative activities and editorial processes. The information includes discussions about editorial issues like taste and decency raised in the BBC editorial Guidelines, the cost of programming including determining the allocation of the production budget, and relevant technology needed to produce the programme. Such conversations are part and parcel of the BBC's output and must be protected from undue influence and scrutiny to protect BBC editorial independence.

21. Specifically in relation to the disclosure of financial information, it argued that the Information Commissioner has previously accepted that there is a clear link between the BBC's creative output and financial spending on programmes including actions like marketing activity which seeks to promote output (decision notice FS50206742¹). In the circumstances, the Information Commissioner accepted that it was necessary to recognise the link between operational information relating to the BBC's marketing activities and the creative and journalistic output that it promotes.
22. The Commissioner considers that the material described relates to the BBC's output and in particular editorial decisions linked to this. This part of the information requested, is therefore information held for the purpose of 'journalism, art or literature' as it is linked to decisions regarding production and promotion of BBC output. This falls squarely within this definition.
23. The Commissioner has found that this information is held for the purposes of journalism, art or literature and that the BBC was not obliged to comply with Parts I to V of FOIA.

Section 42

24. Section 42 of the FOIA states that information in respect of which a claim to legal professional privilege could be maintained in legal proceedings is exempt information.
25. It is a qualified exemption. So, in addition to demonstrating that the requested information falls within the definition of the exemption, the BBC must consider the public interest arguments for and against disclosure and demonstrate in a given case that the public interest rests in maintaining the exemption.
26. There are two types of legal professional privilege (LPP); advice privilege and litigation privilege.
27. In this case the BBC has applied the exemption on the basis of litigation privilege. Litigation privilege will be available in connection with confidential communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation. This type of privilege can only be relied upon in circumstances where the following criteria are met:

¹ https://ico.org.uk/media/action-weve-taken/decision-notices/2010/511196/FS_50206742.pdf

- where litigation is underway or anticipated. Where litigation is anticipated there must be a real likelihood of litigation taking place; it is not sufficient that litigation is merely a possibility;
 - the dominant purpose of the communications must be to obtain advice to assist in the litigation; and
 - the communications must be made between a professional legal adviser and client although privilege may extend to communications made with third parties provided that the dominant purpose of the communication is to assist in the preparation of the case.
28. The BBC has explained that the documents withheld under section 42 FOIA are between a BBC IP lawyer and representatives of Phil McIntyre Entertainment Ltd, for the purposes of litigation. While the BBC is not giving legal advice to Phil McIntyre Entertainment Ltd as they are not a client of the BBC, it has said that the communications regard common interest litigation.
29. The BBC has provided further supporting arguments which have been details in the Confidential Annex attached to this Notice.
30. The Commissioner has reviewed the withheld information and she is satisfied that the communications are between a professional legal adviser and third parties with a common interest to assist with the preparation of anticipated litigation. The dominant purpose of the communications were to assist in anticipated litigation.
31. The Commissioner is therefore satisfied that the withheld information is subject to LPP and section 42 of the FOIA is engaged. She now needs to consider the public interest test.
32. The BBC provided the following public interest argument in favour of disclosure:
- There are public interest considerations in favour of disclosing some information in how the BBC protects its intellectual property rights given the fact that the BBC relies on public moneys by way of the TV license fee to generate output.
33. The BBC provided the following public interest argument in favour of maintaining the exemption:
- There are important broader public interest arguments in favour of maintaining the importance of legal privilege to allow in-house legal advisors to provide free and frank advice in day-to-day legal matters and in the event of litigation without the fear that the advice will be disclosed.

34. The Commissioner considers that there is a public interest in disclosure of information relating to how the BBC protects its intellectual property rights given the fact that the BBC relies upon public funding.
35. That being said the Commissioner acknowledges that where material covered by LPP is concerned there is always going to be very strong public interest arguments in favour of maintaining the exemption simply because of the long standing, important principle of LPP and the clear and important need for professional legal advisers to be able to communicate with third parties to assist in the preparation of the case. Only in very exceptional cases can this be overridden when considering where the public interest lies.
36. The Commissioner considers that there is a strong public interest in favour of maintaining LPP and the ability of the BBC legal advisers being able to consult with relevant third parties regarding anticipated litigation. Without this ability, this would have a negative impact on the BBC's decision making with regard to such matters and may unfairly prejudice its position in contemplated litigation. However, the Commissioner considers that as this particular matter may no longer be live, the issues that were under consideration continue to be relevant. For the above reasons, the Commissioner has decided that the public interest in favour of disclosure is outweighed by the public interest in favour of maintain the exemption in this case.

Section 43(2) – prejudice to commercial interests

37. Section 43(2) says that information is exempt information if its disclosure under the FOIA would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it). Trade secrets are one example of commercial interests but the concept is far wider. Commercial interest relates to a person's ability to participate competitively in a commercial activity ie the purchase and sale of goods or services.
38. In order for the exemption to be engaged the BBC would need to demonstrate that disclosing the information would result in some identifiable commercial prejudice which would, or would be likely to, affect one or more parties. Section 43(2) is a qualified exemption and is therefore subject to the public interest test.
39. The BBC has said that it's clear commercial interest identified in this correspondence is the protection of BBC intellectual property through the promotion and defence of BBC trademark and copyright, especially given the fact that it relates to a legacy and popular BBC programme.
40. The BBC has provided the information being withheld under this exemption to the Commissioner. The Commissioner is satisfied that the

withheld information relates to a commercial activity i.e. defence of the BBC's intellectual property rights.

Likelihood of prejudice occurring

41. The ICO has been guided on the interpretation of the phrase 'would, or would be likely to' by a number of Information Tribunal decisions. The Tribunal has been clear that this phrase means that there are two possible limbs upon which a prejudice based exemption can be engaged; ie either prejudice 'would' occur or prejudice 'would be likely to' occur.
42. With regard to 'would be likely to prejudice', the Information Tribunal in *John Connor Press Associates Limited v The Information Commissioner (EA/2005/0005)* confirmed that 'the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk' (Tribunal at paragraph 15).
43. With regard to the alternative limb of 'would prejudice', the Tribunal in *Hogan v Oxford City Council & The Information Commissioner (EA/2005/0026 & 0030)* commented that 'clearly this second limb of the test places a stronger evidential burden on the public authority to discharge' (Tribunal at paragraph 36).
44. It is the BBC's belief that disclosure of the requested information would seriously impair the BBC's capacity to enter into productive and frank discussions with third parties with whom the BBC shares a commercial interest relating to a historic, flagship BBC programme. The information contained within the Confidential Annex in support of section 42 FOIA provides more detailed information regarding the nature of relationship between the BBC and the third party which is also relevant to the prejudice claimed under section 43(2) FOIA.
45. In this case, the Commissioner finds that the BBC has demonstrated that disclosing the information would be likely to prejudice its ability to enter discussions with parties with which it has a shared commercial interest and in turn its ability to protect any shared intellectual property rights. The Commissioner therefore accepts that section 43(2) is engaged in relation to this information.
46. The Commissioner has therefore gone on to consider the public interest test in this case.

Public interest test

Public interest in favour of disclosure

47. The BBC acknowledges that there is a public interest in the BBC being transparent and accountable about how it spend public money. To that end, the BBC publishes a significant amount of information about how it spends public money, including in its Annual Account and Report:

http://downloads.bbc.co.uk/aboutthebbc/insidethebbc/reports/pdf/bbc_annualreport_201718.pdf

Public interest in favour of maintaining the exemption

48. The BBC considers that the countervailing argument that it is not always in the public interest to place information which explains how that income is generated into the public domain, is stronger in the circumstances of this matter. This is because the information concerns a historic, flagship BBC programme that involves the BBC's relationship with a third party with a shared interest in the commercial information.

Balance of the public interest

49. The Commissioner considers that there is a public interest in the BBC operating openly and transparently.
50. The Commissioner considers there is a strong public interest in protecting the BBC's ability to protect its commercial interests and in particular intellectual property rights. In particular when these are shared with a third party. If information is disclosed which would be likely to make the ability to protect shared commercial interests more difficult, this would significantly hinder the BBC's ability to protect its intellectual property rights which would not be in the public interest.
51. On balance the Commissioner 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

52. 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
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

53. 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.
54. 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
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