

Freedom of Information Act Internal Review Decision

Internal Reviewer: David Attfield

Reference: IR 2011027

Date: 17 November 2011

Original Request and the BBC's Decision

By a request made on 6 June 2011, the requestor sought copies of all BBC communications with Ofcom relating to the Ofcom consultation "Content Management on the HD Freeview Platform". A number of documents were then disclosed by the BBC under cover of a letter from Steve Gutteridge (BBC Distribution) dated 8 July 2011.

The requestor then raised a series of questions relating to the disclosed material. Relevant to this internal review, the requestor asked if the BBC had sought and/or received "professional legal advice on the competition issues relating to:

- (i) 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;
- (ii) Rights holders' possible collective efforts to pressurise public service broadcasters into mandating HD DRM?"

In its response dated 25 August 2011, Rachel Ward (Information and Compliance) confirmed that the BBC "did seek legal advice on our approach to HD content management".

Perhaps not surprisingly, the requestor then, on 25 August 2011, requested disclosure of that legal advice and also copies of BBC documents and/or briefings summarising that advice. On 23 September 2011, Mr Gutteridge wrote to Mr Corrigan informing him that the BBC was withholding this information on the basis that it was subject to legal professional privilege. It is this final decision that I am now asked to review.

Issues Under Review

Although the requestor has asked that the review focus on the foundation of one argument relied on by Mr Gutteridge (that legal professional privilege is perhaps at its strongest where it relates to a public body or quasi-public body),

I do not consider it to be my role to scrutinise specific pieces of reasoning which led to the decision to withhold information. My role is to look at the issue afresh and to decide whether an exemption applies in respect of the information that is sought. I therefore summarise the issue that I am to address simply in the following terms:

Whether the Section 42 (1) exemption (legal privilege exemption) requires that the information be withheld.

Consideration

In undertaking this review, I have considered the provisions of the Act and the guidance issued by the Information Commissioner's Office and the Ministry of Justice on the exemption relating to legal professional privilege. I have also consulted individuals within the BBC, both in its Legal Division and in BBC Distribution, who were responsible for advising the BBC on the content management proposals relating to HD on the DTT platform and for corresponding with OFCOM on this issue.

I have gathered together a very considerable body of information relating to the BBC's proposal for content management on the DTT platform. In many instances, one or more internal lawyers were party to internal communications which fed into the BBC's response to Ofcom's consultation on HD Content Management. However, having spent a very considerable amount of time gathering this information and reviewing it, it is clear that only occasional input was sought or offered by lawyers on competition law issues. It is important to note, also, that there was no set piece formal legal advice that was provided and, further, that the legal issues addressed in this advice do not closely mirror the two issues highlighted by the requestor.

My assessment, therefore, is that legal advice was sought and given in email communications on an ad hoc basis over a number of weeks on a range of issues ("the Advice"), only some of which touch on (but do not mirror) the issues highlighted by the requestor. In addition to the Advice, a document was prepared for possible submission to Ofcom outlining some of the competition and copyright law issues that had been identified. It appears from my enquiries that this separate legal document ("the Draft Submission") was not in the event submitted to Ofcom.

The requestor is seeking the BBC's internal legal advice and also documents/briefings which summarise that advice. I consider that the Advice corresponds with the first category of documents and that the Draft Submission corresponds with the second category.

Notwithstanding the requestor's observation that not all advice given by lawyers is privileged legal advice (based on the House of Lords decision in the Three Rivers Litigation), the wording of the request makes it clear in my view that peripheral advice relating to business issues that may have been provided by lawyers is not what is being sought. The requestor in terms seeks "professional legal advice" on "competition issues relating to two

specific issues". Any presentational and/or commercial advice given by a lawyer would fall outside the scope of the request. I am satisfied, therefore, that the Advice held by the BBC is subject to legal professional privilege.

Section 42 (1) is for qualified exemption and it is therefore necessary to consider the public interest test. In this case, apart from furthering the general public interest in disclosure of information relating to public authorities, it is also possible that the public interest is served by the public understanding the tenor of legal advice that was received may further the BBC's accountability in respect of its actions. However, in the absence of a formal, structured piece of advice on the competition law issues highlighted by the requestor, the disclosure of the Advice would in fact shed little light. I consider that the public interest in disclosure is clearly outweighed in respect of the Advice by the public interest in legal privilege being maintained (recognised by the Information Tribunal in *Bellamy v Information Commissioner* as being a strong public interest). I see no factor in other words which displaces the public interest in an organisation being able in confidence to seek and be given candid legal advice on complex legal issues.

However, slightly different considerations apply to the Draft Submission because, although this can be seen as addressing some of the same issues as the Advice, it was prepared with a view to being provided to Ofcom as representing the BBC's considered position on the legal issues it addressed. It was therefore prepared with a view to any legal privilege attaching to it being waived. This document can be regarded in my view as a BBC document and/or briefing which to a degree summarises the legal advice that was received (albeit, understandably, it does not address the full process by which the BBC came to form its legal position). Whilst legal professional privilege does still apply to this document, it is of a lower order than attaches to the Advice in respect of which, as I have explained, it is vital that organisations can seek, receive and consider legal advice candidly and in confidence.

I also believe that there is some public interest in disclosing the Draft Submission. This is because it may aid public understanding of the legal basis of the BBC's submission to Ofcom on HD Content Management because the Draft Submission provides legal analysis of some of the issues raised by the BBC in its submission. The disclosure of this document does not risk in my view revealing the train of thought of the legal advice that was sought and received and, therefore, does not undermine the confidentiality of that important and sensitive process.

Decision

I endorse the BBC's application of the Section 42(1) (legal professional privilege) exemption so as to withhold the legal professional advice sought and provided to the BBC on the two issues that the requestor has highlighted.

However, I have concluded that the same does not apply to the final version of the Draft Submission document that was prepared with a view to it being provided to Ofcom. Whilst earlier drafts of that document should not be

disclosed because they may reveal the train of the legal advice that was sought and given, the final draft can be seen as setting out the BBC's settled position for external submission. My conclusion, therefore, is that the final draft of the Draft Submission only can be disclosed, redacted to remove any personal or commercially sensitive data in accordance with the Freedom of Information Act and redacted so as to remove information that is not relevant to the request.

David Attfield