

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 26 October 2017

**Public Authority:** Department for Culture, Media & Sport

**Address:** 100 Parliament Street  
London  
SW1A 2BQ

### Decision (including any steps ordered)

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1. The complainant requested copies of minutes and notes of meetings between, the public authority and the BBC, the public authority and other departments, and, within the public authority, in relation to the government's decision to cease funding the over 75s TV licence concession, and for the BBC 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 35(1)(a) and (b), 36(2)(b)(i) and(ii), 40(2), 42(1) and 43(2) 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.
  - The public authority was entitled to conclude that most of the withheld information was exempt from disclosure on the basis of sections 35(1)(a) and (b), 36(2)(b)(i) and (ii), 42(1) and 43(2) FOIA.
  - The public authority was entitled to rely on section 40(2) save with respect to the official phone numbers of senior officials.
3. The Commissioner requires the public authority to take the following step to ensure compliance with the legislation.
  - Disclose the phone numbers of the senior officials redacted from the information in scope.

4. The public authority 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 FOIA and may be dealt with as a contempt of court.

## **Request and response**

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5. The complainant submitted a request for information to the public authority on 28 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.
2. Copies of all minutes or notes of inter-and intra-departmental meetings in relation to the Policy Decision and/or the Implementing Measures.

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, as suggested in your 15 April email)."

6. The Commissioner understands that the public authority initially informed the complainant on 16 June 2016 that it had no record of receiving the request, and only became aware of it following an email on

the same day from the complainant chasing up the authority's response. The public authority's substantive response was issued on 14 July 2016.

7. Information held within the scope of item 1 of the request was withheld on the basis of sections 35(1)(a), 35(1)(b), 36(2)(b)<sup>1</sup> and 43(2) FOIA. Information within the scope of item 2 was withheld on the basis of sections 35(1)(a), 35(1)(b) and 42(1) FOIA.
8. The complainant requested an internal review of the decision on 13 September 2016.
9. The public authority wrote back to the complainant on 8 November 2016 with details of the outcome of the internal review. A number of redacted emails were released to the complainant. Some of the redacted information was withheld on the basis that it fell outside the scope of the request. The rest of the redacted information (in the disclosed emails) along with the remaining information in scope was withheld in reliance on sections 35(1)(a), 35(1)(b), 36(2)(a), 36(2)(b), 40(2), 42(1) and 43(2) FOIA.

## Scope of the case

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10. The complainant contacted the Commissioner on 7 February 2017 to complain about the way his request for information had been handled. He specifically asked the Commissioner to consider the following:
  - Whether the public authority was entitled to deem the information redacted on the basis that it falls outside the scope of the request as such<sup>2</sup>, and
  - Whether the public authority was entitled to rely on the exemptions at sections 35(1)(a), 35(1)(b), 36(2)(a), 36(2)(b), 40(2), 42(1) and 43(2) FOIA.

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<sup>1</sup> Refers to sections 36(2)(b) (i) and (ii) wherever it is used in this notice.

<sup>2</sup> To be clear, the complainant did not raise this with the public authority at the time of his request. He claimed that "correspondence containing that redacted information is, as a whole, responsive to our FOI request...", but specifically asked the Commissioner to consider the "appropriateness of the redactions". In light of this and more significantly the fact that 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, the Commissioner has limited her consideration to whether the redacted information in question relates to the policy decision and/or implementing measures.

11. The complainant however clarified that he was not challenging the redaction of junior officials' names pursuant to the exemption at section 40(2).
12. During the course of the investigation, the public authority sought to also rely on the exemption at section 36(2)(c) and withdrew its reliance on section 36(2)(a).
13. The Commissioner notes (from the evidence provided by the public authority) that at the time of the request, the qualified person had concluded that the public authority was entitled to rely simultaneously on the exemptions at sections 36(2)(a), (b) and (c) FOIA.<sup>3</sup>
14. Therefore, for the avoidance of any doubt, the scope of the Commissioner's investigation extended to whether the public authority was entitled to rely on the exemption at section 36(2)(c) but excluded the exemption at section 36(2)(a).

## **Reasons for decision**

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### Information deemed out of scope

15. Some of the information redacted by the public authority from the emails disclosed to the complainant was considered to be outside the scope of the request. Some of the information in additional emails not released following the internal review was also considered to be outside the scope of the request. For the avoidance of doubt, the remaining information in the additional emails was withheld in reliance on exemptions.
16. The complainant has asked the Commissioner to consider whether the public authority was entitled to conclude that some of the information in the relevant correspondence<sup>4</sup> falls outside the scope of his request.
17. The public authority explained that it interpreted the request to mean that the complainant wanted relevant sections of copies of minutes and/or notes of meetings that relate to the decision and implementation

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<sup>3</sup> This is because the exemptions at section 36(2) FOIA can only be engaged on the basis of the reasonable opinion of a qualified person.

<sup>4</sup> ie – all the emails (including those released to the complainant) containing the withheld information.

measures regarding the transfer of the cost and responsibility for over-75s TV licence concession to the BBC. Therefore, any content contained in such minutes or notes that was not relevant to the policy decision and/or implementation measures was considered to be outside the scope of the request. It explained that there are instances where information which is out of scope is heavily interlinked with information that is in scope. However, as much of this information was already in the public domain, it was included within the information in scope and was released to the complainant (following the internal review) in order to provide as much context as possible.

18. Following the explanation above, the public authority amended its position in respect of some of the information in the disclosed emails it had concluded was exempt from disclosure. It explained that it had reconsidered this information and concluded that some of it is actually outside the scope of the request.
19. The Commissioner notes that the request was limited to copies of minutes and/or notes of meetings between the BBC and Government officials, and inter/intra departmental meetings, in relation to the Policy Decision and/or the Implementing Measures.
20. Having inspected the information redacted on this basis (including the information previously considered exempt), the Commissioner is satisfied that the public authority was entitled to conclude that it does not fall within the scope of the request for the reasons it has given.

### **Application of exemptions**

21. The majority of the information in scope was withheld on the basis of the exemptions at sections 36(2)(b) or 36(2)(c). The rest of the information in scope was withheld in reliance on the exemptions at sections 35(1)(a) and (b), 40(2), 42(1) or 43(2).

#### Section 36(2)(b)

22. 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-
    - 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.”
23. 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 Secretary of State for the Department for Culture, Media & Sport. The Commissioner is satisfied that at the time of the request, the former Secretary of State was a qualified person by virtue of section 36(5)(a) FOIA.<sup>5</sup>
24. The qualified person was of the opinion that information withheld on the basis of section 36(2)(b) would inhibit the free and frank provision of advice, and the free and frank exchange of views for the purposes of deliberation. This is because the information relates to meetings between officials regarding the options to provide to Ministers during negotiations of the over 75s package and later, on how to implement elements of that package. The withheld information also relates to frank discussions between senior BBC officials and Ministers as part of negotiations on the over 75s package and the policy on implementing the package. The qualified person submitted that disclosure could result in loss of frankness and candour and this could damage the quality of advice and deliberation, leading to poorer decision-making in future. This could harm the development of effective policy in an important area –ie- BBC funding settlement.
25. The complainant pointed out in relation to the application of these exemptions that the public authority had not supplied him with a copy of the qualified person’s opinion or prior submissions made to the qualified

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<sup>5</sup> Section 36(5)(a) states that a qualified person in relation to information held by a government department in the charge of a Minister of the Crown, means any Minister of the Crown.

person. The Commissioner notes that there is no requirement for the public authority to do so.

26. However, in relation to the balance of the public interest pursuant to the application of the exemptions at 35(1), the complainant argued that it was significant that the policy decision was made in July 2015, nearly a year prior to his request.<sup>6</sup> Given the passage of time, he did not consider that the matter could still be deemed as being *live*.
27. In determining whether the exemptions are engaged, the Commissioner must also consider whether the qualified person's opinion was a reasonable one. In doing so the Commissioner has considered all of the relevant factors including:
  - 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.
  - 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.
  - The qualified person's knowledge of, or involvement in, the issue.
28. 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.

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<sup>6</sup> 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 submitted in April 2016 though the public authority only became aware of it in June 2016.

29. The Commissioner is satisfied that the qualified person's opinion was reasonable in the circumstances. Having inspected the withheld information and the submissions made to the qualified person, she accepts it was reasonable to conclude that disclosure would have inhibited the free and frank provision of advice and exchange of views for the purposes of deliberations, pursuant to the policy decision and implementing measures as well as broader discussions in relation to funding settlement.
30. The Commissioner has therefore concluded that the public authority was entitled to engage the exemptions at sections 36(2)(b)(i) and (ii).

### **Public interest test**

31. 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 also consider whether in all the circumstances of the case, the public interest in maintaining the exemptions outweigh the public interest in disclosing the information withheld in reliance on section 36(2)(b).

### *Complainant's submissions*

32. The complainant did not provide specific public interest arguments against maintaining the exemptions at section 36(2)(b) because he had pointed out (correctly) to the public authority that the exemption could not be applied to information exempt on the basis of section 35.<sup>7</sup> Nevertheless, he submitted that the public interest arguments he set out in relation to the application of the remaining exemptions would in any event be significant in determining the balance of the public interest in relation to the application of section 36(2)(b).
33. Therefore, the Commissioner has taken into account the complainant's public interest arguments she considers relevant to determining the balance of the public interest in relation to the application of the exemptions at section 36(2)(b). For the avoidance of doubt, the public authority did not apply section 35 to the information she has found was engaged by section 36(2)(b).
34. The complainant argued that the public interest in maintaining a safe space for discussions was no longer strong given that, in his view, the the policy decision had been finalised at the time of the request.

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<sup>7</sup> See section 36(1)(a) FOIA.



35. He further argued that assertions by the public authority of a chilling effect likely to result from the disclosure of the withheld material were too generic or “unparticularised”.
36. On the contrary, he argued 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 therefore specific concern that the policy decision deal was done behind closed doors suggesting that the BBC’s independence from government had been compromised. He submitted 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. There was in his view a strong presumption in favour of disclosure for this reason alone.

*Public authority’s submissions*

37. The public authority acknowledged that openness in the policy making process may lead to increased trust and engagement between citizens and government. It recognised that it would increase public confidence that decisions are taken on the basis of the best available information. It further acknowledged that it would result in better policy formulation and a wider range of views and opinions.
38. The public authority however argued that Ministers and officials need space in which to develop their thinking and explore options in communications and discussions with others, including an important stakeholder like the BBC. In other words, it considered that there was a strong public interest in maintaining a safe space for policy deliberations at the time of the request.
39. It also argued that disclosure of the information withheld in reliance on the exemptions could result in the loss of frankness and candour (a chilling effect) in deliberations. It submitted there is a strong public interest in preventing such an outcome given the damage it could do to the quality of advice resulting in poorer decision-making which would inevitably harm the development of effective policy in relation to future funding settlements for the BBC.
40. The public authority acknowledged that concerns were expressed about the process through which the policy decision was reached. It pointed

out that the then Secretary of State had answered an urgent question in the House of Commons on the issue on 6 July 2015.<sup>8</sup>

41. It submitted that while it understood the concerns around the process not being "conducted in public", this did not amount to a lessening of the BBC's independence. It pointed out that Ministers have made that clear on many occasions and the Director-General of the BBC's statement on 6 July 2015<sup>9</sup> welcomed the agreement between the government and the BBC pursuant to the implementation of the policy decision.
42. It argued the withheld information does not, and could not, ultimately address the concerns the complainant has about the process in any event. The exemptions have been applied to ensure that Ministers could receive free and frank advice on the matter, and more broadly in relation to the Charter renewal.

*Balance of the public interest*

43. The Commissioner considers that the higher threshold of prejudice (ie would prejudice) means that the anticipated prejudice must be more likely than not. She 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 more likely than not.
44. As the public authority has noted, there is generally a public interest in openness in government especially with regards to the formulation and development of policy. Lack of openness, whether perceived or otherwise, in the policy making process does not engender public trust and confidence.
45. Specifically, the Commissioner has considered whether concerns about the process through which the policy decision was reached increased the public interest in disclosing the information withheld on the basis of this exemption to the extent that it outweighed the public interest in maintaining the exemption.
46. She notes that in further support of his view that it does, the complainant has referred to the following statement contained in a letter

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<sup>8</sup> <https://hansard.parliament.uk/Commons/2015-07-06/debates/1507066000004/ConcessionaryTelevisionLicences>

<sup>9</sup> <http://www.bbc.co.uk/mediacentre/statements/tony-hall-government>

from the then Chairman of the BBC to the then Chancellor of the Exchequer and then Secretary of State 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."*

47. 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 BBC's independence from government had been compromised to enable the policy decision. In her view, there would be a significant public interest in disclosing evidence from the withheld information which supports these concerns. However, she is not persuaded that there was a significant public interest in disclosing the withheld information for this reason.
48. To be clear, she is not dismissing the concerns about the process by which the policy decision was reached given that the Chairman of the BBC publicly expressed reservations regarding the process. Rather, from her examination of the information withheld on the basis of this exemption, 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 been compromised.
49. 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.
50. 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 next funding settlement were ongoing. Discussions relating to Charter review also appear to have been ongoing since July 2015. 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".<sup>10</sup> 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

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<sup>10</sup> <https://www.gov.uk/government/news/government-begins-debate-on-the-future-of-bbc>

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 caused undue external interference and distraction during these sensitive related negotiations. Disclosure would lead to premature public and/or media involvement which would make the exchange of views less free and frank.

51. 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 deliberations relating to funding settlements and Charter renewal. It is highly likely that officials would have become restrained in expressing their advice and opinions for fear that they could be disclosed during the course of 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.
52. 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.
53. In light of her decision on the application of section 36(2)(b), the Commissioner has not considered the applicability of section 36(2)(c) to the same information.

#### Sections 35(1)(a) and (b)

54. Information held in two documents was withheld in reliance on section 35(1)(b), and information held in one document was withheld in reliance on section 35(1)(a).
55. Sections 35(1)(a) and (b) state<sup>11</sup>:
  - 1) "Information held by a government department or by the Welsh Assembly Government is exempt information if it relates to—
    - a. the formulation or development of government policy,

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<sup>11</sup> A full text of section 35 can be found here:  
<http://www.legislation.gov.uk/ukpga/2000/36/section/35>

b. Ministerial communications....”

*Complainant's submissions*

56. The complainant's arguments in support of his view that the exemptions were not engaged are summarised below.
57. The meetings were between government officials and an external, independent organisation, the BBC. It cannot be realistically suggested that the BBC played a part in either the 'formulation' or the 'development' of the underlying governmental policy.
58. The government made the decision that the cost of free television licences should be borne by the BBC, and that the meetings between the BBC and government were to discuss how that policy should be implemented. There is a clear distinction between policy formulation and development on the one hand, and implementation on the other. The latter falls outside the scope of section 35 and the exemption cannot apply.
59. Similarly, he argued that item 1 of the request does not concern communications between Ministers (within the meaning in section 35(5) FOIA) and the exemption at section 35(1)(b) does not therefore apply.

*Public authority's submissions*

60. The public authority explained that the information withheld under these exemptions relates to the development of the policy decision and implementation measures regarding the provision of funding for free television licences to persons aged 75 and over.
61. It further explained that some of the information relates to communications between Ministers.

*Commissioner's position*

62. The exemptions at section 35 are class based. This means there is no need to show any harm in order to engage them. The relevant information simply has to fall within the class described. The classes are broad and will capture a wide range of information.
63. The Commissioner considers that the term 'relates to' in section 35 can be interpreted broadly. This means that the information does not itself have to be created as part of the activity. Any significant link between the information and the activity is enough.

64. By virtue of section 35(5), Ministerial communications means any communications between Ministers of the Crown, between Northern Ireland Ministers, including Northern Ireland junior Ministers, or between members of the Welsh Assembly Government.
65. She is satisfied that section 35(1)(a) was correctly engaged. The relevant information relates to discussions regarding implementation options for the policy decision. Therefore, she considers that it relates to the development of the government's policy around the provision of free television licences for the over 75s.
66. She does not agree with the suggestion that the exemption cannot apply in circumstances where an external independent organisation could have been involved in discussions leading up to the formulation or development of government policy. The test in any event is whether the relevant information *relates to* the formulation or development of government policy. She is satisfied that it does in the circumstances of this case.
67. The Commissioner is also satisfied that the section 35(1)(b) was correctly engaged. The relevant information relates to communications between Ministers of the Crown.
68. The public authority therefore correctly engaged the exemptions at sections 35(1)(a) and (b).

### **Public interest test**

69. The exemptions at sections 35(1)(a) and (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 outweigh the public interest in disclosing the information withheld in reliance on both exemptions.
70. Both the complainant's and the public authority's submissions generally mirror those the Commissioner has already considered in relation to the application of section 36(2)(b).
71. The public authority additionally submitted in relation to the public interest in maintaining section 35(1)(b) that disclosure would undermine the convention of collective responsibility. It asserted that discussions pertaining to the implementation measures remain ongoing between Ministers. Therefore, not only would disclosure inhibit free and frank discussions between Ministers, there is also a significant public interest in preserving the convention of collective responsibility.

72. The Commissioner is satisfied that the reasons which led her to conclude that there was a stronger public interest in maintaining the exemptions at section 36(2)(b) equally apply in relation to the application of these exemptions.
73. Furthermore, collective responsibility is the longstanding convention that all ministers are bound by the decisions of the Cabinet and carry joint responsibility for all government policy and decisions. It is a central feature of our constitutional system of government. There is therefore a significant public interest in not undermining this convention. The Commissioner is satisfied that disclosing the information withheld in reliance on section 35(1)(b) could undermine collective responsibility.
74. 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 information.

Section 42(1)

75. Information held in one document was withheld in reliance on section 42(1).

76. Section 42(1) states:

“Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information.”

77. The public authority explained that the information relates to communications between officials and the authority’s legal advisers. It submitted that the information is subject to legal professional privilege because it consists of officials seeking and discussing legal advice in relation to the implementation measures. It confirmed that privilege has not been waived.

78. The Commissioner has been guided by the Information Tribunal’s description of Legal Professional Privilege (LPP) in *Bellamy v the Information Commissioner and the Secretary of State for Trade and Industry*.<sup>12</sup> The Tribunal described LPP as:

“a set of rules or principles which are designed to protect the confidentiality of legal or legally related communications and exchanges between the client and his, her or its lawyers, as well as exchanges

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<sup>12</sup> EA/2005/0023, 4 April 2006

which contain or refer to legal advice which might be imparted to the client, and even exchanges between the clients and [third] parties if such communications or exchanges come into being for the purposes of preparing for litigation.”

79. She is satisfied that the relevant information is information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings.
80. The public authority therefore correctly engaged the exemption at section 42(1).

### **Public interest test**

81. The exemption at section 42(1) is 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 exemption outweigh the public interest in disclosing the information withheld in reliance on it.

### *Complainant's submissions*

82. The proposed shift in costs to the BBC (of funding the free provision of TV licences for the over 75s) involves significant public expenditure. There is a strong public interest in ensuring the robustness of any decision making process involving such sums.
83. The policy decision affects an extremely large amount of people. All those aged 75 and above and, indirectly, individuals under 75, for whom the cost of TV licences may increase when the changes are introduced.
84. There has been a serious lack of transparency in the process by which the government decided that the BBC should bear the relevant costs. In this context, it is important that good decision making be seen to be done.

### *Public authority's submissions*

85. The public authority acknowledged that there is a public interest in public authorities being accountable for the quality of their decision making and ensuring that decisions have been made on the basis of good quality legal advice.
86. It however drew the Commissioner's attention to the strong public interest inherent in maintaining the exemption due to the importance of the principle behind LPP: safeguarding openness in all communications between client and lawyer to ensure access to full and frank legal advice, which in turn is fundamental to the administration of justice



87. Specifically in relation to the withheld information, it argued that the public interest in maintaining the exemption was high because the subject of discussions remains part of live policy considerations.
88. It submitted that legal advice to government must be given with a full appreciation of the facts, and allowing exploration between legal advisers and policy officials as to the possible arguments for and against a particular view. Without such full, comprehensive and dynamic advice, the quality of decision making would be much reduced because decision makers would not be fully informed of the legal context of their decisions. It explained that the policy decision is a particularly technical area in that there were a number of decisions to be made with regard to implementing the decision where it was, and remains beneficial to have legal advice.
89. Finally, it noted that legal advice does not relate to any wrongdoing or illegal actions which would have enhanced the public interest in disclosure.

*Balance of the public interest*

90. The Commissioner shares the view that the policy decision is significant both in terms of the cost to the BBC and the number of people it is likely to affect as a result. Therefore, disclosing the information withheld in reliance on this exemption would have informed public debate regarding some of the implementation options which were considered.
91. While she does not dispute that this was clearly in the public interest in the circumstances, she is persuaded that there was a significant public interest in not revealing the withheld information. The information would have been relevant to discussions pursuant to the Digital Economy Bill still under consideration. Furthermore, given that related sensitive negotiations on Charter renewal were ongoing, disclosure could have undermined the fundamental principle behind LPP and that would not be in the public interest. The withheld information is relatively recent and relates to live issues (ie discussions and negotiations around the Bill and Charter) which in the Commissioner's view significantly increase the public interest in not disclosing it. Her earlier comments from paragraph 48 addressing the public interest in disclosure in view of concerns regarding the transparency of the process equally apply to the information withheld in reliance on this exemption.
92. Therefore, the Commissioner has concluded that on balance, in all the circumstances of the case, the public interest in maintaining the exemption outweighed the public interest in disclosure.

Section 43(2)

93. Section 43(2) states:

“Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).”

*Complainant's submissions*

94. The complainant submitted that there were procedural irregularities in the public authority's application of this exemption. Furthermore, that it was difficult to see how disclosure of information relating to government's dealings with the BBC could affect its interactions with third parties. He therefore submitted that reliance on this exemption should be rejected by the Commissioner. However, in the event that the Commissioner found that the exemption was engaged, he submitted that for reasons given above in relation to the application of the other exemptions relied on by the public authority, the public interest fell squarely in favour of disclosure.

*Public authority's submissions*

95. The public authority considers that disclosing the information withheld in reliance on this exemption would, or would be likely to, prejudice the BBC's commercial interests. This conclusion was reached following consultation with the BBC.

96. Both the public authority and the BBC concluded that the withheld information could be used by the BBC's competitors to understand its funding decisions for parts of the business. In other words, the withheld information could be used by competitors to the detriment of the BBC's commercial interests.

97. In terms of the balance of the public interest, the public authority acknowledged that there is a public interest in transparency of, and proper scrutiny of, the expenditure of public money in relation to the BBC's funding. It however argued that it is important the BBC is able to communicate frankly with government in the knowledge that market sensitive information is not released into the public domain. Furthermore, disclosure of the withheld information could deter the BBC from engaging fully and frankly with the government to the detriment of its commercial interests, and that would not be in the public interest.

*Commissioner's position*

98. In order for a prejudice based exemption such as that contained within section 43(2) to be engaged, the Commissioner considers that three criteria must be met.

- Firstly, the actual harm which the public authority alleges would, or would be likely, to occur if the withheld information was disclosed has to relate to the applicable interests within the relevant exemption;
  - Secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance; and
  - Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – ie, disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice. In relation to the lower threshold 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, in the Commissioner's view this places a stronger evidential burden on the public authority. The anticipated prejudice must be more likely than not.
99. With regard to the first criterion of the three limb test described above, the Commissioner accepts that the potential prejudice described by the public authority clearly relates to the interests which the exemption contained at section 43(2) is designed to protect.
100. She appreciates, as the complainant has pointed out, that the public authority did not make this position absolutely clear. However, having had the benefit of considering the confidential exchanges between the public authority and the BBC in relation to the application of this exemption to the withheld information (which she has also seen), she is able to find that the potential prejudice described in those exchanges relate to the commercial interests of the BBC.
101. The Commissioner is satisfied that the prejudice alleged by the public authority is real and of substance, and there is a causal relationship between the disclosure of the withheld information and the prejudice which the exemption is designed to protect. She must however establish whether disclosure would, or would be likely to, result in the prejudice alleged (ie the third criterion).
102. The Commissioner accepts that the withheld information reveals potential funding related decisions for parts of the BBC's operations and is likely to be beneficial to competitors to the detriment of the BBC. She also accepts that disclosure could deter the BBC from engaging freely and frankly with the government for fear that market sensitive information could be released prematurely. If the BBC's officials felt inhibited from sharing market sensitive information in a candid manner

with government officials in order to support its funding requests, it is likely to have a prejudicial effect on the BBC's commercial interests. Therefore, the Commissioner is persuaded that the disclosing the withheld information would present a real and significant risk of prejudice to the BBC's commercial interests.

103. Consequently, she finds that the exemption was correctly engaged on the basis that disclosure would be likely to prejudice the BBC's commercial interests.
104. The Commissioner has previously mentioned the public interest factors in favour of disclosing information pertinent to the request such as, for reasons of transparency, accountability, and to ensure that the public is kept properly informed regarding a significant decision concerning the BBC's funding settlement.
105. However, she considers that there is a stronger public interest in withholding information which if disclosed, would pose a real and significant risk to the BBC's commercial interests. As a public service provider funded from the public purse, there is a strong public interest in ensuring that the BBC can operate on an even playing field with its competitors who might not be subject to the FOIA or public funding restrictions.
106. The Commissioner has therefore concluded that on balance, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosure.

#### Section 40(2)

107. The public authority applied this exemption to information which could identify junior officials and junior members of staff at the BBC, primarily their names and contact details. It further explained that the names of senior officials (ie above SCS grade) were not withheld but that their phone numbers and personal e-mail were.
108. The complainant is not challenging the redaction of junior officials' names pursuant to the exemption at section 40(2). Therefore, the Commissioner has not considered the application of the exemption to the names and contact details of junior officials.
109. The Commissioner has however concluded that the public authority was not entitled to withhold the phone numbers of senior officials used in an official capacity. Clearly, these officials would have a reasonable expectation that their phone numbers could be published. Furthermore, given the fact that their names have been revealed in the context of the request for information, the Commissioner does not consider that revealing their official phone numbers would constitute a significant

intrusion on their privacy. Consequently, the Commissioner is prepared to accept that emails used by these officials in their private rather than official capacities should be withheld on the basis of section 40(2).

## **Other Matters**

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110. Although they do not form part of this decision notice, the Commissioner wishes to highlight the following points of concern.
111. During the course of the investigation, the public authority amended its position on the information considered out of scope and the information considered exempt on at least three occasions. It also had to clarify the exact exemptions that had been applied to withheld information on a number of occasions.
112. There is no doubt that the public authority fully understood its position with regards to the rationale for the application of exemptions. However, the Commissioner had to seek clarification on a number of occasions regarding the relevant correspondence, particularly in relation to whether information was considered within scope or out of scope. This is because it was during the course of her investigation that the public authority realised that it had interpreted the request too broadly. Therefore, the table it had originally provided outlining its position in relation to each relevant correspondence was no longer accurate in that regard. The table had not in any event specified the exemptions that had been applied to some of the withheld information. The public authority consequently revisited the relevant correspondence and provided an amended table on a number of occasions during the course of the investigation.
113. This obviously made the Commissioner's task rather more difficult, though it must be stressed that it has not affected the quality of her investigation and its outcome. Nevertheless, she is sufficiently concerned that it took the public authority a number of attempts to get this right and for that reason she has felt the need to note her concern here.

## Right of appeal

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114. 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](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

115. 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.

116. 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 .....**

**Gerrard Tracey**  
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**Information Commissioner's Office**  
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**Wilmslow**  
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