



Appeal Number: EA/2022/0069

Neutral Citation Number: [2024] UKFTT 00754 (GRC)

**First-Tier Tribunal
(General Regulatory Chamber)
Information Rights**

Between:

Andrew Webb

Appellant

and

The Information Commissioner

First Respondent

and

British Broadcasting Corporation

Second Respondent

Date and type of hearing: 23 June and 5 September 2023 on GRC CVP remote hearing rooms; panel deliberations on 26 October and 2 November 2023; Adjournment and Case Management Directions on 22 November 2023 updated on 14 December 2023; final hearing of evidence and submissions held in person on 18 & 21 June 2024; panel deliberations on 24 July 2024 and 9 August 2024.

Panel: Brian Kennedy KC, Susan Wolf, and Pieter de Waal.

Decision: The Tribunal dismiss the appeal.

REASONS

1. A previous substantive hearing in this appeal took place on 23 June and 5 September 2023. Following that hearing, the Tribunal issued a Notice of Adjournment and Directions dated 22 November and updated on 14 December 2023 (“the Directions”).

2. The Directions set out the details of the Appellant’s request for information made to the BBC; the chronological background to the Appellant’s appeal; the relevant statutory framework; the Appellant’s grounds of appeal and the Respondents’ respective responses; submissions and evidence advanced by the parties leading up to and at the hearings of 23 June and 5 September 2023; and the Tribunal’s reasons for making the Directions. The content of the Directions is not repeated here, but they should be read in conjunction with this Decision.

3. In summary, the Directions concluded that:
 - (a) The Appellant’s request made under the Freedom of Information Act (FOIA) is for information that is of considerable public interest and relates to an issue in which the BBC has already been subject to an independent enquiry; and

 - (b) The hearing held up to that point had established that:

The BBC had failed to identify the scope of the Appellant's request correctly, properly or fairly;

The BBC had conducted inefficient, ineffective and inadequate searches; and

The BBC's searches had been piecemeal, disjointed and delayed.

4. The Directions required the BBC to:

(a) Disclose to the Appellant all of the information that was produced following the BBC's searches up to that point. This excluded information in respect of which the s.42 FOIA exemption was claimed by the BBC.

(b) Consider the Appellant's information request afresh and to provide a fresh response to it.

(c) In doing so, to undertake appropriate searches for any additional information (not covered by (a) above) that may be held by the BBC within the scope of the request and to comply with its duty under s.16 FOIA by giving reasonable and appropriate advice and assistance to the Appellant with a view to ensuring that the scope and focus of the request was accurately interpreted and understood.

(d) Identify information within the scope of the request in respect of which the BBC asserted that the s.42 exemption applied and to make

its relevant submissions, also in respect of the public interest test. The Appellant would be given an opportunity to reply.

5. The Tribunal required this process to be concluded with the utmost expedition and it reminded the parties of their obligations under Rule 2 of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009.
6. The parties co-operated to progress matters in accordance with the Directions and, having conducted further searches, on 30 January 2024 the BBC disclosed to the Appellant a bundle of documents (with some redactions) comprising 10,336 pages in approximately 20 lever arch folders. A closed version of the documents (without redactions) was provided to the Tribunal.
7. For purposes of the final hearing held on 18 and 21 June 2024, the only issues that remained related to the BBC's application of exemptions under FOIA to withhold certain information. The four exemptions relied upon are: (i) s.40 FOIA (third-party personal data); (ii) s.42 FOIA (information protected by legal professional privilege); (iii) s.37 FOIA (royal communications); and (iv) s.7(1) read with Part VI of Schedule 1 FOIA (the derogation in respect of material held by the BBC for the purposes of journalism).
8. The Appellant helpfully confirmed at the hearing in June 2024 that he takes no substantive point on the BBC's application of the royal communications exemption or the derogation and maintains no challenge to the application of either of these provisions. The Tribunal has itself considered the relevant information withheld by the BBC

under the exemptions in s37 and the derogation under Part VI of Schedule 1 FOIA, and it is satisfied they have been properly applied.

9. By way of material background to the Appellant's information request, during the hearings of the appeal we were referred by both parties to the "Dyson Report", a report published by the BBC in May 2021 (shortly before the Appellant's information request was made) following an independent investigation by the Rt Hon Lord Dyson into the circumstances around the 1995 Panorama interview with Diana, Princess of Wales. See full report at: - <https://downloads.bbc.co.uk/aboutthebbc/reports/reports/dyson-report-20-may-21.pdf>.

10. The following extracts from the executive summary of the report provide important context and background to the Appellant's information request and to this appeal. (The numbers in square brackets refer to paragraph numbers within the Dyson Report.)

"The interview with HRH Diana, Princess of Wales that was aired on 20 November 1995 was a sensational triumph for the BBC and Martin Bashir, both nationally and internationally [151]. Whatever reservations she may have had about it later, Princess Diana was pleased with the interview at the time. By early to mid-August 1995 at the latest, she was keen on the idea of a television interview. She would probably have agreed to be interviewed by any experienced and reputable reporter in whom she had confidence even without the intervention of Mr Bashir [24], [25] and [148]".

"In this Report, I describe in considerable detail the way in which Mr Bashir commissioned fake bank statements from Matt Wiessler [59] to [70]. These documents purported to show payments by Penfolds Consultants and News International into the bank account of Alan Waller, a former employee of Earl Spencer, Princess Diana's brother. Mr Bashir showed the documents to Earl Spencer on a date early in September 1995. Mr Wiessler is an entirely

reputable graphic designer who did freelance work for the BBC. Nobody has criticised him for accepting the commission.

"A few days later, probably on 14 September, Mr Bashir also produced to Earl Spencer other bank statements which, he said, showed payments into the account of Commander Patrick Jephson (Princess Diana's Private Secretary) and Commander Richard Aylard (the Prince of Wales' Private Secretary). It is likely that these statements were created by Mr Bashir and contained information that he had fabricated [56]."

"By showing Earl Spencer the fake Waller and Jephson/Aylard statements and informing him of their contents, Mr Bashir deceived and induced him to arrange a meeting with Princess Diana [105] to [117]. By gaining access to Princess Diana in this way, Mr Bashir was able to persuade her to agree to give the interview. This behaviour was in serious breach of the 1993 edition of the BBC's Producer Guidelines on straight dealing [135] to [142] and [147]."

"On seeing the interview on screen, Mr Wiessler immediately made the connection between the Waller bank statements and the interview. He was concerned that he might have played a role in obtaining the interview by deception [152]."

"Acting responsibly and appropriately, he reported his concerns to the BBC. A detailed account of how the BBC responded is set out at [149] to [182]. The matter was eventually referred to Tim Gardam (Head of Weekly Programmes in BBC News and Current Affairs). Mr Gardam's investigation culminated in a meeting between himself (and two other senior BBC persons) and Mr Bashir [171]. Mr Bashir gave them an account of the faking of the documents. Crucially, he told them that he had not shown them to anyone. They accepted that he was telling them the truth but asked him to provide independent evidence that Princess Diana had not been shown the documents. Within a few hours, Mr Bashir obtained a note dated 22 December 1995, signed by her which supported what he had said. I am satisfied that the Diana note is a genuine document [150]."

Mr Gardam did not then know that Mr Bashir had lied when he said that he had not shown the documents to anyone and did not know that he had in fact shown them to Earl Spencer in September 1995. Mr Bashir was to repeat this lie twice in March 1996. It was only on 23 March 1996 that Mr Bashir admitted that he had lied [190].

Mr Gardam did not consider the possibility that Mr Bashir secured the interview with Princess Diana indirectly by showing the documents to Earl

Spencer [179]. In the light of what he knew at the time (and in particular the Diana note), I do not consider that it would be reasonable to criticise Mr Gardam for failing to ask Earl Spencer for his version of the facts [181]. But Mr Gardam too readily accepted that Mr Bashir was telling the truth about the fake documents [182].

"There were rumours in early 1996 that something had been amiss about the interview. The Mail on Sunday took the lead in carrying out further investigations - Letter from Princess Diana to Martin Bashir dated 22 December 1995 (Annex 3, pages 20-22) which led to Mr Bashir admitting to Mr Gardam that he had shown the fake Waller statements to Earl Spencer. The BBC now decided that it must find out the entire truth behind Mr Bashir's activities [183] to [193]."

"Mr Bashir was interviewed by Tim Suter (Managing Director of Weekly Programmes in BBC News and Current Affairs) and Richard Peel (Head of Communications and Information) on 28 March 1996 [194] to [196]. The conclusions that were reached after this meeting were expressed in a letter to Mr Bashir dated 4 April 1996, which was drafted by Mr Suter and agreed by Tony Hall (now Lord Hall, then Managing Director of News and Current Affairs at the BBC) but probably not sent [197] to [200]. One of their conclusions was that Mr Bashir's dealings with Princess Diana in securing the interview were absolutely straight and fair; but that his use of some material in the early preparation of the programme was in breach of the BBC Producers' Guidelines on straight dealing and justified a reprimand."

"This conclusion was not justified, even on an interim basis. It was based in large part on the uncorroborated assertions of Mr Bashir. This error was compounded by their failure to approach Earl Spencer once they knew that Mr Bashir had shown the Waller statements to him [200]."

"In early April 1996, the press continued to ask searching questions about the methods used by Mr Bashir to secure the interview. The BBC gave evasive answers to these questions [201] to [209]. On 7 April 1996, The Mail on Sunday published an article which asked whether Mr Bashir had intended to show the fake Waller statements to Earl Spencer and thereby convince him that he (Mr Bashir) was the right person to interview Princess Diana [203].

"Suggestions by the press that the Princess Diana interview had been secured by deception persisted [223]. Lord Hall recognised that it was important for the BBC to conduct a full inquiry into what Mr Bashir had

done and why he had done it and to resolve the matter once and for all [227]. To that end, he arranged to meet Mr Bashir together with Anne Sloman (successor to Mr Gardam). The meeting took place on 17 April 1996. Mr Bashir was unable or unwilling to give Lord Hall and Mrs Sloman any credible explanation of why he had commissioned the faking of the Waller statements and why he had shown them to Earl Spencer."

"They did not approach Earl Spencer to ask him for his version of what had happened. They accepted the account that Mr Bashir gave them as truthful. The investigation conducted by Lord Hall and Mrs Sloman was woefully ineffective for the following reasons [259] to [282]:

(i) they failed to interview Earl Spencer: this was a big mistake and the points they (and Lord Birt, the former Director-General) have made to justify their not doing so are rejected [266] to [275];

(ii) they did not scrutinise Mr Bashir's account with the necessary degree of scepticism and caution: they knew he had lied three times when he said that he had not shown the fake statements to Earl Spencer (these were serious lies for which he gave no explanation); they knew that he been unable to provide any credible explanation of why he had commissioned the fake statements (which was a serious breach of the BBC's Producers' Guidelines on straight dealing); and they knew that Mr Bashir's account of what happened was largely uncorroborated [276] and [277]; and;

(iii) without knowing Earl Spencer's version of the facts; without receiving from Mr Bashir a credible explanation of what he had done and why he had done it; and in the light of his serious and unexplained lies, Lord Hall could not reasonably have concluded, as he did, that Mr Bashir was an honest and honourable man [278] and [279]."

"Without justification, the BBC fell short of the high standards of integrity and transparency which are its hallmark by (i) covering up in its press logs such facts as it had been able to establish about how Mr Bashir secured the interview [201] to [298] and [300]; and (ii) failing to mention Mr Bashir's activities or the BBC investigations of them on any news programme [291] to [300]."

11. On 4 June 2021 the Appellant requested information from the BBC in the following terms:

"I would like to request all documents that exist relating to email or other correspondence between BBC managers and the BBC Information Office, between September 2020 and November 2020, which has any bearing on the November 1995 Panorama programme with the Princess of Wales.

I can see from your published list of exclusions, below, that this correspondence is not exempt from disclosure and would therefore be glad to receive it at your earliest convenience.

<https://www.bbc.co.uk/foi/about/exemptions>

For your information, we were contacted by [named individual] at the BBC on 19 10 2020 to say that the BBC IO would shortly be writing to us, indicating that she at least had some sort of advance knowledge of your intentions.

It is the correspondence underpinning that kind of knowledge which we would be most interested to see."

12. In advance of the final hearing of this appeal the BBC submitted a detailed open witness statement made by a senior official who is also its most senior lawyer. It also provided a closed statement made by the same witness, dealing with references to information withheld from the Appellant by the BBC under the FOIA exemptions. At the hearing the Tribunal and the Appellant had the benefit of hearing evidence from the witness who was also questioned by the Tribunal and by the Appellant on a range of issues relevant to the appeal, including the information searches undertaken by the BBC in response to the Appellant's information request and the searches undertaken following the Tribunal's Directions. The witness was also able to give evidence and to be questioned about the BBC's application of exemptions to withhold information and, in the case of the s.42 FOIA exemption, about its assessment of the public interest balance. At the hearing the Tribunal also had the benefit of closed evidence given by the witness and closed submissions made on behalf of the BBC, gists of which were given to the Appellant in the open part of the hearing.

13. As per the authorities in *West London Pipeline and Storage Ltd v Total UK Ltd* [2008] 2 CLC 258, at §86 8 [CA/5/124] (endorsed in *Re Edwardian Group Ltd* [2017] EWHC 2805 (Ch), at §42 [CA/11/217] and *In Re RBS (Rights Issue*

Litigation) [2017] 1 WLR 1991, at §108 [CA/12/245]), the conventional approach is to scrutinise witness evidence carefully but not to go behind it unless it is reasonably certain that it misrepresents matters, demonstrates a misunderstanding of relevant documents, or is otherwise incorrect or incomplete. On that basis the Tribunal was assisted by the witness's written and oral evidence in both the open and closed parts of the hearing, particularly in circumstances where the closed material (i.e. material in respect of which exemptions were claimed by the BBC) is voluminous and it would have been manifestly disproportionate (and placed an excessive burden on the Tribunal) to review each and every individual document over which exemptions were claimed.

14. The Tribunal's assessment of the BBC's witness evidence is that it was given with candour, credibility and reliability. Sincere apologies were also made by the witness on behalf of the BBC (in open forum) for failures on the part of the BBC towards the Appellant and other parties.

15. The witness confirmed that they had examined all documents in respect of which exemptions were claimed by the BBC (in particular under s.40 and s.42 FOIA) to ensure that the exemptions were accurately and appropriately applied. In the closed part of the hearing the Tribunal was able to scrutinise and test the BBC's application of the exemptions with the witness, with specific and direct reference to the closed material. On the basis of the evidence and the Tribunal's scrutiny of the evidence with specific reference to the closed material, for the

reasons explained further below the Tribunal is satisfied that the exemptions in s.40 and s.42 FOIA were appropriately applied to the scope of information withheld by the BBC under those exemptions.

16. The Appellant raised concerns about the BBC's reliance on the exemptions: (i) he has overarching concerns about whether all of the information in respect of which the s.42 exemption was applied is indeed information that is subject to legal professional privilege, (ii) he is concerned about the BBC's candour generally, and more specifically that the BBC potentially sought to mislead in a communication published on 19 October 2020, (iii) he asserts that the BBC lied about Mr Bashir's health condition and that the BBC attempted to 'frame' Earl Spencer by means of the 19 October 2020 communication. He also submitted that in view of these and other factors the public interest weighs in favour of disclosing the withheld information, even if it is subject to legal professional privilege.

17. To the extent that the Appellant may consider that the BBC has destroyed or concealed any records, the Appellant accepted that this is not a matter for the Tribunal but rather a matter to pursue with the Information Commissioner or the Director of Public Prosecutions under s.77 FOIA.

18. In respect of the Appellant's first concern about the breadth and scope of the closed material, the Tribunal is satisfied by the open and closed evidence that the information in respect of which the s.40 FOIA

exemption was applied is personal data and that the information in respect of which the s.42 FOIA exemption was applied is protected by legal professional privilege.

19. The Tribunal accepts that the Appellant's further concerns are relevant to the public interest test applicable to the exemption in s.42 FOIA (i.e. whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information) and relevant in the context of s.40 FOIA read with the UK General Data Protection Regulation (i.e. whether disclosure of the withheld personal data would be lawful because the disclosure is necessary for the purpose of legitimate interests pursued by the Appellant, except where such interests are overridden by the interests or fundamental rights and freedoms of the relevant data subjects which require protection of their personal data).

20. In respect of personal data withheld by the BBC under the exemption in s.40 FOIA, as mentioned the Tribunal is satisfied that the withheld information is personal data and that the exemption was applied correctly and appropriately. More specifically, having considered the withheld personal data and the BBC's evidence in respect of it, the Tribunal considers that disclosure of the personal data would contravene the data protection principle that personal data must be processed lawfully (Article 5(1) of the UK GDPR and in s. 34(1) of the Data Protection Act 2018). The conditions for lawful processing of personal data are set out in Article 6 UK GDPR. The only condition that is potentially relevant in this case is that the processing of personal data is lawful if it is necessary for the purposes of pursuing legitimate interests, except where such interests are overridden by the interests

or fundamental rights and freedoms of the data subjects which require protection of their personal data.

21. Accepting that the Appellant's information request broadly pursues a legitimate interest, the Tribunal is not persuaded that public disclosure *of the withheld personal data is necessary* for the purposes of that legitimate interest. That is because disclosure of the personal data in question would not actually help to further the legitimate interest pursued by the Appellant; and the legitimate interest may be pursued in less intrusive ways including disclosure of the remaining, unredacted parts of the relevant documents.

22. In respect of the public interest test applicable to the exemption in s.42 FOIA, the Tribunal accepts that the general public interest inherent in this exemption will always be a strong factor due to the importance of the principle which supports the protection of legal professional privilege. Safeguarding the protection of communications between a client and their lawyer/s is fundamental to ensuring access to full and frank legal advice, and to the administration of justice. The Tribunal agrees with the approach in *Crawford v Information Commissioner & Lincolnshire County Council EA/2011/0145* (also relied on by the BBC in submissions made on its behalf):

"Our starting point, therefore, is that the exemption is qualified, not absolute, but that Mrs Crawford must show clear, compelling and specific justification that at least equals the public interest in protecting the information in dispute..."

23. Put similarly in *Bellamy v the Information Commissioner and the Secretary of State for Trade and Industry (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."

24. However, the Tribunal also agrees with the decision in *Boyce v IC and PHSO (EA/2019/0032)* that the public interest in disclosure of information subject to legal professional privilege does not have to be exceptional:

"In our view every case must be considered on its own merits, and it would be an error to seek to limit the application of the public interest test in relation to LPP material so as to give rise to a presumption that only in very exceptional cases would the public interest be in favour of disclosure."

25. While the Tribunal accepts that broadly there is a significant public interest in the privileged information requested by the Appellant, also in the wider context of the factual events preceding the Appellant's information request, having examined the closed material and heard the BBC's evidence in respect of it, the Tribunal does not consider that there is clear, compelling and specific justification in the public interest which equals the public interest in maintaining the exemption applicable to privileged information. On the witness evidence provided at the hearing, where the witness averred to having seen the relevant documents, the Tribunal are satisfied this is not a case where the withheld information reveals any form of wrongdoing, malpractice or maladministration or other form of dishonesty or, using the examples given by the Tribunal in *Mersey Tunnel Users' Association (MTUA) v Information Commissioner and Merseytravel (EA/2007/0052)*, a case where advice was obtained with a view to helping a public authority to act

outside the law or where advice was given in breach of a lawyer's professional and ethical obligations.

26. In balancing the public interest in maintaining the s.42 exemption against the public interest in disclosure of the withheld information, the Tribunal also takes into consideration and gives significant weight to the comprehensive, independent and publicly available report of Lord Dyson which describes in very certain terms the failures, evasiveness, ineffectiveness and cover-up on the part of the BBC (although not in relation to any communications between the BBC and its lawyers) and ultimately concludes that 'without justification the BBC fell short of the high standards of integrity and transparency which are its hallmark'.

27. The Tribunal also takes into account that the BBC published and accepted Lord Dyson's findings in full and apologised unconditionally.

28. The Tribunal considers that the public interest in transparency and accountability is to a significant extent met by the publication of Lord Dyson's report and accepts the BBC's submission (supported by credible evidence) that the public interest is further met by:

(a) The public information that the BBC already provides regarding the work of its Information Rights team and further information provided in the course of this appeal relating to the work of that team (directly relevant to the Appellant's' information request).

(b) The BBC's compliance with its Charter obligations and general commitment to maximising transparency and accountability.

- (c) The availability of robust complaint mechanisms publicised on the BBC's website in respect of any wrongdoing alleged by members of the public, which – in addition to the complaints procedure under s.77 FOIA – provides the Appellant (and others) with an avenue for recourse in respect of allegations of wrongdoing.
- (d) The BBC's internal review of the decision to appoint Mr Bashir in 2016 as its Religious Affairs Correspondent.
- (e) A subsequent DCMS Select Committee hearing that heard evidence from current and former BBC executives.
- (f) The further, extensive disclosures made by the BBC in the course of this appeal including the documents disclosed in January 2024 following the Tribunal's Directions.

29. Taking into account the disclosures now made and the nature and scope of the privileged information withheld by the BBC under s.42 FOIA, and the witness evidence before us, the Tribunal does not consider that disclosure of the privileged information would significantly aid, advance or add to any public interest in transparency or accountability. Accordingly, the Tribunal determines that in all the circumstances of the case the public interest in maintaining the s.42 exemption outweighs the public interest in disclosing the withheld privileged information. Accordingly, the appeal is dismissed.

30. The Tribunal deems it necessary to conclude with observations on two aspects relating to the conduct of this appeal and to the BBC's overall approach to its handling of the Appellant's information request made in June 2021.

31. First, in open hearing the Appellant was criticised for being misleading and for making unfounded allegations against the BBC. It was also suggested that he had been less than honest in his dealings with the Tribunal in the course of his appeal. In response, the Appellant says:

"Without getting drawn into semantics, every allegation I have made is at least founded on credible evidence and I stand by them. I have pursued a long career in journalism and have approached this matter in exactly the same way as I would any other inquiry. Using detailed research, informed and I hope intelligent analysis, to arrive at a story which can be both fact-checked and pass legal muster."

32. As with whistleblowers exercising their statutory rights with appropriate protections, persons seeking to legitimately exercise their statutory rights of access to information held by public authorities should not be criticised for or discouraged from doing so. The Information Commissioner's guidance serves as a timely reminder that public authorities subject to FOIA, including the BBC, spend money collected from taxpayers and make decisions that can significantly affect many people's lives. Access to information is instrumental in ensuring accountability and allows public debate to be better informed. The Tribunal accepts entirely the good faith in which this appeal has been pursued and conducted by the Appellant on a legitimate basis and in the public interest.

33. Second, the previous Directions made by the Tribunal alluded to a pattern of errors and inconsistencies on the part of the BBC in its handling of the Appellant's information request of June 2021 and in the BBC's dealings with the Appellant as a public authority who is subject to FOIA. Although the BBC has accepted and apologised for its mistakes, its errors significantly contributed to the Appellant's scepticism of the BBC which is not without cause.

34. As referenced in the Directions, the evidence suggests that the BBC never conducted an initial search upon receipt of the Appellant's information request and at first it applied a blanket exemption to documents that had not been properly searched or reviewed. It also made insufficient searches at the Internal Review stage. When it subsequently did another search through its Information Security team using search parameters based on the wording of the Appellant's request, it found 3,228 documents. Of these, it disclosed about 3%. It was not until January 2024, two and a half years after the information request was made and only after the BBC was directed by the Tribunal to conduct proper searches, when the BBC produced anything resembling a reliable search and disclosure (comprising approximately 20 folders with more than 10,000 pages).

35. Succinctly put, the journey on which the BBC has taken the Appellant (and then the Tribunal) has been arduously and burdensomely long and hard. It has also come at a disproportionate cost - not only in terms of significant delay to the administration of justice but also in terms of expense to the public purse and to public confidence in the ability of the public service broadcaster to deal with and answer legitimate information requests in a responsible, accountable and adequate way.

The Appellant is to be commended for patiently and assiduously persevering in the pursuance of his appeal until this ultimate conclusion.

Brian Kennedy KC

9 August 2024