

Freedom of Information Internal Review decision

Internal Reviewer	Lawyer – Information Rights, BBC Legal
Reference	RFI20211601 / IR2021096
Date	14 February 2022

Requested information

On 21 October 2021, you requested that the BBC provide the following information under the Freedom of Information Act 2000 ('the FOI Act'):

““[...] a copy of the invitation to tender for the logo redesign as referenced on BBC news <https://www.bbc.co.uk/news/entertainment-arts-58970323>

If the invitation to tender is available online, please provide a link to the invitation to tender.

If an ITT was not issued, please provide any documents outlining the decision why competitive tendering was not required.”

On 18 November 2021, the BBC responded advising that whilst information with the scope of your request was held, it was exempt from disclosure under the commercial prejudice exemption of the FOI Act (section 43(2)). The BBC's decision was as follows:

“We can confirm we hold information relevant to your request. However, we consider this information to be exempt from disclosure under section 43(2) of the Act as disclosure would be likely to prejudice the commercial interests of the BBC or a third party or both.

As section 43 is a qualified exemption, the BBC is required by section 2(2) of the Act to consider the public interest factors both for and against disclosing information in relation to this request. Specifically, we looked at whether in all the circumstances, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Factors in favour of disclosing this information:

- *enables the licence fee payer and the public in general to know whether the BBC is using public money effectively, and whether the BBC is getting value for money when purchasing goods and services;*
- *enables the public to know whether the BBC's commercial activities (including the procurement process) are conducted in an open and honest way.*

Factors for withholding disclosure of this information:

- *prejudice to the negotiating position of the BBC (and/or a third party) in ongoing contractual negotiations; and*
- *weakening of the BBC's bargaining position with suppliers of goods and services (which may in turn weaken a third party supplier's bargaining position with other customers).*

In light of the above, we are, in terms of section 2 of the Act, of the view that in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.”

On 16 December 2021, you sought internal review of the BBC’s decision. In particular, you said that:

“I am writing to request an internal review of British Broadcasting Corporation's handling of my FOI request 'Invitation to tender for logo redesign'.

You have cited Section 43 as grounds for refusing to disclose, however that exemption would only apply to the terms of a contract.

My request was specifically for the Invitation to Tender (which should be available online in line with procurement policy) or any documents detailing why no such ITT was completed.

I fail to see how either a public ITT or documents detailing why no ITT was required could prejudice the negotiating position of the BBC.

As you may be aware, ICO guidance states that when applying a Section 43 exemption, an authority "must show that because [the information] is commercially sensitive, disclosure would be, or would be likely to be, prejudicial to the commercial activities of a person (an individual, a company, the public authority itself or any other legal entity)".

This response does not appear to have included such details, so I am requesting that you conduct an internal review, and, if the exemption is upheld, show how the release would be prejudicial to commercial activities, and of whom.

You have cited the likelihood of prejudice to a third party's commercial interests. As you may be aware, ICO guidance states "When a public authority wants to withhold information on the basis that to disclose the information would or would be likely to prejudice the commercial interests of a third party, it must have evidence that this does in fact represent the concerns of that third party. It is not sufficient for the public authority to speculate on the prejudice which may be caused to the third party by the disclosure."

Please review this decision, and, if the exemption is upheld, demonstrate stronger evidence that this disclosure 'would, or would be likely to' prejudice the concerns of the third party.”

The issues for review

It is open to me in undertaking an internal review to make a fresh decision on the request. I will therefore consider the following issues:

- Whether recorded information relevant to part 1 of your request is held;
- Whether recorded information relevant to part 2 of your request is held; and

- Whether any recorded information that is held with respect to part 2 of the request is exempt under the legal privilege exemption of the FOI Act (section 42).

Decision

Part 1 of your request

With respect to part 1 of your request which asks for a copy of the invitation to tender for the BBC's logo redesign services, please be advised an invitation to tender was not issued and therefore this information is not held under the FOI Act.

Part 2 of your request

With respect to part 2 of your request which asks for “*any documents outlining the decision why competitive tendering was not required*”, please be advised that information relevant to this part of your request is held.

The original decision-maker considered that this information was exempt under the commercial prejudice exemption of the FOI Act. Whilst there is information that is commercially sensitive, I consider that this information can reasonably be excluded from the scope of your request as you have said that you are particularly interested in the reasons as to why an invitation to tender was not published, rather than pricing and other commercially sensitive information.

I have considered whether the recorded information falling within this narrowed interpretation of your request is subject to the legal professional privilege exemption.

Legal professional privilege exemption

Section 42(1) of the FOI Act provides that:

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.

There are several types of privilege within the concept of legal professional privilege, including litigation privilege, legal advice privilege and common interest privilege. Legal advice privilege covers confidential communications between a client and lawyer made for the dominant purpose of seeking or giving legal advice.¹

The information you have requested is captured in a communication between BBC Legal and the BBC business area, as well as a legal and procurement record that was the subject of legal advice

¹ See paragraph [10] of the ICO's guidance on 'Legal professional privilege', accessible via https://ico.org.uk/media/1208/legal_professional_privilege_exemption_s42.pdf.

and that is retained by the BBC for legal and procurement purposes. I am satisfied that this information is therefore subject to legal advice privilege.

Public interest test

As section 42 of the FOI Act is a qualified exemption, it is subject to the public interest test.

In favour of disclosure, I accept that there is a strong public interest in transparency and accountability, particularly with respect to the expenditure of public funds.

Against disclosure, I consider there to be a strong public interest that is inherent in the principle of legal professional privilege as this is fundamental to protecting the confidentiality and openness of communications between lawyers and clients. The ICO has relevantly recognised that:

“The general public interest inherent in this exemption will always be strong 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.”²

In addition, in *Bellamy v Information Commissioner & the Secretary of State for Trade and Industry* (EA/2005/0023, 4 April 2006), the Information Tribunal recognised that:

“... 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.”³

In these circumstances, I do not consider that there are strong countervailing considerations that override, or at least equal, the strong and well-established public interest in protecting legal professional privilege.

For these reasons, I am satisfied that the public interest in maintaining the exemption at section 42 of the FOI Act outweighs the public interest in disclosure. Therefore, in so far as the BBC holds recorded information relevant to why an invitation to tender was not issued in this instance, I am satisfied that this information is exempt under the legal professional exemption of the FOI Act.

² See page 15, https://ico.org.uk/media/for-organisations/documents/1208/legal_professional_privilege_exemption_s42.pdf

³ *Bellamy v Information Commissioner & the Secretary of State for Trade and Industry* (EA/2005/0023, 4 April 2006), http://www.informationtribunal.gov.uk/DBFiles/Decision/128/bellamy_v_information_commissioner1.pdf

Appeal Rights

If you are not satisfied with the outcome of your 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 <https://ico.org.uk/>