



Appeal Number: EA/2022/0376

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

Between:

British Broadcasting Corporation

Appellant:

And

The Information Commissioner

First Respondent:

And

William Turvill

Second Respondent

Date and type of Hearing: 1st June 2023. – on the papers.

Panel: Brian Kennedy KC, Emma Yates, and Kate Grimley Evans.

Representation:

Appellant: Ishani Jayaweera of the BBC Legal team.

First Respondent: Louisa Lansell, of the Information Commissioners Office.

Second Respondent: William Turvill on behalf of Press Gazette.

Date of Decision: - 6 June 2023

Result: The Tribunal allow the Appeal.

REASONS

Introduction:

- [1] This decision relates to an appeal brought under section 57 of the Freedom of Information Act 2000 (“the FOIA”). The appeal is against the decision of the Information Commissioner (“the Commissioner”) contained in a Decision Notice (“DN”) dated 21 October 2022 (reference IC-176960-W6S1), which is a matter of public record.

Factual Background to this Appeal:

- [2] Full details of the background to this appeal and the Commissioner’s decision are set out in the DN and not repeated here, other than to state that, in brief, the appeal concerns a request for the overall cost to the BBC of a Deprivation Study. The BBC refused to disclose the requested information under section 43(2) FOIA.
- [3] The Commissioner considered that the BBC was incorrect to apply section 43(2) FOIA to the withheld information. The Commissioner required the BBC to disclose the information withheld under section 43(2) FOIA. The BBC appeals against the Commissioner’s DN.

History and Chronology:

On 3 May 2022 William Turvill requested information of the following description:

"Under the FOI Act, please could you tell me the total cost to the BBC of this MTM Deprivation Study:

<https://www.bbc.co.uk/aboutthebbc/documents/mtm-bbc-deprivationstudy-2020-2021-final-report.pdf>."

On 4 May 2022 the BBC responded and on 26 May 2022 formally refused to disclose the requested information under section 43(2) FOIA within 20 working days of the initial request.

William Turvill requested an internal review on 26 May 2022. The BBC sent the outcome of its internal review on 17 June 2022. It upheld its original position.

Relevant Law:

A person requesting information from a public authority has a right to be informed by the public authority in writing whether it holds the information (section I(l)(a) FOIA) and to have that information communicated to them if the public authority holds it (section I(l)(b) FOIA).

However, these rights are subject to certain exemptions, set out in Part II of FOIA. For the purposes of this appeal, the relevant exemption in Part II is section 43(2) FOIA which provides that:

"Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it)."

In Hogan and Oxford City Council v the Information Commissioner (EA/2005/0026 and 0030) at §§28-43 ("*Hogan*") the Tribunal set out the following criteria:

- a. Identify the "*applicable interests*" within the relevant exemption,
- b. Identify the "*nature of the prejudice*". This means:
 1. Show that the prejudice claimed is "*real, actual or of substance*" (as endorsed by the Upper Tribunal in *Department for Work and Pensions v Information Commissioner* [2014] UKUT 0334 (AAC) at §26);

11. Show that there is a "causal link" between the disclosure and the prejudice claimed.

- c. Decide on the "*likelihood of the occurrence of prejudice*" ... [firstly] *more probable than not* ["would"], and secondly *there is a real and significant risk of prejudice, even if it cannot be said that the occurrence of prejudice is more probable than not* ["would be likely]." (§33) (as endorsed by the Court of Appeal in *DWP v Information Commissioner* [2016] EWCA Civ 758: per Lloyd Jones LJ §27.)

The phrase "*would be likely to prejudice*" was considered in *R (Lord) v Secretary of State for the Home Department* [2003] EWHC 2073 (Admin) at [100]: "*likely*" ... *connotes a degree of probability where there is a very significant and weighty chance of prejudice to the identified public interests. The degree of risk must be such that there "may very well" be prejudice to those interests, even if the risk falls short of being more probable than not*" (emphasis added). Further, in *John Connor Press Associates v Information Commissioner* (EA/2005/0005) the Tribunal clarified that:

"We interpret the expression "likely to prejudice" as meaning that the chance of prejudice being suffered should be more than a hypothetical or remote possibility" (§15)

Where the exemption in section 43 FOIA is engaged, a public authority seeking to rely on the exemption must demonstrate that "*in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information*": section 2(2)(b) FOIA. It must do so by reference to the specific information which it seeks to withhold: *Department of Health v IC and Lewis* [2015] UKUT 0159 (AAC).

The Commissioner's Decision Notice:

- [4] On 21 October 2022 the Commissioner issued the DN which concluded that the BBC was not entitled to rely on the exemption from disclosure in section 43(2) FOIA (commercial interests) in respect of the total cost of the 2020/21 Study and he ordered the BBC to disclose that information under FOIA (DN §§2-4).
- [5] After carefully considering the correspondence relating to the relevant information request, the Commissioner concluded in the DN that section 43(2) FOIA is not engaged in respect of the total cost of the 2020/21 Study. The Commissioner was not satisfied by the BBC's arguments that the prejudice caused to its own commercial interests by the disclosure of the Withheld Information was 'real, actual or of substance'. Further, the Commissioner decided that the BBC had failed to demonstrate a causal link between the disclosure of the total cost of the 2020/21 Study and prejudice to its own commercial interests (DN §§15-17).

The Appellants' Grounds of Appeal:

- [6] The Appellant's Grounds of Appeal ('the Grounds') are summarised as follows:

Ground 1: The information should be considered exempt under section 43(2) of the FOIA on the basis that disclosure would be likely to harm the commercial interests of MTM, the affected third party, and the public interest balance lies in maintaining the exemption.

Ground 2: The ICO erred in finding that section 43(2) of the FOIA was not engaged with respect to the BBC's commercial interests.

The Commissioner's Response:

- [7] The Commissioner resisted the appeal and relied on the DN for the findings therein. However, in response to the Appellant's Grounds of Appeal, the Commissioner made the following further contentions.

- [8] In relation to MTM's commercial interests the Commissioner notes that the 2020/21 Study pre-dates the relevant request (made in March 2022). Accordingly, by the time of the request the contract was concluded, and the work had been carried out (DN §16). The Withheld Information did not concern on-going negotiations at the time of the request and the precise details of any future sufficiently similar study being commissioned by the BBC, including timescales are unknown.
- [9] In relation to the BBC's commercial interests, the Commissioner noted In the Grounds of Appeal the BBC repeats the arguments in the DN §15: that disclosure would be likely to hamper its negotiating position in terms of price in future negotiations for a similar study to the 2020/21 Study. The Commissioner submits that in future negotiations for a similar study, the BBC could refuse nonsensical offers from other service providers based on the total cost of the 2020/21 Study and differentiate any future contracts based on the circumstances that exist at that time as per the DN§16.
- [10] Considering the public interest test, as the Commissioner concluded that section 43(2) FOIA was not engaged, he did not go on to consider the balance of the public interest test in the DN. The Commissioner submitted that there is a public interest in knowing how much the BBC paid to MTM for the 2020/21 Study in that the BBC would be more accountable to the public for how it spent public money. This could either increase public confidence in the BBC's allocation of funds or allow public scrutiny of the same. Further, the Commissioner acknowledged that there is a clear public interest in encouraging competition amongst private companies for public sector contracts. Greater transparency about the tendering process and the negotiation of such contracts may encourage more companies to take part in the process and should help them to improve the quality and content of their bids. This ultimately should help public authorities to obtain best value for money from tendering exercises. Being transparent and open with regard to tendering information is therefore beneficial to both parties and should not deter contractors from bidding for public sector contracts,

particularly as the value of these contracts also provides a clear incentive to tender for the work.

- [11] The Commissioner maintained that section 43(2) FOIA is not engaged in respect of the Withheld Information. The BBC have not demonstrated that the prejudice caused to its own commercial interests and those of MTM by the disclosure of the Withheld Information is 'real, actual or of substance'. Further, the BBC has not demonstrated a causal link between the disclosure of the total cost of the 2020/21 Study and prejudice to those commercial interests.

BBC's Response:

- [12] In relation to Ground 1, the Commissioner asserted that the total costs of the study do not represent a granular breakdown of the tasks that were undertaken, and requests more detail as to how other market research providers would or could use the information to cost their own projects. As noted in the Grounds of Appeal at §15-17, the BBC's position, and the position of MTM, is that competitors could work out what services MTM provided for the total cost as they have access to a breakdown of the services provided in this case. The publicly available information contained within the 2020/21 deprivation study includes the following detail:
- a. The research involved a quantitative sample of 80 households, involving just under 200 participants across the households. The report details the specific sampling criteria used to recruit the households, and also explains that they were organised in groups based on their willingness to pay the license fee.
 - b. The report explains that the fieldwork was conducted over the course of five months, staggered over the course of four "waves". The dates of these waves are set out in the report. It details that all interviews were conducted remotely.
 - c. The report details how the study was conducted including: the length of the initial and final interviews; the topics covered during each interview;

how the deprivation exercise was run; the contact that MTM had with the participants over the course of the study; and the resources provided to each household as part of the study.

- [13] The position of MTM, as explained in their evidence, is that the published information is sufficient for competitor market research agencies to calculate MTM's rates for the work they conducted and then to cost future projects accordingly, potentially undercutting MTM. Costs could also be adjusted for varied research requirements, for example, an agency would know the cost of delivering a study of 80 households, and so they could adjust up or down accordingly.
- [14] The Commissioner's response at §19 misunderstands the BBC's Grounds of Appeal at §17. The BBC is not claiming that disclosing the costs of the research study would prejudice MTM's commercial interests in relation to its methodology *per se*. As explained above at §9, details of the study methodology employed by MTM is available publicly. The BBC's contention at §17 of the Grounds of Appeal is that MTM's commercial interests are likely to be damaged by the disclosure of the total cost *coupled with* the methodology which is already publicly available. This is a real and significant risk having regard to the reasonable prospects that the BBC is likely to commission a study of this nature again in the future, and noting also that MTM is engaged by other third parties to carry out studies of this nature. The combination of the research methodology being publicly available, and the disclosure of the requested information, would unfairly advantage MTM's competitors in the market research field who would be able to use this information to cost their own projects, and subsequently undercut MTM. This is a risk both with respect to future BBC work, and MTM's wider engagements.
- [15] In relation to the concerns raised at §20 of the Commissioner's reply, the BBC commissioned the study in order to help it understand the value that it delivers to UK households in return for the license fee and how this could be improved.

It is a duty as contained within the Charter to ensure that we evaluate and assess public value. The BBC conducts a suite of work to this end, of which the deprivation exercise is one part. It is likely that a similar deprivation study will be commissioned by competitive tender between now and the end of the current Charter in 2027/28. If the total costs of this study were disclosed, competitors would have enough information in the published documents to accordingly adjust their costings for varied research requirements in the future, accounting for inflation which is a known figure.

[16] In relation to Ground 2, the BBC noted the Commissioner contends at §21 that the BBC could refuse nonsensical offers. As stated at §8(b) of Nick North's witness statement, the BBC are not concerned about "nonsensical" offers being made. The concern for the BBC is that disclosure would risk the ability to negotiate on an equal footing in the future. The BBC needs to ensure that its research is delivered at the optimum cost, maintaining the best value for licence fee payers. The BBC has a roster of market research agencies. The latest Framework Agreement for these services took effect on 1 March 2019, and the next Framework Agreement will be effective from 1 March 2023. A future study of this nature, and indeed other research studies, will be subject to competitive tender amongst the suppliers on this roster given the market changes and time elapsed since the 2014 study. All agencies on this roster have been selected because they are leading suppliers in the field of market research. In this context, even small differences in pricing, as opposed to "nonsensical offers", can be a significant factor when deciding which supplier to award work to. If these costs were made public, not only would potential suppliers be able to undercut each other, but they would have an upper hand when it came to negotiations on cost in future projects.

[17] The BBC appreciate that they are a public authority with responsibilities of accountability and transparency, and that suppliers are expected to understand that confidentiality clauses are subject to FOIA. The BBC publishes a significant amount of information about its spending in its Annual Report and Accounts. In situations of competitive tender, a degree of confidentiality is required particularly in respect of pricing. This matter can be

distinguished from *Brendan Montague v The Information Commissioner and another* [2016] EA/2015/0289 which concerned corporate sponsorship arrangements from BP to the Tate Gallery, including the total amount of sponsorship received. This is different from disclosing the figures negotiated for the provision of services, by a relatively small agency. The 2020/21 Deprivation Study was an update to the work that MTM conducted in 2014/15. The costs of the 2014/15 study have not been published.

- [18] With respect to the public interest test, the BBC agrees with these points, but disagrees that disclosure of the requested information in this case will further these public interests. It is because the BBC values transparency and accountability that granular details of the research methodology for this research are publicly available – this was proactively published by the BBC. The BBC also submits that, contrary to encouraging competition, a disclosure in this case is likely to have the opposite effect and allow an unfair competitive advantage to MTM's competitors, precisely because of the amount of information that is already publicly available.

Witness Statement of Gary White:

- [19] Gary White, of MTM provided written witness evidence to the Tribunal as follows:

The 2014/15 and 2020/21 Deprivation Studies

1. *The BBC commissioned the 2020/21 Deprivation Study in order to help it better understand the value that it delivers to UK households in return for the licence fee, and how this could be improved. This was in the context of a rapidly changing media landscape. All fieldwork for this project was conducted remotely, via digital methods, as fieldwork timing sometimes coincided with lockdowns owing to the Covid 19 pandemic.*
2. *That study was an update to the work that MTM designed and conducted in 2014/15. The original study sought to explore what, if anything, UK*

households would miss if the BBC was taken away from them, whether they would change their views about the BBC and how willing, if at all, they were to pay the licence fee after nine days without access to any programs and services. Fieldwork for this work was conducted face-to-face.

Prejudice to MTM's commercial interests if the total cost of the 2020/21 Deprivation Study is disclosed.

- 3. MTM has indicated to the BBC that it does not consent to the total cost of the 2020/21 Deprivation Study being disclosed, on the basis that it will cause prejudice to MTM's commercial interest. In my view, there is a real and significant risk of that prejudice occurring. We raised our concerns with the Market Research Society, although they indicated that they were not in a position to provide legal advice. The total cost of the 2014/15 Deprivation Study is not in the public domain.*
- 4. There are two key areas where MTM's commercial interests are likely to be prejudiced if this material is published: (i) in our future work with the BBC; and (ii) in future work with other clients.*
- 5. As regards future work with the BBC, disclosure of this information to our competitors will provide them with an unfair commercial advantage. In light of the detailed outline of our approach and methodology in the published 2020/21 Deprivation Study, it would, in my view, be possible for a competitor to calculate our approximate rates and thereby deliberately undercut MTM in future competitive tenders for comparable work. This could be for opportunities with the BBC, but, as noted below, also other clients that MTM works with now or in the future.*
- 6. I note that the ICO has suggested that disclosing the overall cost of the contract would not provide details of the specific terms agreed or any detail regarding the negotiating process (see ICO Decision Notice, at paragraph 16). I disagree with that. It is the publication of the total cost*

of the 2020/21 Deprivation Study combined with the detail of our methodology and approach published in the 2020/21 Deprivation Study that will allow a competitor to calculate our approximate rates for comparable work.

- 7. In relation to the BBC specifically, MTM adheres to the BBC Market Research Framework which means we have standardised day rates for members of staff that work on BBC projects which are 10-20% lower than what we charge our other clients. This is part of commitment to deliver value to licence fee payers. The 2020/21 Deprivation Study was conducted on the previous Market Research Framework, which began in 2018, with rates that are substantially lower than what they are today, and also lower than our current rates on the new 2023 BBC Market Research Framework. This further increases the likelihood that competitors to MTM could undercut us for future opportunities.*
- 8. We understand that there is a possibility that the BBC may wish to run a similar deprivation study to the ones we have conducted in 2014-15 and 2020-21 within the period of the current Market Research Framework, so we would be at a disadvantage for this work should it be tendered out to multiple agencies on the roster who would know the 'price to beat', based on the release of the price of the most recent study.*
- 9. As regards work with other clients, I can confirm that we are in current conversations with another media client about conducting a deprivation study for them in 2023, so the risks of being undercut by competitors for comparable work is a very real one. This gives us serious cause for concern, as clients would be able to see what we have charged the BBC and could use this to their advantage when trying to negotiate with MTM on price. As stated already we provide the BBC with a discount as part of being on the BBC roster and this could cause us commercial issues with prices and projects with other clients.*

Witness Statement of Nick North:

[20] Nick North, of BBC, provided written witness evidence to the Tribunal as follows:

Background to the 2014/15 and 2020/21 Deprivation Studies

1. The Deprivation Study was initiated in 2014 by the BBC's Strategy department. I work with the Strategy department often: their team is responsible for developing strategy on the evolution of markets, audiences and technologies. We worked closely on both the 2014/15 study and the 2020/21 study. As the BBC's Director of Audiences, my role was to have oversight of, and input into, the methodology of the work where required.
2. The study is part of the way that we assess the value that the BBC delivers to the UK public in return for the licence fee. BBC surveys find that the clear majority of licence fee payers say they are prepared to pay the level of the licence fee or more given the choice. However, there is a sizable minority who say that, if it was down to them, they would not pay at all and would forego the BBC or would pay less. We wanted to interrogate why that might be and developed a methodology for this Deprivation Study to understand if people still held these views if they were unable to access BBC content and services for a period of time. By taking something away, a unique understanding of its role and value, if any, can emerge. Deprivation exercises like this are used in research to help to uncover underlying benefits of the products and services that people use habitually but often without consciously thinking about their value.
3. This study was run for the first time in 2014, and we revisited it in 2020/21 to see if the results had changed significantly. My colleague in Strategy has confirmed that in 2014 the contract to run this study was awarded by competitive tender, and MTM were awarded the contract. She has advised that the 2014/15 study overall costs have not been published. MTM were awarded the contract for the 2020/21 study by direct award as it was an

extension of the 2014 study. It is likely that the deprivation exercise will be run again, and this will be through competitive tender.

4. A colleague in Strategy has also confirmed that conversations have begun about undertaking the deprivation exercise again as part of new work on assessing the public value of the BBC. Timescales are not determined, but it is likely that we will undertake at least one more deprivation exercise between now and the end of the current Charter in 2027/28. The scope is also not determined, but the two previous studies were similar sized in that the 2014/15 study involved 70 households and the 2020/21 study involved 80 households.

Prejudice to the BBC if the total cost of the 2020/21 Deprivation Study is disclosed.

5. I consider that there is a risk that disclosure of the total cost of this 2020/21 Deprivation Study would be likely to harm the commercial interests of the BBC. The nature of that harm is threefold.
6. First, disclosure could harm our negotiating position in the future on similar studies. We are in the unusual position that due to the fact that the 2020/21 Deprivation Study has been published, granular detail of the work done by MTM has been published. From my time working in market research agencies, I understand that it would be relatively straightforward for competitors to cost their own projects from this information. The ICO has stated that overall cost of the contract would not provide details of the specific terms agreed or detail regarding the negotiating process¹. I agree with this, but that is not the issue here. Disclosure of the overall cost when combined with the published, detailed information would allow competitor agencies to calculate costings. This is not only a risk to MTM, but a risk to the BBC's interests. If we were to repeat this study, it would be through competitive tender with the agencies that are on our research roster. We evaluate all applications on the quality and

credibility of the bid and the pricing. If agencies were aware of the costs of another agency, it could present two problems for our negotiations:

- a. Agencies who would have been able to deliver the work for a lower amount may raise their bids to be just under the amount that MTM were paid, meaning the BBC were to overpay.
 - b. Alternatively, agencies could submit bids that are priced at an artificially low level, underestimating the complexity of the task required and delivering less value for money. While I acknowledge lower bids could present a short-term financial benefit for the BBC, the outcome and quality of the work done for that price could be worse, which is detrimental to our work. The ICO has stated that in future negotiations for a similar study, the BBC could refuse nonsensical offers from other service providers². The BBC would refuse any nonsensical offers; however the issue is that the border between nonsensical and competitive is not clear cut. For example, a bidder could make an offer 20% lower than the price of this study – that would not be described as “nonsensical”. Indeed, it may be enough for us to be led to select that agency under procurement rules. The agency may want to do this in order to build a reputation in working with the BBC, and in conducting these type of studies in order to win work with better paying clients in the future. But underpricing may cause the agency to cut corners, to reduce the time and effort into the work, delivering a sub-standard result that may not stand up to independent scrutiny, as this work requires.
7. Secondly, disclosure of this total would be likely to damage our existing relationship that we have with MTM, or indeed any other research partner under similar circumstances if a precedent is set in this case. This is a real risk in light of MTM’s own strong objections to disclosure.

8. Thirdly, I am concerned that this would set a damaging precedent for future research work. While of course agencies understand that work with the BBC may be subject to Freedom of Information Act requests, it is not common practice that sensitive information about pricing be disclosed, and particularly not when full details of the work are also in the public domain. I would be very concerned that other agencies on our research roster would be discouraged from working with us in the future. The feedback that we have had from agencies is that the BBC is not a generous payer when compared with other media organisations. Public exposure of the rates we pay an agency may cause other, better paying clients to demand similar rates, which would be a major disincentive to research agencies to work with the BBC. On top of the quite demanding terms and conditions we demand of our partners compared with others this leads me to be concerned that disclosure of agency rates would create yet another disincentive, putting our ability to attract the best media research agencies at risk.
9. I understand the importance of transparency and accountability when it comes to the public money that the BBC spends. The process of inviting agencies to be part of the research roster is a public process and the amount of money that is allocated to the roster is published, and the Marketing and Audiences budget is contained in the Annual Plan⁴. However, it is my view that the costs of each study within that overall research budget are not published for the reasons of commercial sensitivity set out above.

William Turvill Grounds of Opposition:

[21] The 2nd Respondents' Grounds of Opposition concentrate on the public interest factors in favour of disclosure, rather than whether the exemption contained within section 43(2) of the FOI Act is engaged. In summary, he contends that:

(a) as the Deprivation study was partly to examine whether the BBC delivered value for money, the public should have a right to know how much the BBC paid for production of the study; (b) the BBC license fee is subject to wider political/economic discussion and the release of these costs could inform that debate; and therefore (c) there is public interest in disclosure as the public should be able to judge whether or not the money spent on the study provided value for money.

Reply from the BBC to William Turvill:

[22] The BBC acknowledged the importance of transparency and accountability when it comes to how we spend money. However, as explained paragraph §18-21 of the Reply to the Commissioner and in the witness statement of Nick North, the BBC already publishes a significant amount of information in its Annual Report and Accounts and Annual Plan in relation to spend. The total Marketing and Audiences departmental budget is contained within the Annual Plan¹. More specifically, the budgetary range for market research was published as part of the procurement process that is undertaken to enrol suppliers on the BBC's market research roster. Publishing the costs of an individual survey would not significantly add to the information that is already available in the public domain. The public are already able to judge for themselves using the information available whether the amount of money spent on market research represents value for money. The second respondent has not engaged at all with this point.

[23] In these circumstances, the BBC maintained that the public interest balance favours maintaining the exemption for the reasons already given in previous submissions. Against disclosure, there is a public interest in ensuring that the BBC maintained a strong bargaining position to ensure the licence fee is spent effectively, has a safe space to negotiate costs to ensure value for money and there is a strong public interest in ensuring the competitive position of MTM is not disadvantaged from working with the BBC for the reason given in their witness evidence.

Further Submissions of the Commissioner:

[24] The Commissioner carefully considered the further submissions and evidence. However, the Commissioner maintained that the exemption from disclosure in section 43(2) FOIA (commercial interests) is not engaged in respect of the Withheld Information. The Commissioner was not satisfied that the prejudice claimed to the commercial interests of both the BBC and MTM by the disclosure of the Withheld Information can be said to be 'real, actual or of substance' per *Hogan*². Further, the Commissioner submitted that the BBC and MTM have failed to demonstrate a causal link between the disclosure of the Withheld Information and prejudice to their commercial interests.

Reply of the BBC to the Commissioners' Further Submissions:

[25] In this Reply to the Commissioner, at §9, the BBC relied on the evidence provided in the second statements of Nick North (BBC) and Gary White (MTM). The BBC does not consider that this evidence needs to be closed. It is not necessary for competitor agencies to work out precisely how much MTM were paid for each specific task. To cost a project, market research agencies need the type of information in relation to scale and scope of the study that has already been published in this case. If they were aware of the total fee paid to MTM, they could then price a similar study accordingly in the way described in the witness evidence given they would have the published information on the scale, nature and methodology of the research and the total price paid.

[26] In the Reply to the Commissioners' Further Submissions at §10, the BBC relied on witness statements. Competitors will be aware of the rates they were charging in 2018 and would therefore be able to take a view as to how much they could afford to charge competitively in a future study to potentially undercut MTM, considering inflationary increases (a known figure) and market changes – something that market research agencies should be in a good position to understand. The second statement of Nick North confirms at § 4, that it is

unlikely that the methodology and scale of future research would change. The BBC therefore submit that disclosure of the 2020/21 research cost could assist competitors in working out costings for the next study of this type given the methodology is likely to be similar, inflation is known, and market research agencies are likely to be aware of rate/market changes over time. For these reasons the BBC maintain that there is a real risk that the prejudice to BBC and MTM's commercial interests would be likely to occur if the withheld information was disclosed and that a causal relationship exists between potential disclosure and that prejudice.

Second Witness of Gary White

[27] Gary White, of MTM, provided a second written witness statement to the Tribunal as follows:

1. *“The ICO have asked for examples of how the published methodology information, combined with the withheld total figure, could reveal what the BBC paid MTM for each specific task that it undertook as part of the study. We have an agreed rate-card with the BBC as part of our involvement on the Market Research Framework. This pricing is agreed between MTM and the BBC and may vary from other agencies on the Market Research Framework. When responding to a BBC brief, agencies may quote lower rates than those on the rate card to be more competitive, but we cannot exceed the rates agreed. When costing projects the final cost will vary based on the scale of the work required and the personnel that we feel need to be appointed to a project (based on level of seniority). The scale and nature of the work is published in relation to this study, and so just by knowing this information and having disclosure of the final cost of the study, a competitor could charge a lower rate. It is not necessary to know the cost of each specific task – rather with the detail of the scale and nature of the work already published, if competitors knew the final cost also, this would be sufficient information for them to then charge a rate lower than MTM in future”.*

2. *“For example, if another study was held in 2027 and a competitor wished to win a comparable study to this one, they could simply charge a similar rate to the price in 2020, knowing that MTM will almost certainly charge a higher fee, due to inflation and costs increasing over time. It sets a benchmark for a fee for competitors to aim for. A competitor could also easily calculate cost on a pro rata level. The study involved 80 households, so if you know the total fee you can then calculate a rough cost-per-household in 2020 and then calculate a price to set based on the number of households you are including in 2027. An agency could look back at their own rates from 2018 or 2020 and determine the difference from that time to the rates they charge in 2027, to work out the margin range they could work within to be more competitive in the price they choose to set”.*
3. *“The ICO has asked for an explanation as to how our competitors could offer and deliver similar services to those provided in the 2020/21 study at even lower prices than those agreed in 2018. Competitors will agree their own rates to be on the BBC’s Market Research Framework. We are not privy to what they have agreed (nor they to us). As such there is no ‘flat rate’ that everyone adheres to and agencies can charge whatever price they wish to win the mini contracts / briefs that are sent out by BBC, as long as it does not exceed the agreed rates. This means that if competitors are aware of what MTM has charged in the past for a project of this nature, it becomes easy to either charge a similar amount to that or lower amount or an amount increased by less than the rate of inflation for a comparable study (based on their own 2018 Framework rates) if they wished to do so.”*

Second Witness Statement of Nick North:

[28] Nick North, of BBC, provided a second written witness statement to the Tribunal detailing the following:

1. *“The ICO have asked for examples of how the published methodology information, combined with the withheld total figure, could reveal what the BBC paid MTM for each specific task that it undertook as part of the study. From my experience working for market research companies and at the BBC, it is not necessary to know the price charged for any specific task; simply by knowing the overall price paid for this research, and having the detailed published information about the size, duration and methodology of the research, agencies would be able to price their own projects accordingly. If the size of the study were to change next time, for example if there were 70 households to be interviewed instead of 80, the competitor agencies could still easily work out that the sample size would be roughly 12% smaller and so adjust their costings accordingly. In future, if and when the BBC seeks to repeat a deprivation study such as that previously conducted by MTM, then another agency could simply provide a discounted price (proportionately adjusted to any stated change in size of study and inflation) rather than calculate a price based on careful analysis of the requirement”.*

2. *“The ICO has also sought an explanation as to how disclosure of the information based on 2018 rates would likely prejudice future similar negotiations at least five, possibly ten years later. As previously stated, there is a reasonable prospect that the BBC will commission a study of this nature between now and 2027/28. My understanding at this stage is that the methodology and scale is not likely to change considerably from the 2020/21 study. The 2020/21 study is the second time that the BBC has commissioned a research study of this nature, and the design and methodology adopted in the most recent study is a follow-up from that used in 2014/15. The main difference in methodology was that in 2020/21 the interviews were conducted remotely due to Covid-19 restrictions that were in place during some of the time when the research was conducted. The remote interviews were of good quality and resulted in cost efficiencies, meaning any future study would be likely to follow the remote methodology of the 2020/21 study. While we may choose to alter the*

research slightly if re-run, it is likely to be very similar as the 2020/21. Indeed, from my perspective, it is important that we continue with a consistent approach with the study as we need to understand trends and changes over time. If the research were to radically change, it would hamper our ability to do this”.

3. *“Given the methodology and scale is not likely to change considerably in the future, I am of the view that it would likely still be prejudicial to release the cost even though the 2020/21 study was conducted using 2018 rates. Inflation is a publicly known figure and market research agencies working in the field are likely to understand how the commercial market has changed in terms of cost since 2018. They would be able to adjust their rates accordingly to compensate for inflation and market changes as the methodology and size of the study is likely to remain fairly similar”.*

4. *“The ICO have said that even if others could undercut, the BBC could build quality control/price review mechanisms into any such future agreement to protect or mitigate against the harm described in my first witness statement. The BBC does have quality control mechanisms it uses when considering proposals, and the BBC has high expectations of the quality of work from all agencies on our roster. However, it is always the case that cost cutting – particularly when working to an unrealistic budget - can compromise quality in a way that is not visible until the research is completed. Choice of sample source, amount of executive time spent, seniority of executives working on the project – there are many hidden variables, which will not be obvious to the client that will affect the quality of results.”*

BBC Skeleton Argument:

[29] In their Skeleton argument, the BBC argue: *It is the position of MTM that if this information were to be disclosed prejudice would be likely to occur to MTM’s commercial interests. This prejudice would be real, actual or of substance because*

disclosure of the total fee could allow competitors to use the information published in the study itself about size, duration, and methodology to cost a similar project in the future and undercut MTM. This would not be a complex task; particularly given competitors will have an awareness of market cost variations and inflationary changes over time. There is a reasonable prospect that the BBC will commission a study of this nature between now and 2027/28, and if we do the methodology and scale is not likely to change considerably from the 2020/21 study and therefore releasing the cost of the survey will be likely to give competitors an advantage in the future. This is a competitive market and economic advantage to MTM's competitors has the potential to damage MTM's commercial interests'.

[30] The BBC rely on the “*would be likely*” threshold i.e. a lower level of probability than ‘*would*’ (no more than 50%), but one which is still significant. They rely on the two witness statements from Gary White (Finance Director of MTM), together with their submissions, to demonstrate that there is clearly more than a hypothetical or remote possibility of this prejudice occurring, indeed the risk of this prejudice occurring is real and significant.

[31] The Withheld Information also relates to the BBC’s commercial interests. The BBC filed two witness statements from Nick North (Director of Audiences), together with submissions, in support of this ground.

[32] It is the position of the BBC that the nature of the harm is that (i) disclosure could harm our negotiating position in the future on similar studies, (ii) that it would be likely to damage our existing relationship with research partners if costs of individual projects are disclosed, particularly in circumstances where methodological information has been published. The BBC repeat they rely on the “*would be likely*” threshold i.e. a lower level of probability than ‘*would*’ (no more than 50%), but one which is still significant.

[33] While the BBC acknowledge the importance of transparency and accountability around spending, they submit that the public interest balance lies in maintaining the exemption. The BBC have set out in previous submissions the budgetary information

that is already published and publicly available, while we appreciate that this is high level information, we submit that it is sufficient to meet public interest, allowing the public to understand the amount that is ringfenced for spending on market research and make a judgment on whether this delivers value for money, without disclosure of individual project costs.

[34] Against disclosure, there is a public interest in ensuring that the BBC maintains a strong bargaining position to ensure the licence fee is spent effectively and has a safe space to negotiate costs to ensure value for money. Finally, there is a strong public interest in ensuring the competitive position of MTM is not disadvantaged.

The Tribunals' Conclusions:

[35] The Tribunal is most grateful to all parties for the helpful, detailed, and comprehensive identification and presentation of the arguments on the relevant and material issues before us. We find the s43(2) exemption is engaged as both the commercial interests of the BBC and of MTM are affected. The Tribunal finds that the three elements of the Hogan test are made out. The BBC has been able to demonstrate to us that the actual harm envisaged relates to commercial interests and is able to demonstrate a causal link between the potential disclosure of the withheld information and the prejudice. The Tribunal finds that there is a real and significant risk of prejudice to the Commercial Interests of the BBC (and MTM) in precisely the manner that section 43(2) is supposed to be engaged as is the case in many such situations as come before this Tribunal.

[36] The witness evidence of Nick North, Director of Audiences at the BBC has clearly explained how the BBC's interests would be likely to be harmed (first witness statement, See § 7 onwards page 44 of the open bundle). He covered the effect on the BBC's negotiating position, in particular the possibility that agencies would raise prices to just under the MTM level or submit bids which were artificially low and risked a lowering of quality which would not be good for the BBC in the longer term. He also demonstrated potential harm to the existing relationship with MTM and the effect of a

damaging precedent which a disclosure would set, leading to other potential clients of MTM wanting BBC rates.

[37] Both Nick North of the BBC and Gary White, (employed as Finance Director by MTM, an international research and strategy consultancy, specialising in media, technology, entertainment, and advertising and responsible, inter-alia for all matters relating to financial, commercial, legal and Information Technology at MTM), were able to show the causal link between such disclosure of the Withheld Information and the prejudice, highlighting that the significant amount of information already available to the public in the Deprivation Study would allow a future potential bidder to calculate a cost per household. (See their second witness statements at pages 63 and 66 of the Open Bundle).

[38] In considering the evidence and deciding that there was a real and significant risk of the harm occurring, the Tribunal considered that it was likely that a competitive process would be used again in the future (See first witness statement of Nick North, § 6, page 44 open bundle). Although a firm decision to carry out another deprivation study may not have been reached at the time that the BBC responded to the FOIA request, we are satisfied a deprivation study was something which the BBC had done before and is likely to do again.

The Public Interest Test:

[39] Having found that the commercial interests' exemption was engaged, the Tribunal went on to consider the balance of the public interest test. The Tribunal accepted that there was a significant public interest in how the licence fee is spent. However, the BBC were able to demonstrate to the Tribunal how the public interest in transparency is already met by a significant amount of existing disclosure about how the licence fee is spent. The Tribunal found that although there was a strong public interest in transparency, the public interest is met by the publication of less detailed information as Nick White explained in §11 of his first witness statement. There is not ordinarily much public interest in the cost of a particular market research study. This is fine detail, and in most cases, the public interest is in the broader picture. The Tribunal accepts

that there may be a public interest in finer details of how a budget is spent, for example in a case where proper procurement processes are not followed, or where the costs seem to be outrageously high, but these circumstances do not pertain to this case. Having seen the withheld information, the Tribunal considered that the sum did not appear unusually large in the context of the licence fee or in the context of the relevant budget. There is no evidence before us that there is anything untoward about the contract in general or the expenditure at issue. Similarly, although the Tribunal does not claim any expertise on the sums usually paid for such pieces of work, the Tribunal did not feel that the sum was of sufficient size to indicate that in this case there was a compelling or significant public interest in the cost being disclosed.

[40] The Tribunal was persuaded that there was a strong public interest in competitive bidding processes not being undermined. The witness evidence has demonstrated how the disclosure would be likely to undermine the process and lead to worse value for money. This was not purely about price but also about the quality of the service. It was clearly in the public interest that good value for money was obtained when using the money from the licence fee (as pointed out in §18 of the BBC's skeleton argument). It seems to us somewhat trite to suggest the BBC could simply - '*refuse nonsensical offers*' in what is clearly a refined, bespoke, complex and complicated process.

[41] Similarly, MTM operates in a competitive environment and has demonstrated, in our view uncontrovertibly, that disclosure of the withheld information would be likely to prejudice their commercial interests. (Gary White, first witness statement, See § 6 onwards). There is a clear public interest in this competitive environment being maintained. The Tribunal found that the public interest was in favour of the information being withheld. We find the disclosure of the sum spent on the Deprivation Study would add very little to the general picture already available to the public about how the licence fee is spent while the public interest in the BBC being able to obtain good value for money is very strong.

[42] More specifically the Tribunal find that the exemption under Section 43(2) of the FOIA is engaged in relation to the Withheld Information - (following the Prejudice Test in Hogan):

(i) **'applicable interest'** - [DN § § 12-14] the Commissioner is content that the withheld information relates to a commercial interest; - i.e., this is information relating to a legal person's ability to participate competitively in a commercial activity, namely, the pricing of commissioning a market research study:

(ii) **'nature of prejudice'** - 'real, accurate or of substance' and with a causal link between disclosure and the prejudice:

For the BBC:

- a) See §8 – Witness Statement of Nick North: - the information has the potential to impact the BBC's ability to obtain the best value for money in future commercial negotiations this could lead to the BBC overpaying where lower cost competitors raised their bid to just below MTM's amount; and there is a risk that lower quality work may be delivered for a lower cost, with a short-term benefit of a cost saving but a long-term detriment on value for money, this is particularly the case where procurement rules may mean that low bids could be selected. It is important given the public nature of the BBC's work that reports of this nature are of sufficient quality to 'stand up to independent scrutiny.'
- b) The BBC are clear that it is likely that there will be further studies of this (or an equivalent nature) commissioned in future [See §6 – Witness Statement of Nick North].
- c) The report has been published therefore there is sufficient information in the public domain to enable other suppliers to understand the granular scope of the work that MTM carried out and therefore the pricing that the BBC was willing to accept on this occasion. This may lead to other suppliers regarding this as a starting point for pricing.
- d) [See §1 Witness Statement of Nick North] It is clear that the BBC seek to understand their audiences in order to inform other business decisions. Therefore, any impact in the quality of the research carried out could have a broader impact on commercial decisions made across the BBC.

- e) [See §9 – Witness Statement of Nick North] the BBC’s relationship with MTM could be damaged impacting future work (and potentially pricing).
- f) [See §10 – Witness Statement of Nick North] if the BBC were seen in the marketplace as a customer who would release pricing information which suppliers felt to be commercially sensitive, there could be a reluctance amongst other suppliers to contract with them or an inflationary impact on their fees in order to cover the additional risk the supplier may perceive in contracting with the BBC, particularly where there is already a perception in the marketplace that the BBC *‘is not a generous payer’*.

For MTM:

- a) [See §7 – Witness Statement of Gary White] sharing information with competitors will give them an unfair commercial advantage over MTM in future bids for work of this type with the BBC (and others) and leaves MTM open to being undercut by a competitor.
- b) [See §8 – Witness Statement of Gary White] the amount of the contract together (our emphasis) with the information which can be gleaned from the published report would enable competitors to calculate MTM’s approximate rates.
- c) [See § 11 – Witness Statement of Gary White] MTM are currently negotiating with another media client to perform a similar study therefore there is potential for a real, live prejudice to these negotiations should the withheld information be released particularly given the time elapsed, the BBC’s discounted rate and the challenging financial climate.
- d) [See §5 of the 2nd Witness Statement of Gary White] releasing the fee would *‘set a benchmark for a fee for competitors to aim for’* and with the total sum and the detail of the project already (our emphasis) in the public domain competitors could calculate a cost per household (as is helpfully described in the witness statement of Mr White [See §6 – 2nd Witness Statement of Gary White and See §4 – 2nd Witness Statement of Nick North]

(iii) Likelihood of prejudice occurring:

- Would be likely to... for the reasons described above the tribunal concludes that there is a sufficient causal link between the release of the withheld information and the potential risk of commercial harm to mean that it would be likely to prejudice the commercial interests of both MTM and the BBC.

[43] In applying the Public Interest test, the Tribunal find in favour of the exemption for the following compelling reasons:

- a) - obtaining the best prices for future commercial negotiations of this (or a related) nature. [See §5 – Witness Statement of Nick North] the MTM contract was awarded via competitive tender therefore the withheld information (especially when taken with the closed material before us) does not add any greater understanding of the value for money of the contract.
- b) - [See §9 – Witness Statement of Gary White] the MTM contract was awarded at a competitive discounted rate via a procurement framework this supports the public's understanding that value for money was achieved in this contract.
- c) - [See §11 – Witness Statement of Nick North] the public interest in the money that the BBC spends is met by the transparency around the research roster and the publishing of the money allocated [See §4 – Reply of BBC p 51 Open Bundle]
- d) -There is limited public interest in the cost of one study – particularly in a context where other financial information and process information is already published to meet the public interest in the way the BBC spends public funds and given the fact that this is one cost within a significant marketing budget.

[44] Finally, Mr Turvill argues strongly that the Public Interest test favours disclosure of the withheld information and we have set out our position on this above.

[45] The Commissioner has raised a preliminary point at §16 of the Response to the Appellants Grounds of Appeal dated 20 January 2023 and invites the Tribunal to consider whether the exemption in section 43(2) of the FOIA was engaged and whether the public interest test favoured maintaining that exemption as of 4 April 2020

(being more than 20 working days following receipt of the request). The Tribunal accept the position set out in §8 of the BBC Reply dated 17 February 2023 which clarifies a misunderstanding that the DN under challenge (IC-176960-W6S1) and subsequent documents (Grounds of Appeal and Response from the Commissioner) which have incorrectly stated that the request was sent on 5 March 2022). Mr Turvill sent the request by e-mail to the BBC on 3 May 2022 (See page 75 of the Open Bundle). The BBC's e-mail response is dated 4 May 2022 and the formal refusal was sent by e-mail on 26 May 2022 (within 20 working days of the initial request) and in accordance with the statutory timeframes for compliance with Part 1 of the FOIA.

[46] Accordingly, and for all the above reasons, we allow the Appeal and find that the requested information is exempt from disclosure under section 43(2) of the FOIA, with respect to third party commercial interests and the BBC's own commercial interests and we find the Public Interest lies in favour of non-disclosure of the Withheld Information.

Brian Kennedy KC
Promulgated

6 June 2023.
9 June 2023.