

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 8 September 2023

**Public Authority:** British Broadcasting Corporation (BBC)  
**Address:** Broadcasting House  
Portland Place  
London  
W1A 1AA

#### **Decision (including any steps ordered)**

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1. The complainant has requested copies of legal advice that the BBC sought in relation to Gary Lineker. The BBC relied on section 42 of FOIA (legal professional privilege) to withhold the information.
2. The Commissioner's decision is that the BBC was entitled to rely on section 42 of FOIA and the balance of the public interest favours maintaining that exemption. The BBC breached sections 10 and 17 of FOIA as it failed to respond to the request within 20 working days.
3. The Commissioner does not require further steps to be taken.

#### **Background**

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4. On 7 March 2023, Mr Lineker responded to a tweet from the Home Secretary which concerned policies to reduce immigration. Mr Lineker described the Home Secretary's statement as "beyond awful."<sup>1</sup> That tweet was followed by a further tweet in which he stated that it was:

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<sup>1</sup> <https://twitter.com/GaryLineker/status/1633094764865126400?>

"an immeasurably cruel policy directed at the most vulnerable people in language that is not dissimilar to that used by Germany in the 30s."<sup>2</sup>

5. The BBC had (and continues to have) guidance on the use of social media by its employees. It states that:

"Everyone who works for the BBC should ensure their activity on social media platforms does not compromise the perception of or undermine the impartiality and reputation of the BBC, nor their own professional impartiality or reputation and/or otherwise undermine trust in the BBC."

And also:

"Individuals working in news and current affairs (across all Divisions) and factual journalism production, along with all senior leaders have a particular responsibility to uphold the BBC's impartiality through their actions on social media and so must abide by specific rules set out in this Guidance.

"Factual journalism includes returning strands which cover topical issues (such as Countryfile, The One Show and Woman's Hour). It does not include, for example, specialist, authored or limited documentary series.

"There are also others who are not journalists or involved in factual programming who nevertheless have an additional responsibility to the BBC because of their profile on the BBC. We expect these individuals to avoid taking sides on party political issues or political controversies and to take care when addressing public policy matters."<sup>3</sup>

6. This was not the first time Mr Lineker had been accused of breaching the BBC's guidelines. In October 2022, the BBC's own internal complaints department upheld a complaint that one of his tweets breached impartiality rules and he received a public reprimand. Although it was recognised that Mr Lineker was not involved in the BBC's news output (where the strictest guidelines on impartiality apply), the BBC still recognised that he should be held to a higher standard than other sports

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<sup>2</sup> <https://www.theguardian.com/football/2023/mar/08/gary-lineker-bbc-uk-asylum-policy-nazi-germany-match-of-the-day-presenter>

<sup>3</sup> <https://www.bbc.co.uk/editorialguidelines/guidance/individual-use-of-social-media/>

presenters because of his high profile as a well-known “face” of the organisation.<sup>4</sup>

7. On 10 March 2023, the BBC announced that Mr Lineker would not present Match of the Day, the following day. In a statement it said that:

“The BBC has been in extensive discussions with Gary and his team in recent days. **We have said that we consider his recent social media activity to be a breach of our guidelines.**

“The BBC has decided that he will step back from presenting Match of the Day until we’ve got an agreed and clear position on his use of social media.

“When it comes to leading our football and sports coverage, Gary is second to none. We have never said that Gary should be an opinion free zone, or that he can’t have a view on issues that matter to him, but **we have said that he should keep well away from taking sides on party political issues or political controversies.**”<sup>5</sup>  
[emphasis added]

8. Following that statement, pundits Ian Wright and Alan Shearer, who were also due to feature on that Saturday’s edition of Match of the Day announced that they would not be participating. Several other presenters, commentators and pundits also announced that they would either not participate in their usual programmes or would refuse to fill in if asked.

9. On 13 May 2023, the Director General of the BBC issued a further statement, in which he said:

“Everyone recognises this has been a difficult period for staff, contributors, presenters and, most importantly, our audiences. I apologise for this. The potential confusion caused by the grey areas of the BBC’s social media guidance that was introduced in 2020 is recognised. I want to get matters resolved and our sport content back on air.

“Impartiality is important to the BBC. It is also important to the public. The BBC has a commitment to impartiality in its Charter and a commitment to freedom of expression. That is a difficult balancing act

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<sup>4</sup> <https://www.theguardian.com/football/2022/oct/13/gary-lineker-found-in-breach-of-bbc-guidelines-with-tory-donors-tweet>

<sup>5</sup> <https://www.bbc.co.uk/mediacentre/statements/gary-lineker-match-of-the-day>

to get right where people are subject to different contracts and on air positions, and with different audience and social media profiles. The BBC's social media guidance is designed to help manage these sometimes difficult challenges and I am aware there is a need to ensure that the guidance is up to this task. It should be clear, proportionate, and appropriate.

"Accordingly, we are announcing a review led by an independent expert – reporting to the BBC – on its existing social media guidance, with a particular focus on how it applies to freelancers outside news and current affairs. The BBC and myself are aware that Gary is in favour of such a review.

"Shortly, the BBC will announce who will conduct that review. Whilst this work is undertaken, the BBC's current social media guidance remains in place.

"Gary is a valued part of the BBC and I know how much the BBC means to Gary, and I look forward to him presenting our coverage this coming weekend."<sup>6</sup>

10. Mr Lineker issued a simultaneous statement, welcoming the review and adding that he was looking forward to returning to work.
11. At the date of this notice, no new guidance had been published.

## **Request and response**

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12. On 22 March 2023, the complainant wrote to the public authority and requested information in the following terms:

"[1] Copies of all written legal advice and transcripts or lawyers' summary notes of all oral legal advice given to Director-General Tim Davie, between March 7 and March 13, regarding Gary Lineker's employment with the BBC following his Twitter posts about UK government asylum policy, which allegedly breached impartiality rules.

"[2] Copies of all written legal advice and transcripts or lawyers' summary notes of all oral legal advice given to Director-General Tim Davie, between March 7 and March 13, regarding the

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<sup>6</sup> <https://www.bbc.co.uk/mediacentre/statements/director-general-tim-davie-gary-lineker>

employment of other BBC staff and freelance contributors who refused to take part in scheduled programming in support of Lineker following his reported suspension from Match of the Day.

[3] The dates, times, locations and number of meetings held between Tim Davie and legal representatives relating to Gary Lineker's employment between March 7 and March 13. Please include the name(s) of the firm(s) of legal representatives in attendance, the names of any other BBC executives in attendance and their job titles."

13. The public authority responded on 15 June 2023. It provided some information within the scope of element [3], but refused to provide the information within the scope of either element [1] or [2]. The BBC relied on section 42 of FOIA to withhold this information. It upheld this position following an internal review.

### **Reasons for decision**

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14. Section 42 allows a public authority to withhold information that would be subject to legal professional privilege. This covers communications between a lawyer and their client for the purposes of seeking or receiving professional legal advice.
15. The complainant accepts that the withheld information will be covered by privilege. The Commissioner considers it self-evident that any information that fell within the scope of the request would, by definition, be covered by legal advice privilege. Section 42 of FOIA is therefore engaged.

### **Public interest test**

16. The complainant argued that there was a strong public interest in disclosure because:

"as a publicly-funded institution, the BBC's decision to remove its highest-paid presenter from air for allegedly breaking impartiality rules is of significant public interest. The BBC never adequately explained its reasoning for suspending Lineker, who was reinstated after only a few days. In my view it is vital, in order to properly hold the BBC to account to its licence fee subscribers, that it discloses the basis on which it made this decision and to clarify whether its impartiality rules (which are central to its justification for charging the public to watch live television broadcasts) were indeed broken in this instance... Given that nearly six months have passed since the story broke, I submit that the incident is not live and recent."

17. The Commissioner accepts that the usual public interest in disclosure is heightened by three factors.
18. First is Mr Lineker's high profile and high salary. Of the on-air "talent" the BBC pays directly, he receives the highest annual sum, taking home £1.35m per year.<sup>7</sup> Given that the BBC is funded by licence-payers, there is a strong public interest in the behaviour of its most highly-paid stars.
19. Second is that the BBC is required to be impartial. As noted above, the BBC had already had to reprimand Mr Lineker for failing to abide by the editorial guidelines it sets its staff to ensure its impartiality. There is a strong public interest in knowing whether one of the BBC's most well-known faces had been found to have failed to abide by those guidelines a second time.
20. Third is the lack of an official explanation for the decision to reinstate Mr Lineker. When announcing that Mr Lineker would not be presenting Match of the Day, the BBC was very clear that it considered that its guidelines had been breached (see the highlighted sections in paragraph 7). Mr Lineker has not apologised for the "breach" and has not been reprimanded. The statement the BBC made on the 13 May 2023 referred to the "confusion" caused by the "grey areas" in its guidelines, but made no mention of whether the guidelines had or had not been breached.
21. In a follow-up television interview, the BBC's Director General stated that he had taken a "pragmatic" decision and that removing Mr Lineker from presenting duties was "always about buying some time until the two sides could come to an agreement over his political tweets."<sup>8</sup>
22. The Commissioner recognises that there would be a strong public interest in such information to the extent that it would shed light on the reasons why Mr Lineker was both removed and reinstated.
23. Given the consensus that the exemption is engaged, the Commissioner has not felt it necessary to view the information in question, but accepts that it might show that the BBC had changed its mind about whether there had been a breach (possibly because of fresh evidence coming to light) or whether the "pragmatic" decision of the Director General came about as a result of external or internal pressure, or both.

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<sup>7</sup> <https://www.bbc.co.uk/news/entertainment-arts-66156287>

<sup>8</sup> <https://www.bbc.co.uk/news/uk-64940114>

24. Given that Mr Lineker has, despite agreeing to abide by current BBC guidelines, continued to tweet about matters of political controversy,<sup>9</sup> there would also be a public interest in understanding exactly what he agreed to do and, as importantly, not to do.
25. However, weighed against that, the Commissioner notes that it is a well-established principle that the public interest in maintaining legal privilege is considerable.
26. There is no requirement to demonstrate that privileged material would be harmful if disclosed. The very fact that privilege has been violated is inherently harmful, because privilege is a fundamental part of the British justice system. Public authorities must feel free to seek and to receive, high quality professional legal advice on challenges that they face.
27. The correct time to assess the balance of the public interest is the time at which either the public authority responded or 20 working days from the date the request was received – whichever comes earlier.
28. At the point the request should have been responded to (late April), the immediate media furore had subsided. However, the Director-General's comments quoted in paragraph 21 would indicate that the BBC still considered the matter to be unresolved – at least until a revised set of guidelines were in place.
29. The fact that no new guidelines had been produced by the date the BBC should have responded (or the date of this notice) would also suggest that any legal advice is still live. If another high profile BBC employee or contributor were accused of having breached the guidelines, it seems likely that the BBC would consult or revisit the legal advice it had sought in relation to Mr Lineker.
30. Whilst the Commissioner recognises that the public interest in disclosure is stronger than usual in this case, he does not consider that it is sufficient to outweigh the public interest in maintaining the exemption.

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<sup>9</sup> <https://inews.co.uk/news/media/bbc-review-social-media-guidelines-gary-lineker-report-2501578>

## **Procedural matters**

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31. The BBC breached section 10 of FOIA as it failed to confirm that it held relevant information and to communicate non-exempt information within 20 working days of receiving this request.
32. The BBC breached section 10 of FOIA as it failed to confirm that it held relevant information and to communicate non-exempt information within 20 working days of receiving this request.



## Right of appeal

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33. 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](mailto:grc@justice.gov.uk)

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

34. 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.
35. 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**