

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 25 August 2016

Public Authority: The British Broadcasting Corporation (BBC)
Address: Broadcast Centre
White City
Wood Lane
London
W12 7TP

Decision (including any steps ordered)

1. The complainant has requested information on the detection capabilities of the BBC in relation to the TV licensing regime and online services. The BBC refused the request on the basis of section 31(1)(a), (b), (d), (g) and 2(a).
2. The Commissioner's decision is that the BBC has correctly applied the provisions of section 31 and the public interest favours maintaining the exemption. She requires no steps to be taken.

Request and response

3. On 26 September 2015, the complainant wrote to the BBC and requested information relating to TV licencing enforcement technology in the following terms:

"I would be grateful if you could clarify the position. For example, can your detection equipment actually determine if someone is watching an online TV service as opposed to accessing other online services or even, say, playing a DVD through their monitor/TV? Is it further possible to identify which online TV service is being accessed (for example, BBC iPlayer as opposed to ITV-player)? Is it also possible to say if someone is watching an online TV service on a phone, tablet or laptop as opposed to a TV/computer monitor?"

4. The BBC responded on 7 December 2015. It stated that it held information relevant to the request but considered it exempt from disclosure under section 31(1)(a), (b), (d), (g) and 2(a) of the FOIA.
5. Following an internal review the BBC wrote to the complainant on 17 February 2016. It stated that it upheld its decision to withhold the information under the cited sub-sections of the section 31 exemption.

Scope of the case

6. The complainant contacted the Commissioner on 1 March 2016 to complain about the way his request for information had been handled.
7. The Commissioner considers the scope of his investigation to be to determine if the BBC was correct to apply section 31(1)(a), (b), (d) and (g) with subsection 31(2)(a) to withhold the requested information.

Background

8. The Broadcasting Act 1990 transferred responsibility for the administration of the TV Licensing regime to the BBC and this is collected by the BBC under the banner of TV Licensing. Section 363 of the Communications Act 2003 ("CA2003") along with the Communications (Television Licensing) Regulations 2004, make it an offence for a person to use or install a television receiver i.e. any equipment used to receive a television programme service or programmes included in that service, at the same time or virtually at the same time as broadcast, unless that use or installation is licensed.
9. Sections 364 and 365 of the CA2003 impose duties on the BBC to issue and revoke TV licenses in accordance with restrictions and condition as imposed by the Secretary of State. There is also an obligation for television license holders to pay a fee for their license which is payable to, and recoverable, by the BBC.
10. On the 6 July 2015 it was announced that the Government had committed to modernise the licence fee to ensure that watching catch-up TV required a TV licence. This had been confirmed by the Secretary of State for Culture, Media and Sport in March 2016.

Reasons for decision

Section 31 – law enforcement

11. Section 31(1) states that:

Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to prejudice, -

(a) the prevention or detection of crime,

(b) the apprehension or prosecution of offenders,

(d) the assessment or collection of any tax or duty or of any imposition of a similar nature,

(g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2).

12. Section 31(2) states that:

The purposes referred to in subsection (1)(g) to (i) are –

(a) the purpose of ascertaining whether any person has failed to comply with the law,

13. In determining whether prejudice would or would be likely to occur from disclosure, the Commissioner will consider the nature and likelihood of the prejudice in question occurring.

14. The BBC has explained that it has an intentional policy of minimising the amount of information in the public domain relating to its ability to enforce the licence fee regime. The Information Tribunal has considered this point before¹ and found that:

“The Tribunal places considerable weight on all the public interest factors we have had to consider ... and observe that when the issue relates to crime prevention, uncertainty itself encourages compliance.”

15. The Commissioner has also considered this matter before and has issued decision notices² accepting the BBCs views that uncertainty does encourage compliance and disclosure of information about licensing enforcement would affect the rate of compliance.

¹ Bowditch v IC & BBC (EA/2012/0168)

² ICO decision notices FS50431580 & FS50476136

16. The BBC has stated that, in this case as in previous ones, in respect of section 31(1)(a) and (b), disclosure of the requested information would prejudice the prevention and detection of crime, in this case, licence fee evasion, and the apprehension and prosecution of licence fee evasion. Section 31(1)(d) is engaged as the BBC's duties in respect of licence fee collection fall within the definition of the collection of any tax or duty or of any imposition of a similar nature. Section 31(1)(g) with subsection 31(2)(a) is therefore engaged as disclosure of the information would be likely to prejudice the exercise by the BBC of its functions for the purpose of ascertaining whether any person has failed to comply with the law.
17. Before considering if the section 31 exemption has been correctly applied by the BBC, the Commissioner firstly must address the points made by the complainant that the BBC can only use section 31 in relation to the disclosure of information about the existing licence regime, not to a proposed extension of the licensing regime. The complainant also argued that he had not asked for information about the equipment or methods used by the BBC for enforcement but simply wanted to know if the BBC could enforce the licensing of online services.
18. The complainant considered there was a difference between the enforcement of live TV services received via the internet and catch-up services (iPlayer) and static sites (BBC News). The complainant argued that at the time of the request (and up until 1 September 2016) the TV licensing regime does not cover online services (the so called "iPlayer loophole") and it cannot therefore be the case that disclosure of information about the potential enforcement of new legislation could engage any part of the section 31 exemption.
19. The BBC argues that the current law, as set out in the CA2003, requires that if programmes are watched or recorded as they are being shown on TV or on an online TV service then a TV licence is required. This applies whether a TV, computer, tablet, mobile phone, games console, digital box, DVD recorder or any other device is used. This also applies whether the programmes being shown are broadcast by ITV, Channel 4, the BBC or any other broadcaster. The BBC therefore disputes the complainant's statement that the current licensing regime does not cover online services but does acknowledge that it is true that if only on demand or catch-up programmes are watched then a TV licence has not previously been required.
20. The complainant considers that section 31 cannot apply when disclosure could be prejudicial to the enforcement of new legislation in this context. He believes that supply of information in relation to a hypothetical position would not be detrimental to the current licensing regime and therefore the exemption is not engaged.

21. The complainant argues that disclosing information about how and to what extent the BBC can enforce licensing requirements and particularly whether the BBC can tell if someone is watching only online catch-up and on demand services would relate to the enforcement of the extended legislation and section 31 cannot be applied as disclosing this information would not prejudice the prevention or detection of crime when currently (and at the time of the request) the licencing regime did not cover watching these non-live broadcasts.
22. The Commissioner has considered these arguments and in making a decision has referred back to the information that was actually requested. The complainant asked several questions relating to the detection equipment that may or may not be available to the BBC and the capabilities of this in terms of being able to differentiate between online live TV services and other TV services.
23. The BBC has pointed out that the information which would have to be provided to answer the complainant's questions would be equally applicable to live or catch-up programmes. It would not be possible for the BBC to answer the questions without providing information which is also relevant to the enforcement of live programming. The Commissioner agrees with this position; in particular where the complainant has asked questions around the detection equipment the BBC has and the capabilities of the BBC in terms of knowing what platform a viewer is using to watch online services. The Commissioner does not see how the BBC could provide information in response to this request which would not disclose information on the detection equipment used for all types of enforcement and detection both current and upcoming.
24. As such the Commissioner accepts, as she has done in earlier decision notices, that disclosing information which goes against the BBCs deliberate policy of uncertainty could affect the rate of compliance with licencing requirements. The complainant had argued that section 31 cannot be applied when the extension to the licence requirements has not come into force, but as the Commissioner has found that the information requested is intrinsically linked to information on the enforcement of current licence provisions, the information can engage the section 31 exemption.
25. The Commissioner therefore follows the approach she has taken before in considering not just whether the section 31 exemption can be engaged but whether it is engaged in this case and where the balance of the public interest lays.

26. The BBC has stated it uses a range of powers to enforce the TV licensing regime and its powers to use detection equipment are set out under the Regulation of Investigatory Powers Act 2000 (RIPA) and the Regulation of Investigatory Powers (British Broadcasting Corporation) Order 2001. The use of these powers by the BBC is in accordance with the BBCs policy on this matter and subject to the oversight of the Office of Surveillance Commissioners. In addition to this section 366 of the CA2003 entitles the BBC to apply to a magistrate for a search warrant to search premises suspected of using television equipment without a valid licence.
27. The Commissioner accepts that uncertainty does encourage compliance, supported by the views of the Tribunal, and therefore disclosure would remove that uncertainty by providing an insight into the tools at the BBCs disposal, making enforcement of the licensing regime more difficult.
28. The BBC has argued that the disclosure of the information 'would be likely' to prejudice the functions set out in section 31. In previous decisions relating to similar issue the BBC provided the Commissioner with evidence to suggest that there were individuals and groups who objected to paying the licence fee and sought ways to avoid paying it. The BBC had explained that it believed there was a willingness among these people to share information on how to avoid payment. Both the Commissioner and the Tribunal³ considered this evidence and accepted that it showed a clear link between disclosure of the information and the prejudice described.
29. The Commissioner considers that this is still relevant in this case and as the issue of information on detection equipment and the broader enforcement of the licensing regime has been considered extensively in previous cases, she accepts that the prejudice argued in this case would also be likely to occur.
30. The Commissioner therefore finds that section 31(1)(a), (b), (d) and (g) are engaged. Section 31 is a qualified exemption and the Commissioner must therefore consider the public interest test before reaching a conclusion.

Public interest arguments in favour of disclosure

³ EA/2010/0087

31. The BBC has recognised the public interest in transparency, particularly where this would contribute to increasing the public's understanding of how the licensing regimes is administered and to demonstrate the BBC is exercising its functions as the licensing authority appropriately and proportionately.
32. The BBC also recognises there is a public interest in the public having the opportunity to scrutinise how public funds are used, allowing the public to make their own assessment of the appropriateness of this use and whether value for money is obtained.
33. The complainant believes there is a public interest in understanding how and if the licensing regime can be enforced. Specifically whether the BBC is even able to enforce the new provisions. The complainant considers it would not be fair or in the public interest for any individual to be taken to court for non-payment only for the nature of the evidence to emerge at that stage.
34. In addition to this, the complainant does not accept that uncertainty is the best tool for compliance. The complainant believes that most TV viewers make a calculated risk-based decision on whether to pay the licence fee, choosing to pay as the TV licence seems like good value for money and the technical basis and effectiveness of enforcement is known (even if precise operational details are not). The complainant argues this is only the case for TV viewers. However, for online services there is a perception these are free to access and there is no perceived risk of detection. The complainant therefore considers if the licence requirements are extended to online services, such as catch-up and on demand programmes, without the BBC showing it has enforcement capabilities then it is actually more likely there will be a higher rate of evasion which would not be in the public interest.
35. The complainant has also highlighted the public interest in ensuring that when new legislation is introduced, or existing legislation is extended, it is seen that it is necessary, reasonable and enforceable.

Public interest arguments in favour of maintaining the exemption

36. The BBC believes that all of the arguments for disclosure are balanced out by the wide range of voluntary information about its administration of the licensing regime it provides. It is also subject to oversight of its licensing activities by the BBC Trust, the Comptroller and Auditor General to the House of Commons, the Office of Surveillance Commissioners, and the National Audit Office (NAO).
37. The BBC also considers it relevant to consider the public interest in the prevention of crime by not disclosing information which prejudices law

enforcement. The BBC argues that providing information which may assist in evaders of the licensing regime escaping detection or prosecution would not be in the public interest.

38. As well as this the BBC argues that there is a strong public interest in it being able to collect all licence fee money to which it is entitled to enable the BBC to provide the public with services that encompass its public mission of informing, educating and entertaining.
39. The BBC has already explained the importance of maintaining uncertainty as to TV licensing's enforcement practices in order to act as a deterrent and has restated this as an argument in favour of the public interest in withholding the information. The BBC argues that without an effective deterrent, evasion would increase and this would be to the detriment of the majority of people who are properly licensed and should not have to pay more than necessary to ensure the compliance of those who evade paying the licence fee.
40. In addition to this the BBC considers that an increase in the rate of licence fee evasion would lead to an increase in enforcement costs and may lead to more prosecutions. This would not be in the public interest as an increase in enforcement costs will lead to a decrease in the funds available for producing the BBCs content.

Balance of the public interest arguments

41. The BBC has provided details of the ways in which it considers much of the public interest arguments in favour of disclosure have been "adequately addressed" including the substantial amount of information the BBC publishes on TV licensing operations⁴ and in the NAOs annual Licence Fee Settlement Statement. The BBC believes there are sufficient safeguards in place to ensure value for money is being obtained and that disclosure of the requested information would add little benefit to the information which is already routinely published.
42. Similarly although the BBC recognised the public interest in accountability and transparency where it could contribute to increased awareness and understanding of the BBC's use of its statutory powers; it considered that the fact it is strictly monitored and its surveillance powers are regulated balance this out. The BBC explained that it is tasked under Article 24(2)(m) of the BBC Charter with ensuring the

⁴ www.tv-licensing.co.uk/about/our-performance-AB6

arrangements for the collection of the Licence Fee are efficient, appropriate and proportionate. TV Licencing's functions are also subject to external review through reports of the Comptroller and Auditor General to the House of Commons and the BBC itself if inspected by an independent body (the Office of Surveillance Commissioners) to ensure it is complying with legislation regarding detection and therefore not unfairly or unlawfully subjecting the public to detection.

43. The Commissioner does still consider there is a public interest in openness, transparency and accountability in relation the BBC's licensing regime as it affects a significant proportion of the population. She accepts there will be a public interest in the disclosure of information which would enable the public to scrutinise how public funds are being utilised and that the licensing regime is operating at the best value for money.
44. That being said, the Commissioner does consider the BBC has shown it has safeguards in place and oversight to ensure it is effectively operating the licensing regime and the BBC does provide information on this on a voluntary, and regular, basis. This does go some way to meeting the public interest arguments in disclosure.
45. In contrast, the Commissioner recognises the importance of the BBC being able to effectively enforce the licensing system and having effective deterrents against evasion. The BBC has demonstrated that disclosure would be likely to prejudice its enforcement activities leading to a loss of revenue. The Commissioner accepts it is in the public interest for the BBC to continue to be able to detect and prosecute licence fee evasion and this public interest argument is therefore strong.
46. As well as this the Commissioner has factored in the impact of disclosure on not just the ability of the BBC to enforce the current licensing regime by disclosing information about its detection and enforcement capabilities; but also the impact on the licensing regime going forwards and the ability of the BBC to administer the amended regime. It is not in the public interest to hinder this and make it more difficult for the BBC to detect individuals looking to evade paying for a TV license and consequently affecting the amount of money legitimate licence fee payers may have to pay.
47. In weighing up the public interest arguments the Commissioner cannot ignore the decisions made in previous cases and the comments and outcomes of the various Tribunal decisions. In *Bowditch v BBC & IC (EA/2012/01/68)* when summarising the public interest arguments which were largely the same as the ones put forward in this case, at paragraphs 28 and 29 the Tribunal found that "*taken either individually*

or cumulatively, these are powerful public interest arguments which cannot be displaced without the most powerful justification By minimising the cost of enforcement this keeps the costs of the licence fee lower for the millions of people who pay it and, in doing so, abide by the law. We have considered the countervailing public interest elements identified by the Appellant but have no doubt that the public interest in maintaining the exemption substantially outweighs the interest in disclosure."

48. Taking all of this into account the Commissioner considers that the public interest in favour of disclosure has been somewhat met by the safeguards and oversight in place and the voluntary disclosure of information. In contrast, there are strong arguments for maintaining the exemption to preserve the BBC's ability to effectively enforce both the current licensing regime and any planned extensions to ensure value for money (for the BBC and the public) and that anyone looking to circumvent the licensing regime can be prosecuted.
49. Therefore the Commissioner finds that the public interest in favour of disclosure is outweighed by the public interest in maintaining the exemption.

Section 10

50. The complainant also raised concerns about the time taken by the BBC to initially respond to the request. The BBC acknowledges the request was originally sent to TV Licensing before being passed to the BBC on 10 November 2015. The BBC then responded on 7 December 2015.
51. Section 10(a) of the FOIA states *"...a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt."*
52. The BBC states it is unaware of the date the request was received by TV Licensing but it responded within 20 working days of the request being passed to the BBC.
53. However, the Commissioner has seen a copy of the original request sent to TV Licensing and this is clearly dated 26 September 2015. Although the Commissioner understands the BBC's position, she also recognises that TV Licensing is a trademark of the BBC and as such the date the request was received is the date it was sent to TV Licensing.
54. As such the BBC breached section 10(1) by failing to respond to the request within 20 working days.

Reference: FS50619819

Right of appeal

55. 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@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

56. 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.
57. 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

Jill Hulley
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