

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 12 February 2021

**Public Authority:** British Broadcasting Corporation (BBC)

**Address:** Broadcasting House

Portland Place

London W1A 1AA

### **Decision (including any steps ordered)**

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1. The complainant requested information from the BBC about how much it had spent in defending an equal pay claim brought by the journalist Samira Ahmed. The BBC withheld the information, citing the exemption at section 43(2) of the FOIA: prejudicial to commercial interests. Belatedly, it stated that it also considered that part of the requested information comprised the personal data of external legal counsel and was additionally exempt under section 40(2) of the FOIA: third party personal data.
2. The Commissioner's decision is that, while the exemption at section 43(2) of the FOIA is narrowly engaged, the public interest favours disclosure of the information. She has also decided that the exemption at section 40(2) is not engaged in respect of Counsel's fees, since it would be lawful, fair and transparent to disclose it.
3. The Commissioner requires the BBC to take the following step to ensure compliance with the legislation.
  - Disclose the requested information to the complainant.
4. The BBC must take this step within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act, and may be dealt with as a contempt of court.

## Request and response

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5. On 10 January 2020, the complainant wrote to the BBC and requested information in the following terms:

*"How much in total did the BBC spend defending the Samira Ahmed v BBC equal pay case? Please give a full breakdown of this total".*

6. On 6 February 2020, the BBC responded and confirmed that it held the information. However, it considered that it was exempt from disclosure under section 43(2) of the FOIA: prejudicial to commercial interests, and that the balance of the public interest favoured maintaining the exemption.
7. Following an internal review, the BBC upheld its position.

## Scope of the case

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8. The complainant contacted the Commissioner on 18 April 2020 to complain about the way his request for information had been handled.
9. Since she began her investigation, the Commissioner is aware that the BBC has disclosed to the Digital, Culture, Media and Sport (DCMS) Committee that it had, as at January 2021, spent £1,121,652 on external lawyers' fees in defending equal pay and race discrimination cases against its own staff. This letter was published and widely reported on, and has prompted calls by MPs for an inquiry into the level of costs.
10. However, the role of the Commissioner in this case, which concerns the cost of defending a specific equal pay claim, is to consider the BBC's position at the time it was handling the request; that is, between January and April 2020. Her remit is to consider whether the BBC correctly considered that the information was exempt at that date.
11. The withheld information in this case comprises (a) the total amount spent on legal professionals as at 28 January 2020 and (b) a breakdown of those costs. The BBC has broken the costs down as follows:
- External law firm: [amount withheld]
  - Counsel (paid): [amount withheld]
  - Counsel (invoiced): [amount withheld]

12. During the course of the Commissioner's investigation, the BBC introduced a further exemption, in addition to section 43(2). It considered that the parts of the requested information which relate to Counsel (both "paid" and "invoiced") comprised the personal data of the relevant legal counsel; that is, individual barristers. It considered this information to be exempt under section 40(2) of the FOIA – third party personal data.
13. This notice considers whether the BBC correctly withheld the requested information under the exemption at section 43(2) and/or section 40(2) of the FOIA.
14. Since the BBC considers all of the information to be exempt under section 43(2), the Commissioner has considered this exemption first.

## Reasons for decision

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### Section 43(2) – prejudicial to commercial interests

15. Section 43(2) of the FOIA states that information is exempt from disclosure if its disclosure would, or would be likely to, prejudice the commercial interests of any person, including the public authority holding it. It is a qualified exemption and is, therefore, subject to the public interest test.
16. As the wording sets out, the exemption can be engaged either because disclosing the information *would* prejudice commercial interests, or on the lower threshold that disclosure *would be likely* to prejudice those interests.
17. In this case, the BBC considered that disclosure of the requested information *would be likely* to prejudice both its own commercial interests and those of its lawyers.
18. Following the Information Tribunal in *John Connor Press Associates Limited v The Information Commissioner* (EA/2005/0005), "*would be likely*" is taken to mean that there has to be a real and significant risk of the prejudice arising: the Commissioner must be satisfied that the prejudice would be more likely to occur than not.
19. In a letter to the Commissioner sent during the course of her investigation, in November 2020, the BBC argued: "*there are several ongoing Employment Tribunal matters as at the present date. Whilst the Employment Tribunal matter that is the subject of this FOIA request has been concluded, the BBC is likely to have a continuing need in the*

*foreseeable future to obtain the same, or similar, legal services from external law firms and counsel for dealing with these ongoing matters”.*

20. The BBC also stated that:

*“... different law firms and counsel could be used for future claims and proceedings, and... fees are negotiated on an individual basis for each matter with the respective law firms and counsel. In these circumstances, there is a real risk that disclosure of detailed costs information could undermine the BBC’s ability to negotiate fees for the provision similar services on a fair and equal footing in the future. This is because the withheld information could be used by legal professionals bidding for work in future negotiations to infer what the BBC is willing to pay for similar services. This information could be used to determine a starting point for negotiations, and ultimately this would impact the BBC’s ability to enter negotiations on an equal footing and obtain the best value for public money.”*

21. With regard to the commercial interests of any relevant third parties – in this case, a firm of solicitors and individual barristers (Counsel) – the BBC explained that the name of the firm and the identity of the barristers was in the public domain. Since other information, such as the length of the hearing, was also in the public domain, the BBC considered that disclosure of the breakdown of the requested information would potentially enable the public to work out the details of what the third parties had charged for their services in this case. It considered that this would be likely to prejudice the third parties’ position when they were negotiating their fees for providing their services in future.

22. Specifically, the BBC argued that *“This disclosure would undermine the competitive position of those external firms and counsel as other firms or counsel may pitch their rates below that of those firms in future cases. Arguably, similar to any competitive process, this could lead to firms entering a bidding war for BBC legal work.”*

23. The BBC considered that this would then be likely to reflect back on its own commercial position since *“this would in turn undermine the BBC’s relationships with external firms and counsel by providing previously confidential information.”*

24. The Commissioner has considered whether the exemption is engaged.

25. For section 43(2) to be engaged three criteria must be met:

- (i) The actual harm which the public authority alleges would, or would be likely to, occur if the withheld information was disclosed has to relate to commercial interests; and

- (ii) The public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the withheld information and the prejudice to those commercial interests; and
  - (iii) Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met; in this case, whether there is at least a real and significant risk of the prejudice occurring.
26. With regard to the first criterion, the Commissioner has considered the nature of the information. She is satisfied that it is commercial in nature, since it comprises the amount spent by the BBC on legal professionals in engaging their services.
  27. The Commissioner is satisfied that the BBC and the legal professionals have a commercial interest in the requested information, which relates to the procurement and delivery of services in a specific case. She is satisfied that prejudice envisaged by the BBC (prejudice to future negotiation by the various parties) relates to these commercial interests.
  28. Accordingly, the Commissioner is satisfied that the first criterion for the exemption to be engaged is met with regard to the nature of the information.
  29. The Commissioner notes that the BBC explained that it anticipates engaging legal services in future for a range of services, including similar work on other employment cases, and not necessarily from the same legal professionals. It is also, undoubtedly, the case that legal professionals will seek to offer their services to the BBC in future.
  30. The Commissioner therefore accepts that a causal link potentially exists between the disclosure of the information under the FOIA and the envisaged prejudice being likely to occur (the second criterion).
  31. The third criterion requires that the disclosure of the information under the legislation *would be likely* to lead to the envisaged prejudice occurring. As stated above, this requires the Commissioner to accept that the prejudice is more likely than not to occur.
  32. Although the Commissioner doubts that the BBC would be severely prejudiced in being able to negotiate for the services of legal professionals at a competitive rate in the future, or that legal professionals would be severely prejudiced in future negotiations, she has an established position relating to the procurement and delivery of the type of professional services under consideration here, where the need for future procurement/delivery is reasonably certain.

33. She therefore accepts that the disclosure of the information may have some impact on future negotiations, for all parties in this case, and therefore accepts that the envisaged prejudice narrowly reaches the threshold of being likely to occur.
34. Having accepted that the exemption at section 43(2) of the FOIA is engaged, the Commissioner has gone on to consider the public interest test.

### **The balance of the public interest**

#### *The BBC's position*

35. The BBC acknowledged that, at the time it was dealing with the request, there was *"a public interest in public awareness of the way the BBC has responded to equal pay cases and the amount of public money the BBC has spent on litigation"*. It also acknowledged the importance of Article 12 of its own Royal Charter, which establishes an expectation of transparency.
36. It argued that it places/had placed into the public domain some information which goes some way towards meeting the expectation of transparency: it had published a statement about the relevant tribunal decision (on 10 January 2020), and also routinely includes information about legal expenses, including relating to litigation claims, in its annual reports.
37. However, with regard to the specific legal costs in this case, the BBC considered that the balance of the public interest fell in the exemption being maintained. In particular, it considered that, in order to fulfil its duty, it is obliged to ensure that it can negotiate competitive rates to secure legal and professional services, and that this, in itself, is a public interest factor carrying significant weight.
38. Specifically, it argued: *"It is particularly important for the BBC to safeguard commercially sensitive information as the BBC is funded by the TV-licence fee payer and must take proportionate and reasonable measures to ensure the monies accrued through levying the fee are spent carefully. This must involve safeguarding important commercial relationships including with external legal counsel."*
39. The BBC also argued that its relationships with legal professionals going forward may be damaged by disclosure, since there is an expectation that fees are a confidential matter. It considers this a public interest factor in maintaining the exemption, since there is a public interest in its being able to engage appropriate professional services in future.

40. The BBC concluded that the balance of the public interest lay in the exemption being maintained.

*The complainant's view*

41. The complainant considered that the amount spent by the BBC in this case is a matter of importance to the public, and that the public interest in disclosure outweighs any interest in the exemption being maintained.
42. He pointed out that the relevant legal professionals had been unsuccessful in defending the BBC's position and that, as is a matter of public record, the tribunal had, in some instances, highlighted the lawyers' failure to present relevant arguments. He therefore considered that the information should be disclosed.
43. The complainant also argued that the BBC was going through a process of reducing its staff at the time of the equal pay tribunal hearing, and it was a matter of public importance to know how much it had spent on defending the case at a time when it may have been seeking to reduce its spending.
44. Put simply, the complainant stated his position to be that "*I believe the licence fee payer has a right to this information.*"

*The balance of the public interest*

45. The Commissioner has considered the arguments from the complainant and from the BBC. She has also considered the withheld information, and the background and context of the specific legal case.
46. As set out in paragraph 11 of this notice, the requested information comprises (a) the total amount of money spent on legal professionals, and (b) a breakdown of the figure, detailing separate amounts for the external law firm and legal counsel.
47. The Commissioner considers that there is an extremely high expectation of transparency with regard to information held by the BBC, which operates under Royal Charter and has a unique funding arrangement with the public. The BBC itself has acknowledged that this expectation is set out at Article 12 of the Charter.
48. She accepts that there is some public interest in the BBC being allowed to negotiate on a "level playing field" when it procures the services of legal professionals. As with any public authority spending public money, the BBC has a duty to try to negotiate favourable terms. Since the Commissioner has accepted that the exemption is engaged, she has already accepted that the BBC's commercial interests may potentially be



prejudiced by the disclosure of the amount spent on legal services in this case.

49. However, as previously stated, she considers the exemption to be narrowly engaged on the facts of this case, and does not consider that the envisaged prejudice would be severe. Evidence suggests that legal professionals consider there to be prestige in working for the BBC, and the Commissioner does not consider that costs information being published under the FOIA would severely impact on legal professionals wishing to be engaged by the BBC in future, and seeking to offer competitive rates. She notes that the law firm in this case advertises the fact that it acted for the BBC in the hearing, on its website, despite having lost the case, which may be taken as an indication that to be engaged by the BBC is desirable for legal professionals, due to the high profile nature of the work.
50. The BBC also expressed the view that the legal professionals whom they engage have an expectation that their fees will remain confidential, and that the disclosure of costs in this case may therefore damage potential future relationships. While the Commissioner acknowledges this, she is not persuaded that it carries significant weight. It is already understood by legal professionals that, as a public authority, the BBC receives requests for information under the FOIA and is expected to be transparent and is subject to scrutiny as to its spending. This is further heightened by the particular funding arrangement that the BBC has with members of the public: the licence fee. She therefore considers that legal professionals engaged to act by the BBC in a high profile matter such as this would have some expectation that some information about costs may be placed into the public domain.
51. The Commissioner considers every case on its merits and this includes a consideration of the withheld information in every case, and the public interest in the disclosure of the information itself, as well as wider public interest matters.
52. The Commissioner is aware that this is a high-profile matter, which has been widely reported. The Samira Ahmed hearing attracted widespread attention, as did the claims brought by other female BBC employees, and the issue continues to attract attention, not least in Parliament.
53. The level of interest in the recent BBC letter to the DCMS Committee (previously referred to in paragraph 9 of this notice) which detailed that, as at that date in January 2021, over a million pounds had been spent by the BBC on defending claims relating to equal pay and racial discrimination, and the calls by MPs for an inquiry as a result of the publication of that letter, demonstrates that there is a very high level of public interest in knowing what the BBC spends on such matters.



54. The Commissioner has also had the benefit of considering the cost of the legal professionals' services in this case, alongside the likely cost to the BBC had they agreed to a settlement with Samira Ahmed without going to tribunal. In her view, there is a public interest in transparency over the decision to defend the claim at tribunal including weighing the costs.

### **The Commissioner's decision (section 43(2))**

55. In this case, the Commissioner is not persuaded that the public interest arguments in favour of maintaining the exemption at section 43(2) of the FOIA are sufficiently strong to outweigh the factors in favour of disclosure.
56. She has determined that the balance of the public interest lies in disclosing the information.
57. The Commissioner is aware that the BBC considers that the two amounts of money relating to payments to Counsel are, additionally, exempt under section 40(2) of the FOIA – third party personal data – and she has considered this in the next section of this notice.
58. She notes that the *total* cost, which was also requested, comprises the sum of the two amounts relating to Counsel, added to the amount paid to the external law firm. The BBC has not explicitly applied section 40(2) to the total figure, in its submissions. However, the Commissioner cannot order disclosure of the total without first considering the section 40(2) exemption, since, if the total were disclosed, it would be possible to subtract from it the amount spent on the law firm, and therefore to calculate the amount spent on Counsel, which, the BBC considers, may be exempt under section 40(2).
59. However, the BBC has not argued that the amount spent on the external law firm is covered by section 40(2).
60. The Commissioner orders disclosure of the amount of money spent on the external law firm, to the complainant.

### **Section 40(2) – third party personal data**

61. This part of the notice considers the remainder of the withheld information: the amount of money the BBC spent on legal counsel (both "paid" and "invoiced") and the total costs.
62. Section 40(2) of the FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the requester, and where one of the conditions listed in section 40(3A)(3B) or 40(4A) is satisfied.

63. The relevant condition is contained in section 40(3A)(a)<sup>1</sup>. This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data ("the DP principles"), as set out in Article 5 of the General Data Protection Regulation ("GDPR").
64. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ("DPA"). If it is not personal data, then section 40 of the FOIA cannot apply.
65. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, she must establish whether disclosure of that data would breach any of the DP principles.

**Is the information personal data?**

66. Section 3(2) of the DPA defines personal data as:

*"any information relating to an identified or identifiable living individual".*

67. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
68. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data or an online identifier, or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.
69. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them, or has them as its main focus.
70. In this case, the BBC has explained that the information it has withheld relating to Counsel's fees (both "paid" and "invoiced") could lead to the identification of individual barrister(s) when combined with other information that is in the public domain.
71. It has explained that the names of the barristers engaged to represent the BBC in the relevant case, are in the public domain. It therefore

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<sup>1</sup> As amended by Schedule 19 Paragraph 58(3) DPA.

considers that the information about Counsel's fees relates to identifiable individuals.

72. The Commissioner notes that the relevant parts of the withheld information do not identify individual barristers by name. However, in considering identifiability, she will take into account the possibility of identification taking place by linking the withheld data with other available data. As her Anonymisation Code<sup>2</sup> provides, the Commissioner's view is that (when considering the application of section 40(2)) *"public authorities have to assess whether releasing apparently anonymised data to a member of the public would breach the data protection principles. This is intended to ensure that public authorities take into account the additional information that a particular member of the public might have that could allow data to be combined to produce information that relates to and identifies a particular individual – and that is therefore personal data"* (Anonymisation Code, p. 19).
73. Therefore, in determining whether data identifies a living individual, the Commissioner will consider any identifying factors in the data itself, and also the possibility that the data could be combined with other information in the public domain or already in the possession of others.
74. The Commissioner will also consider the possibility of identification by a "motivated intruder", defined in the Anonymisation Code as *"a person who starts without any prior knowledge but who wishes to identify the individual from whose personal data the anonymised data has been derived"*. A motivated intruder is, the Code explains, someone who may undertake standard investigative techniques, such as use of the internet or making their own enquiries, to use the "anonymised" data to identify people.
75. In this case, the Commissioner is satisfied that the names of the barristers acting in the case are in the public domain, and that the relevant parts of the withheld information can be linked with this information.
76. She is also aware that Counsels' fees are paid to barristers as individuals, rather than, say, to their Chambers. This means that she is satisfied that the information relates to them as individuals.

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<sup>2</sup> *Anonymisation: managing data protection risk code of practice*  
<https://ico.org.uk/media/1061/anonymisation-code.pdf>

77. In the circumstances of this case, having considered the relevant parts of the withheld information, the Commissioner is satisfied that it relates to individual legal professionals. This information therefore falls within the definition of "personal data" in section 3(2) of the DPA.
78. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under the FOIA. The second element is to determine whether disclosure would contravene any of the DP principles. The most relevant DP principle in this case is principle (a), which is set out below.

**Would disclosure contravene principle (a)?**

79. Article 5(1)(a) of the GDPR states that:

*"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject".*

80. In the case of an FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair and transparent.
81. In order to be lawful, one of the lawful bases listed in Article 6(1) of the GDPR must apply to the processing. It must also be generally lawful.

**Would the processing be lawful?**

82. Article 6(1) of the GDPR specifies the requirements for lawful processing by providing that:

*"processing shall be lawful only if and to the extent that at least one of the" lawful bases for processing listed in the Article applies".*

83. The Commissioner considers that the lawful basis most applicable is set out at Article 6(1)(f) which states:

*"processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child"<sup>3</sup>.*

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<sup>3</sup> Article 6(1) goes on to state that:-

84. In considering the application of Article 6(1)(f) of the GDPR in the context of a request for information under the FOIA, it is therefore necessary to consider the following three-part test:-

(i) Legitimate interest test: Whether a legitimate interest is being pursued in the request for information;

(ii) Necessity test: Whether disclosure of the information is necessary to meet the legitimate interest in question;

(iii) Balancing test: Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.

85. The Commissioner considers that the test of "necessity" under stage (ii) must be met before the balancing test under stage (iii) is applied.

*(i) Legitimate interests*

86. In considering any legitimate interests in the disclosure of the requested information under FOIA, the Commissioner recognises that a wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, and commercial interests as well as wider societal benefits. These interests can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests. However, if the requester is pursuing a purely private concern unrelated to any broader public interest, unrestricted disclosure to the general public is unlikely to be proportionate. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.

87. In this case, as previously mentioned, the complainant has argued that as well as there being a general need for transparency, the BBC incurred

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*"Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks".*

However, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA) provides that:-

*"In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the GDPR would be contravened by the disclosure of information, Article 6(1) of the GDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted".*

the costs at a time when it was reducing staffing levels. In his view, this creates a heightened interest in knowing the costs of defending the claim, which, he also points out, they lost.

88. The Commissioner, again as previously mentioned, considers that the BBC occupies a fairly unique position as a public authority, since it operates under Royal Charter and has a unique funding arrangement with the public (the licence fee). In her view, this increases the expectation of its transparency when it comes to spending.
89. She is also aware that Samira Ahmed's equal pay claim was a matter of widespread interest, and, together with other claims, has led to increased scrutiny regarding the BBC's highest-paid staff and whether there is/was a gender pay gap. The Commissioner considers that information about the legal costs incurred in defending this specific claim contributes to an understanding of this issue, and is a key part of a bigger picture enabling a full understanding of the BBC's actions.
90. She is satisfied that there is a legitimate interest in the disclosure of the information.

*(ii) Is disclosure necessary?*

91. "Necessary" means more than desirable, but less than indispensable or of absolute necessity. Accordingly, the test is one of reasonable necessity, and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under the FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
92. The Commissioner is aware that some information about the tribunal was made public at the time. The BBC has argued that disclosure is not necessary to meet the legitimate interests, due to information already being in the public domain.
93. However, while the BBC publishes information about what it has spent on litigation in its annual accounts, the information for the relevant year would not have been publicly available at the date of the request, and likely would not have detailed Counsel's fees in this case, in any event. The BBC's "necessity" arguments do not relate to the specific information under consideration here: Counsel's fees in the Samira Ahmed case.
94. In the Commissioner's view, in this case, this information was not otherwise available at the date of the request and disclosure of the data under the FOIA would be necessary to meet the legitimate interests in disclosure. She has therefore gone on to conduct the balancing test.

*(iii) Balance between legitimate interests and the data subject's interests or fundamental rights and freedoms*

95. It is necessary to balance the legitimate interests in disclosure against the data subjects' interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For example, if the data subjects would not reasonably expect that the information would be disclosed to the public under the FOIA in response to the request, or if such disclosure would cause unjustified harm, their interests or rights are likely to override legitimate interests in disclosure.
96. In considering this balancing test, the Commissioner has taken into account the following factors:
- the potential harm or distress that disclosure may cause;
  - whether the information is already in the public domain;
  - whether the information is already known to some individuals;
  - whether the individual expressed concern to the disclosure; and
  - the reasonable expectations of the individual.
97. In the Commissioner's view, a key issue is whether the individuals concerned have a reasonable expectation that their information will not be disclosed. These expectations can be shaped by factors such as an individual's general expectation of privacy, whether the information relates to an employee in their professional role or to them as individuals, and the purpose for which they provided their personal data.
98. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
99. In this case, the BBC considered that *"legal counsel would not reasonably expect information about the fees that they individually negotiate and charge to be disclosed to the public at large in response to a FOIA request. Such a disclosure also has potential to cause significant harm and distress to the legal counsel concerned, including through the likely infliction of commercial detriment"*.
100. The BBC has also pointed out that, in another case involving a hospital trust<sup>4</sup>, the Commissioner found that the disclosure of Counsel's fees

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<sup>4</sup> <https://ico.org.uk/media/action-weve-taken/decision-notice/2020/2618405/ic-47655-16m9.pdf>



would not be lawful, and agreed with the trusts' application of section 40(2).

101. The Commissioner has considered this case on its own merits. It is evident that Counsel's fees relate to the individual barristers' professional lives and not to their personal lives. In this respect, the information is not inherently intrusive in nature.
102. She also considers that a barrister agreeing to take on a high profile matter for a high profile public authority is likely to have some expectation that their fees may become subject to public scrutiny.
103. She agrees that there is the potential for some commercial detriment arising from the disclosure of the fees, but, for the reasons set out previously in this notice when the Commissioner was considering the application of section 43(2), she does not consider that this is likely to be to a severe extent.
104. She acknowledges that there is no suggestion of impropriety on the part of the individual legal professionals, which arguably lessens the weight of the legitimate interests.
105. However, whereas in the hospital trust case the Commissioner found the legitimate interests in the disclosure of Counsel's fees to be less than compelling, in this case, the Commissioner considers the legitimate interests to be much weightier. These have been described above, and were also considered as part of the public interest test in relation to section 43(2).
106. Based on the above factors, the Commissioner has determined that there is sufficient legitimate interest to outweigh the data subjects' fundamental rights and freedoms. The Commissioner therefore considers that there is a lawful basis for processing under Article 6(1)(f) of the GDPR and so the disclosure of the information would be lawful.

### ***Fairness and transparency***

107. Even though it has been demonstrated that disclosure of the requested information under the FOIA would be lawful, it is still necessary to show that disclosure would be fair and transparent under the principle (a).
108. In relation to fairness, the Commissioner considers that if the disclosure passes the legitimate interest test for lawful processing, it is highly likely that disclosure will be fair for the same reasons. She also considers that the requirement for transparency is met because as a public authority, the BBC is known to be subject to the FOIA.
109. She is satisfied that disclosure would be fair and transparent.

**The Commissioner's decision (section 40(2))**

110. In this instance, the Commissioner has determined that the exemption at section 40(2) is not engaged with respect to the information pertaining to Counsel's fees (paid and invoiced), nor, by extension to the total costs figure.

111. She orders the BBC to disclose the information to the complainant.

## Right of appeal

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112. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)  
GRC & GRP Tribunals,  
PO Box 9300,  
LEICESTER,  
LE1 8DJ

Tel: 0300 1234504

Fax: 0870 739 5836

Email: [grc@justice.gov.uk](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

113. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.

114. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

**Signed .....**

**Phillip Angell**  
**Group Manager**  
**Information Commissioner's Office**  
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**Wilmslow**  
**Cheshire**  
**SK9 5AF**