



Information Policy & Compliance
bbc.co.uk/foi

Mr Ray Corrigan

Sent by email to: request-74209-950772a7@whatdotheyknow.com

23rd September 2011

Dear Mr Corrigan

Freedom of Information Act 2000 – RFI20111060

Thank you for your request under the Freedom of Information Act (the Act) received by email on 25 August 2011 as follows:

“Thank you for your further helpful response, in particular the confirmation that the BBC sought and received professional legal advice on the competition issues relating to:

(1) mandatory DRM removing the ability of consumers to purchase receivers without DRM and the BBC leveraging its position as holder of the multiplex licence to mandate DRM thereby affecting competition at the level of the manufacturers;

(2) rights holders' possible collective efforts to pressurise public service broadcasters into mandating HD DRM?

I would therefore appreciate it if could you supply me with:

- (a) a copy of that legal advice*
- (b) copies of BBC documents and/or briefings summarising that legal advice”*

Under section 1(1) of the Act, and as per our previous response in RFI20110890, I can confirm that the BBC did seek legal advice on our approach to HD content management. I am withholding this advice however as I have determined it is exempt under section 42 of the Act relating to legal professional privilege.

Legal professional privilege covers amongst other things, confidential communications between lawyers and their clients for the purpose of seeking and obtaining legal advice. It is important that openness between them is protected and access to fully informed frank legal advice is safe-guarded in order to achieve the administration of justice.

As section 42 is a qualified exemption, the BBC has considered the public interest in disclosing the legal advice against the public interest in maintaining the exemption.

I am satisfied in terms of section 2(2)(b) of the Act that in all the circumstances of the case, the public interest in maintaining the section 42 exemption outweighs the public interest in disclosing the information. I have provided further explanation of my consideration of the public interest test below.

Why information has been withheld

In considering the factors that might weigh in favour of the public interest in disclosure, we took into account:

- There is a public interest in the BBC being accountable for the decisions it makes, and demonstrating that legal advice is sought to ensure that the right outcome is achieved.
- Releasing the information held would ensure that the public, including staff, understand the reasoning upon which the BBC is making decisions that have the potential to affect large numbers of people.

On the other hand, in considering factors that might weigh in favour of the public interest in withholding, we took into account:

- The public interest factors in maintaining the exemption centre on the principle of protecting communications between lawyer and client. The seeking of legal advice by all persons so that they can order their affairs in a lawful manner is strongly in the public interest. That public interest is perhaps at its strongest where the client seeking and receiving legal advice is a public body or quasi-public body whose decisions have the potential to affect large numbers of people.

In order for the advice given to be valuable, it is crucial that the seeking and giving of such advice be carried out with absolute candour. This requires that the persons seeking the legal advice are secure in the knowledge that the information that passes between them and their lawyers will be free from scrutiny by outsiders. As the Information Tribunal recognised in Bellamy v Information Commissioner EA/2005/0023:

“There is a strong element of public interest inbuilt into the privilege itself. At least equally strong countervailing considerations would need to be adduced to override that inbuilt public interest.”

- If legal professional privilege was not upheld, it could lead to lawyers providing only partial advice, or to public authorities choosing not to seek legal advice (whether from external or internal lawyers), thereby reducing the quality of decision making. It is in the public interest for lawyers to be able to present their advice to the BBC in full, and to ensure that all legal advice is fully and accurately recorded in writing.
- Further guidance from the Department of Constitutional Affairs also states: “*given the very substantial public interest in maintaining the confidentiality of LPP [legal professional privilege] material, it is likely to be only in exceptional circumstances that it will give way to the public interest in disclosure.*”

In light of the above, the BBC considers that the public interest in withholding the information outweighs the public interest in disclosing the information you have requested.

Appeal Rights

If you are not satisfied with this response you have the right to an internal review by a BBC senior manager or legal adviser. Please contact us at the address below, explaining what you would like us to review and including your reference number. If you are not satisfied with the internal review, you can appeal to the Information Commissioner. The contact details are: Information Commissioner's Office, Wycliffe House, Water Lane, Wilmslow, Cheshire, SK9 5AF, telephone 01625 545 700 or see <http://www.ico.gov.uk/>

Yours sincerely,

Steve Gutteridge
BBC Distribution