



Information Rights

bbc.co.uk/foi bbc.co.uk/privacy

Freedom of Information

Internal Review decision

Internal Reviewer	Lawyer – Legal Workplace and Information Rights
Reference	IR2017072 / RFI20171205
Date	20 October 2017

Requested information

On 10 August 2017, Mr P Fischer (**the “applicant”**) made a request for information under the Freedom of Information Act 2000 (**the “FOIA”**) for the following information:

At the time of your semi-recent policy change re: WOIRA in Scotland (see RFI20150609), you mention that TV Licensing would no longer be honouring WOIRA requests from Scottish residents due to legal advice you had been given about the civil tort of trespass in Scottish law.

However, I would like to know what your policies are, and what advice or guidelines you have recorded, regarding two related acts of law which Scottish occupiers may use to restrict access to their properties.

These acts are:

1) The Land Reform (Scotland) Act 2003. I highlight Section 6 (1)(b)(iv) which defines private homes and gardens as “land over which access rights not exercisable”

2) Article 8 of the Human Rights Act 1998, which provides “right to respect for private and family life” and specifically states that “there shall be no interference by a public authority with this right”

Specifically, with reference to your internal policy documents, guidelines, training manuals, legal counsel records, emails etc., I would like to know:

- i) What information TV Licensing has been given regarding the above two acts in general;*
- ii) How TV Licensing deals with occupiers who instruct that they wish to be excluded from any form of contact with TV Licensing under those acts; and*

iii) If there are any records of occupiers having successfully removed access rights from TV Licensing under those acts

The BBC responded to this request for information on 08 September 2017:

Please note that "TV Licensing" is a trade mark used by companies contracted by the BBC to administer the collection of television licence fees and enforcement of the television licensing system. The majority of the administration of TV Licensing is contracted to Capita Business Services Ltd ('Capita'). Over-the-counter services are provided by PayPoint plc ('PayPoint') in the UK, and by the Post Office in the Isle of Man and Channel Islands. Marketing and printing services are contracted to Proximity London Ltd. Media services are contracted to Media Planning Limited trading as Havas Media UK. The BBC is a public authority in respect of its television licensing functions and retains overall responsibility.

I shall address your requests in turn below.

Request i)

I can confirm under section 1(1) of the Act that we hold recorded information relevant to this part of your request. However, I have determined details pertaining to this advice to be exempt under section 42 of the Act which relates to legal professional privilege. Legal professional privilege covers amongst other things, confidential communications between lawyers and their clients for the purpose of seeking, obtaining and consulting on legal advice and between parties who share a common interest in the confidentiality of the communication. It is important that openness between them is protected and access to fully informed, frank legal advice, including potential weaknesses and counter-arguments, is safe-guarded in order to achieve the administration of justice.

As section 42 is a qualified exemption, I am required under section 2(2) of the Act to assess whether in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

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 exemption at section 42 outweighs the public interest in disclosing the information. I have provided further explanation of my consideration of the public interest test below.

Request ii)

We are satisfied that we are compliant with all relevant legislation and can confirm that we have taken into account the provisions of the legislation you have cited. To reiterate my previous response to your request RFI20171131, the withdrawal of the common law right for TV Licensing's officers to approach properties is not recognised under Scottish law. In England, Wales and Northern Ireland we recognise that the common law right for TV Licensing's officers to visit your property may be withdrawn, but we'll use other methods of detection to check if a licence is needed. We do not recognise this withdrawal in Scotland as different laws apply.

Request iii)

In view of my response to request ii) above, I can confirm that there have been no instances of occupiers having successfully removed access rights under the legislation you have specified.

Why information has been withheld

I am required under section 2(2) of the Act to assess whether the public interest in maintaining the section 42 exemption outweighs the public interest in disclosing the information.

The following factors are in favour of disclosure:

- 1. That 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.*
- 2. That 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.*

I consider that the following factors are in favour of withholding the information:

- 1. The public interest factors in maintaining the exemption centre on the principle of protecting communications between lawyers and clients and those who have a common interest in relation to the legal advice. 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, receiving or consulting on legal advice is a public body or quasi-public body whose decisions have the potential to affect large numbers of people.*
- 2. In order for the advice given to be valuable, it is crucial that the seeking and determination of such advice be carried out with absolute candour. This requires that the persons seeking and where appropriate sharing 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.

3. *The advice remains live and is still being relied upon by TV Licensing, which strengthens the public interest in maintaining privilege at this time.*
4. *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 this instance, the public interest is served by safeguarding openness in all communications between client and lawyer to ensure access to full and frank legal advice.

In light of the above, I am therefore satisfied, in terms of section 2 of the Act, that in all the circumstances of the case, the public interest in maintaining the exemptions cited in each case outweighs the public interest (outlined above) in disclosing the information identified.

Appeal Rights

If you are not satisfied that the BBC has complied with the Act in responding to your request you have the right to an internal review by a BBC senior manager or legal adviser. Please contact us at the address above, explaining what you would like us to review under the Act 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 SK9 5AF. Tel: 0303 123 1113 (local rate) or 01625 545 745 (national rate) or see <http://www.ico.gov.uk/>.

On 29 September 2017 the applicant requested an internal review of the BBC's decision:

I am writing to request an internal review of British Broadcasting Corporation's handling of my FOI request 'TV Licensing policy for dealing with instructions made under the Human Rights Act and the Land Reform (Scotland) Act'.

I asked about information you hold regarding The Land Reform (Scotland) Act 2003. In your reply, you claim "legal professional privilege" as justification for not disclosing that information.

It is my understanding that such legal privilege only covers communications between a client and the lawyer for the purposes of obtaining advice. The courts have previously ruled that when the client is an organisation the "client" is only those people who are authorised to obtain legal advice on its behalf (e.g. in house lawyers, board members or specific committees), not the entire organisation. If legal advice is shared outside the part of the organisation that is the client it loses its privilege.

I would therefore like the information to be disclosed.

A full history of my FOI request and all correspondence is available on the Internet at this address:

https://www.whatdotheyknow.com/request/tv_licensing_policy_for_dealing

Scope of this internal review

The issues I must consider in this FOI internal review are:

Did the BBC apply section 42 (the legal professional privilege exemption) in accordance with the Act? This includes addressing the Applicant's specific issues of:

- a. Why does information attract legal professional privilege, and
- b. Did the BBC consider the strong public interest in disclosure of the information?

Decision

In my view, the BBC correctly applied the exemption at section 42. I have set out my reasoning below.

Analysis

Legal professional privilege

Legal professional privilege (LPP) protects confidential communications between lawyers and clients and it is a fundamental principle of English law. Section 42(1) 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.

In *Bellamy v the Information Commissioner* (EA/2005/0023, 4 April 2006), the Information Tribunal acknowledged that there are two types of privilege within the concept of LPP:

- i. Litigation privilege; and
- ii. Legal advice privilege.

Advice privilege applies where no litigation is in progress or contemplated. It covers confidential communications between the client and lawyer made for the dominant purpose of seeking or giving legal advice.

Litigation privilege applies to confidential communications made for the purpose of providing or obtaining legal advice about proposed or contemplated litigation. There must be a real prospect or likelihood of litigation, rather than just a fear or possibility. This means litigation privilege can cover information which is created prior to a claim being issued or legal proceedings commencing in a court.

I have reviewed the information provided to the Applicant and the withheld information. Taking into account the definition of LPP and the Information Commissioner's guidance¹, I am satisfied that the relevant information was passed by BBC Legal to their clients or relevant third parties on a privileged and confidential basis to consider the legal issues. This was either the dominant purpose of providing legal advice *OR* in the contemplation of litigation. As mentioned above, advice privilege can apply to confidential communications between the client and lawyer for the dominant purpose of seeking or giving legal advice. The BBC Television Licence fee unit were seeking legal advice in regards to considering or exercising their legal rights in respect of WOIRA in Scotland. Advice privilege can be applied to communication between a BBC Lawyer and their client e.g. the Television Licence Unit advisor² or a BBC Lawyer and external counsel³. LLP can be applied to advice received by a team of employees such as the Television Licence Unit, working on the same matter rather than one particular employee⁴.

I am satisfied that the information withheld is protected by LPP, and section 42(1) of the FOI Act applies.

Public Interest Test

Section 42(1) exemption is qualified, so I must consider the public interest in disclosure.

As recognised in the BBC's response, I agree that there is a strong public interest in promoting the transparency and accountability of the BBC for the quality of its decision making in the handling of matters. It is important that the public knows that decisions have been made on the basis of good quality legal advice, and disclosure may become part of that accountability.

Despite the factors in favour of disclosing the information, I consider that there is a very strong public interest in preserving the ability of the BBC to obtain full and frank advice from its legal advisers to enable it to consider its position in private, something that is fundamental to the administration of justice. Furthermore, the disclosure of the requested information would prejudice the BBC's case in any potential litigation, undermining its position, and therefore actively disadvantaging the licence fee payer.

¹ https://ico.org.uk/media/for-organisations/documents/1208/legal_professional_privilege_exemption_s42.pdf

² Three Rivers District Council and others v Governor and Company of the Bank of England [2004] UKHL 48

³ Calland v Information Commissioner & the Financial Services Authority (EA/2007/0136, 8 August 2008)

⁴ Three Rivers District Council & Ors v The Governor & Company of the Bank of England (No.5) [2003] EWCA Civ 474

As referenced in the BBC's original response, I consider that the Information Tribunal's decision in *Bellamy* carries significant weight, which held 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 interest....it is important that public authorities be allowed to conduct a free exchange of views as to their legal rights and obligations with those advising them without fear of intrusion, save in the most clear case..."

As there is such an overwhelming strong public interest in maintaining the principle of LPP, which (as mentioned above) is fundamental to the administration of justice, I agree with the BBC's original decision that the public interest in maintaining the exemption outweighs the public interest in releasing the information.

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/>