

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 30 May 2022

Public Authority: British Broadcasting Corporation
Address: Broadcasting House
Portland Place
London
W1A 1AA

Decision (including any steps ordered)

1. The complainant has requested information regarding enforcement of licence fees. The British Broadcasting Corporation ("the BBC") disclosed some information but relied on sections 31 (law enforcement) and 36 (prejudice to the effective conduct of public affairs) of FOIA to withhold the remainder.
2. The Commissioner's decision is that none of the limbs of section 36 are engaged and therefore the BBC is not entitled to rely on this exemption. The Commissioner also considers that the BBC failed to complete its public interest deliberations in respect of elements [D2], [E1] and [E2] within a reasonable timeframe and therefore breached sections 10(3) and 17(3) of FOIA.
3. The Commissioner requires the BBC to take the following steps to ensure compliance with the legislation.
 - Disclose, to the complainant, the two reports it has withheld. The BBC may make appropriate redactions to remove personal data.
4. The BBC 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 pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 28 April 2020 the complainant requested information as part of a longer letter to the BBC. The salient parts of the information request were:
 - "[A1] Does the BBC retain information on how many addresses have been suppressed from the national pool of eligible addresses for visitation by Enforcement Officers?
 - "[A2] If so, we would like to know what number of the total addresses in the visitation pool are suppressed year on year from 2009-2019.

 - "[B] We thank you for the information provided in your response and for providing the TV Licensing Visiting Procedures Handbook ...on pages 99-100 an explanatory note for a section of the Record of Interview document which asks "Are there any personal circumstances you would like us to be aware of" is redacted....We also note that much of 'Chapter 5: Special Considerations' is also redacted. We would be grateful for a reconsideration of providing us those sections unredacted, or more in-depth explanation for these redactions.

 - "[D] Is there a handbook or guide provided to court presenters who prosecute TV Licence non-payment in Magistrates Court? If such a handbook is kept by the BBC, we would be grateful for a copy.
6. On 28 May 2020, the BBC responded. It refused the request and relied on section 12 of FOIA in order to do so.
7. On 5 June 2020, the complainant contacted the BBC again to complain about its refusal to comply with the request. She argued that it had not discharged its section 16 duty to provide advice and assistance as it had not identified the costly parts of the request so that they could be refined.
8. The BBC issued a fresh response to the request on 9 July 2020. In respect of elements [A1], [A2] and [B], it withheld the information and relied on section 31 of FOIA in order to do so. In respect of element [D] it was willing to consider a refined request.
9. The complainant wrote to the BBC again on 20 July 2020. She restated elements [A2] and [B] of her request and explained why she did not consider that section 31 could be relied upon to withhold the relevant information. She also refined her original element [D] and added two

completely new elements as follows:

“[D2] We use this letter to request a copy of any guide or handbook provided to court presenters who prosecute TV Licence non-payment in Magistrates’ Court.

“[E] We would like to request the reports prepared by Harris Interactive which the BBC commissioned to inform:

[E1] the Gender Disparity Report 2017 and;

[E2] its response to the Department of Digital, Culture, Media and Sport 2020 consultation on decriminalising TV licence evasion”

10. The BBC acknowledged this correspondence on 27 July 2020. It informed the complainant that it intended to treat elements [D2], [E1] and [E2] as fresh requests and the remainder of the correspondence as a request for an internal review of its response to elements [A2] and [B].
11. The BBC completed the internal review on 7 September 2020. It upheld its previous response in respect of elements [A2] and [B].
12. On 8 March 2021, the BBC issued its response to element [D2]. It provided some information but withheld the remainder. It relied upon section 31 of the FOIA to withhold the information.
13. On 12 March 2021, the BBC responded to element [E1] of the request. It withheld the requested information and relied on section 36 of FOIA in order to do so. It issued a further, separate, response on the same day in which it relied on the same exemption to withhold the information falling within the scope of element [E2].
14. The complainant requested an internal review of the BBC’s response to elements [E1] and [E2] on 15 March 2021. The BBC dealt with each element separately and provided the outcome of its reviews on 14 May 2021 ([E1]) and 3 June 2021 ([E2]).

Scope of the case

15. The complainant contacted the Commissioner on 30 July 2021 to complain about the way her request for information had been handled. In particular, she wished to challenge the BBC’s reliance on section 31 to withhold information within the scope of element [A2] and [B] and its use of section 36 to withhold information within the scope of [E1] and [E2].

16. Having reviewed its position, the BBC disclosed the information it held within the scope of [A2] during the course of the investigation. It also disclosed some additional information within the scope of elements [B] and [D2]. However, it continued to rely on section 31 to withhold the remaining information within the scope of both elements. Its position in respect of elements [E1] and [E2] remained unchanged.
17. Having received the BBC's submission (most of which was helpfully provided to the complainant), the Commissioner contacted the complainant to establish which elements of the request she still wished to pursue. He also explained that, having viewed the withheld information, in his view, the BBC's reliance on section 31 appeared to be broadly correct. The complainant was happy with the BBC's revised responses to elements [A2] and [D2], but asked the Commissioner to issue a decision in respect of the BBC's reliance on section 36 of FOIA to withhold the information within the scope of elements [E1] and [E2].
18. The Commissioner considers that the scope of his investigation is to determine whether the BBC is entitled to rely on section 36 in the manner that it has done.

Reasons for decision

Section 36 – prejudice to the effective conduct of public affairs

19. Section 36(1) states that this exemption can only apply to information to which section 35 does not apply.
20. Section 36(2) states that information is exempt from disclosure if, in the reasonable opinion of the Qualified Person, disclosure of the information:
 - (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—
 - (i) the free and frank provision of advice, or
 - (ii) the free and frank exchange of views for the purposes of deliberation, or

- (c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.
- (3) The duty to confirm or deny does not arise in relation to information to which this section applies (or would apply if held by the public authority) if, or to the extent that, in the reasonable opinion of a qualified person, compliance with section 1(1)(a) would, or would be likely to, have any of the effects mentioned in subsection (2).
- (4) In relation to statistical information, subsections (2) and (3) shall have effect with the omission of the words 'in the reasonable opinion of a qualified person'.

Is the information statistical?

21. The BBC argued that all the information it held within the scope of elements [E1] and [E2] was "statistical information" as it was either the raw data collected by Harris Interactive Ltd or the analysis of that data.
22. Section 36 is an unusual exemption in that, in most cases, the exemption will be engaged or not engaged based on the reasonable opinion of a particular person within the organisation: the Qualified Person. However, section 36(4) allows a public authority to engage the exemption without seeking the view of the Qualified Person – if the information in question is statistical information.
23. FOIA does not define "statistical information". However, the Ministry of Justice does have a definition, which originated from the Office for National Statistics, which says that statistical information:
- "will usually be founded upon the outcomes of mathematical operations performed on a sample of observations or some other factual information. The scientific study of facts and other observations allows descriptive approximations, estimates, summaries, projections, descriptions of relationships between observations, or outcomes of mathematical models, etc to be derived. A distinguishing feature of statistical information is that it is founded to at least some degree on accepted scientific or mathematical principles. Statistical information is therefore distinguished by being:
- (i) derived from some recorded or repeatable methodology, and
 - (ii) qualified by some explicit or implied measures of quality, integrity and relevance.

"This should not imply that the term 'statistical information' only applies to where standards of methodology and relevant measures are particularly high. What distinguishes statistical information is that the

limitations of methodology, and the relevant measures of quality etc, allow for a rational assessment of the validity of the information used as an informed background to the formulation and development of government policy.”

24. The Commissioner notes that the information in question here consists of two reports from the polling firm Harris Interactive Ltd whom the BBC had commissioned to carry out research.
25. The two reports primarily consist of data tables or graphical representations of the work that Harris Interactive had carried out, alongside some explanation of the methodology used and the scope of the work. There are also some conclusions that have been drawn from the data.
26. The Commissioner accepts that, to the extent that the withheld information involves data tables, methodology notes or observations drawn directly from the data, it will be statistical information within the definition set out above. This accounts for the vast majority of the information within scope.
27. However, there are also some slides which contain comments that were made by survey participants. The extent to which these comments were prompted by the person carrying out the survey are unclear.
28. There is no quantifiable element to any of the comments and they do not appear to have been selected to present an accurate representation of opinion – rather, the comments that have been selected appear to represent the breadth the views that were expressed.
29. The Commissioner therefore takes the view that this information is not statistical information and consequently the BBC cannot engage any limb of section 36 without the opinion of its Qualified Person.
30. Given that this part of the request was first made in July 2020, the Commissioner considers that the BBC has had ample time and three specific opportunities (refusal notice, internal review, investigation) to identify non-statistical information and seek the views of its Qualified Person accordingly. The Commissioner therefore considers that it would be unfair to the complainant if he were to allow the BBC to seek the views of its Qualified Person now.
31. Furthermore, given the findings set out below, the Commissioner considers that, even if the BBC's Qualified Person were to provide an opinion reiterating the same prejudice arguments that the BBC has provided in respect of the statistical information, he (the Commissioner) is not persuaded that such an opinion would be obviously reasonable. Furthermore, even if he were so persuaded (because the test would be

slightly different), he considers that there is a strong public interest case for disclosure. Thus, seeking the opinion of the BBC's Qualified Person would delay the Commissioner's decision with a low likelihood of actually changing that decision.

32. Therefore, to the extent that the information is not statistical, the Commissioner does not consider that section 36 is engaged and this information must be disclosed.

Are any of the limbs engaged in relation to the statistical information?

33. The BBC explained to the Commissioner that, in 2015, David Perry QC had been asked by the Government to carry out a review of TV Licence Fee Enforcement. The Licence Fee is relied upon by the BBC as its main source of funding, so enforcement activities are important to the organisation to ensure that it maximises income.

34. Mr Perry's review found that, overall, the system of enforcement:

"represents a broadly fair and proportionate response to the problem of licence fee evasion and provides good value for money (both for licence fee payers and taxpayers)."¹

35. However, Mr Perry also found that:

"One matter that emerged from the Review process is that in 2012, 70% of those prosecuted for TV licence evasion were women. On the evidence available it has not been possible to reach any definitive conclusion to explain the reason for this gender imbalance. There is no evidence of any discriminatory enforcement practices on the part of TV Licensing. It is recommended that the gender disparity in TV licence prosecutions should be the subject of investigation and consideration in the forthcoming Charter Review."

36. In 2017, the BBC published a Gender Disparity Report in response to Mr Perry's recommendation. The report concluded that the gender disparity in enforcement largely arose as a result of factors outside of the BBC's control (such as there being more female-led than male-led single parent households and females being both more likely to answer the door and more likely to engage positively with a visit from an

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/445212/166926_Perry_Review_Text-L-PB.pdf

enforcement officer). The conclusions in the Gender Disparity Report were based on the findings of research commissioned from Harris Interactive – it is those findings that form the information within the scope of [E1] (“the 2017 Report”).

37. Separately, the BBC commissioned further work from Harris Interactive 2020 in order to inform its submission to the Government’s consultation on reform of the system of enforcement of the Licence Fee. It is the report summarising that research which is being withheld in respect of element [E2] (“the 2020 Report”).

38. In respect of the 2017 Report, the BBC argued that:

“we consider that disclosure is likely to inhibit the free and frank exchange provision of advice (section 36(2)(b)(i)), inhibit the free and frank exchange of views for the purposes of deliberation (section 36(2)(b)(ii)) and otherwise prejudice the conduct of public affairs (section 36(2)(c)). In particular, external advisors, such as research firms, are likely to become more circumspect in presenting statistical research and advice on sensitive and contentious issues, especially if they may be subjected to questioning or pressure from external groups in relation to their research. It is important that any advice relevant to these important issues (now or in the future) is free, frank and candid, in the interests of good decision-making.

“Similarly, in relation to section 36(2)(b)(ii), it is important that the BBC has a ‘safe space’ in which it can develop ideas, debate live issues and reach informed decisions away from external interference and distraction. Disclosure of the Retained Requested Information is likely to compromise the safe space that the BBC needs to consider issues of reform affecting the BBC and TV Licensing now and in the future. As set out above, the Government will keep decriminalisation under active review whilst the impact of alternative enforcement schemes are assessed, and there is a continuing need for the BBC to have a safe space to engage with external advisors to gather research and contribute to the debate meaningfully. In relation to section 36(2)(c), it is important that the BBC is now able to focus its finite resources on the Licence Fee Settlement negotiations in which the Government will determine BBC’s future funding, without having those resources diverted to addressing unnecessary speculation and media attention.”

39. In respect of the 2020 Report, the BBC noted that:

“We consider that the Requested Information contains advice about live issues that are of great importance both to the BBC and to licence fee payers, and it is important that in that context any relevant advice

is free, frank and candid, in the interests of good decision-making. Disclosure would or would be likely to inhibit the frankness and candour of such advice (i.e. the grounds in section 36(2)(b)(i)). Although officials "are expected to be impartial and robust when giving advice, and not easily deterred from expressing their views by the possibility of future disclosure" (ICO guidance), it is reasonable to consider that the disclosure of the Requested Information would be likely to create a chilling effect on BBC staff and external advisers.

"For the same reasons, disclosure would likely have a "chilling effect" on the free and frank exchange of views for the purposes of deliberation (i.e. the grounds in section 36(2)(b)(ii)).

"It is also important that the BBC should have a "safe space" in which to develop ideas, debate issues and reach decisions away from external interference and distraction, and formulate its response to a significant Government consultation. The BBC should be free – in that safe space – to commission and consider research in order to make its case for its preferred outcome. We have concluded that disclosure would be likely to compromise this safe space, and officials may become more circumspect in sharing their views, particularly where these highlight difficult and controversial points. Ultimately, poorer decisions would be made.

"Further, there are other ways in which disclosure of the Requested Information could prejudice the effective conduct of public affairs (i.e. the grounds in section 36(2)(c)). In accordance with ICO guidance, prejudice to the effective conduct of public affairs could here refer to an adverse effect on the public authority's ability to offer an effective public service or to meet its wider objectives or purpose, and/ or refer to the disruptive effects of disclosure, for example the diversion of resources in managing the effect of disclosure. The need to explain research results or to counter speculation, media attention or pressure from external parties would divert BBC resources from performance of the BBC's central functions and its preparation of its position for discussions with government."

The Commissioner's view

40. In the Commissioner's view, the BBC has not put forward a persuasive case to explain why any of the limbs of the exemption are engaged.
41. The basic issue is that neither of the two reports constitute advice, nor do they constitute an opinion. Rather, they both present a set of facts that could be used to inform a future discussion or decision.

42. Neither report presents Harris Interactive's "opinion" on what stance the BBC should take or how it should act. The reports was not commissioned to provide advice, but to provide an evidence base on which to inform future debate or future decisions. Therefore the Commissioner cannot accept that withheld information is "advice" or that the BBC would be dissuaded from seeking advice (externally or internally) in future if this information were disclosed.
43. Furthermore, the Commissioner notes that this was not information that Harris Interactive volunteered. This was work that the BBC paid for. No evidence has been put forward to explain why Harris Interactive would refuse to accept the BBC's commissions in future, or why other firms in the same industry would refuse to take on such commissions. The fear of losing future work should be a sufficient incentive to prevent Harris Interactive (or indeed any other similar firm) from providing work of a poor quality.
44. Similarly, the Commissioner does not consider either report to represent any sort of exchange of views. The reports represent the aggregated views of the people who participated in the various surveys. Those people were not providing advice or offering any opinion on what they thought the BBC should do, they were merely answering the questions that were put to them. The reports do not represent the views of Harris International, nor do they represent the corporate view of the BBC nor of any individual officer within the BBC.
45. There is no point in an organisation commissioning survey that is biased towards supporting a favoured view. Nor is any reputable firm likely to carry out such research. Good surveys should test what the public thinks, why they think that and what would persuade them to change the way that they think. The two reports demonstrate these qualities. The value of such research lies in its ability to represent public opinion accurately – not in its confirmation of what the organisation wants to hear.
46. Furthermore, the Commissioner notes that the BBC has quoted extensively from the reports in its Gender Disparity Report² and in its response to the Government's consultation.³ As both those documents were in the public domain at the time of the request, the Commissioner is unclear as to why the effects that the BBC has argued would happen if

² <https://www.tvlicensing.co.uk/about/gender-disparity-AB23>

³ <http://downloads.bbc.co.uk/aboutthebbc/reports/reports/bbc-consultation-response-decriminalising-licence-fee.pdf>

the full data were released apparently did not occur when partial data was released.

47. The Commissioner is supported in this assertion by the rules of the British Polling Council which require Council members (of which Harris Interactive is one⁴) to make available full data tables relating to any survey of the UK population they carry out that is subsequently published. Rule 2.5 of the BPC rules states that:

“Organisations conducting privately commissioned surveys have the right to maintain the confidentiality of survey findings. However, in the event the results of a privately commissioned poll are made public as a result of actions by the organisation [its employees or agents] that commissioned the survey, such results will be deemed to have entered the public domain and procedures outlined above [publishing of data tables] will be followed in respect of those findings. The client and survey organisation may keep other findings (that have not been published) confidential except where such findings are relevant to the topics covered in questions that have entered the public domain or where the question order is relevant to the published results. The research organisation must place other relevant data on its web site within 2 working days of the original release of the results into the public domain in order to place such information into their proper context. If other findings cast doubt on those that have been published then the agency must also release those findings.”⁵ [emphasis added]

48. As the BBC has published some findings from the Harris Interactive surveys in both its Gender Disparity Report and its consultation response then it has arguably triggered Rule 2.5.⁶ Even if that is not the case, withholding the full set of results is only likely to fuel speculation that favourable data may have been “cherry-picked.”
49. In any case, at the point of the request, the Gender Disparity Report had been published and the Government’s consultation closed. BBC officials no longer needed any safe space in which to debate ideas or consider alternatives. Nor is the Commissioner persuaded that there is any real likelihood of a so-called “chilling effect” prejudicing future

⁴ <https://www.britishpollingcouncil.org/officers-members/>

⁵ <https://www.britishpollingcouncil.org/objects-and-rules/>

⁶ If indeed the Rule was triggered (and that is not a judgement for the Commissioner to make), Harris Interactive would have had to disclose its full data tables rather than the actual information being withheld here – but the contents of the withheld information could be derived from the data tables.

negotiations. The BBC is unlikely to make poorer submissions in future as, if it does, it risks losing some or all of its main source of income. Equally, there is nothing to prevent the Government from Commissioning similar research when future negotiations are contemplated.

50. Turning finally to the BBC's arguments in respect of section 36(2)(c) of FOIA, the Commissioner is rarely impressed by arguments that a public authority's media management operation may be undermined, or that the organisation as a whole would be unduly distracted, by disclosure of information. Whilst the Commissioner did accept a similar argument in relation to the government's early handling of the pandemic, these circumstances are in no way comparable to a national public health emergency in which the clarity of messaging could literally save lives.
51. The withheld reports are two pieces of work that are, in themselves, complete. They went on to inform two further reports which, again, were complete at the point the BBC responded to these elements of the request. This is not a case in which the BBC is being asked to disclose earlier drafts (where the public could conceivably be confused as to what the BBC's position was), the BBC is being asked for final drafts of two reports that are complete and have already been quoted in published material.
52. The BBC (probably more so than other organisations) should be well aware that it is required to absorb a certain amount of journalistic enquiries – particularly when those enquiries relate to matters of substantial public interest. The fact that journalists may ask awkward or uncomfortable questions should not, in itself, be a reason to withhold information.
53. The fact that a disproportionate number of women are subject to enforcement action for non-payment of the Licence Fee is and should be an important matter of public debate. The BBC may well be correct in its assertion that this is largely due to factors beyond its control, but that does not diminish the value of subjecting the evidence for such an assertion to the most rigorous scrutiny. To the extent that disclosing the information may increase media interest, that will be legitimate interest in a matter of public concern.
54. However, the Commissioner is sceptical that disclosure will require a significant diversion of resources – especially as many of the reports' key findings are already in the public domain.
55. The Commissioner is therefore not persuaded that disclosure of the withheld information will cause any prejudice to the effective conduct of public affairs that is real, actual and of substance.

56. Moreover, the Commissioner considers that, even if he were so persuaded, he considers that there would be a very strong public interest in disclosure of the withheld information as it would inform public debate on a matter of concern.
57. The Commissioner therefore requires the BBC to disclose the two reports with appropriate personal data redactions.

Procedural matters

58. Section 10(3) of FOIA allows a public authority to delay disclosing information beyond 20 working days if it needs additional time to consider the balance of the public interest.
59. Section 17(3) of FOIA allows a public authority to delay issuing a refusal notice beyond 20 working days if it needs additional time to consider the balance of the public interest.
60. There is no statutory limit on the amount of time a public authority can take in order to consider the balance of the public interest. FOIA refers to a delay that is "reasonable in the circumstances", but the Commissioner considers that this should usually only be an additional 20 working days. A delay beyond 40 working days from the date of the request will only be "reasonable" in exceptional circumstances.
61. The Commissioner does not consider that the BBC has explained why it would not have been reasonable for it to have completed its public interest deliberations earlier. Nor has the Commissioner been able to discern any reason for a delay of eight months for elements [D2], [E1] and [E2] to be dealt with.
62. The Commissioner therefore considers that the BBC took an unreasonable amount of time to complete its public interest deliberations and therefore breached both section 10(3) and 17(3) of FOIA.

Other Matters

63. The Commissioner notes that the BBC completed its internal reviews in respect of elements [E1] and [E2] on the 41st and 54th working day respectively. There is no statutory time limit for completing an internal review, but the Commissioner considers that such delays amount to poor practice – given the amount of time the BBC had already spent assessing the balance of the public interest.

Right of appeal

64. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

65. 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.
66. 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

Roger Cawthorne
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF