

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 31 July 2012

Public Authority: British Broadcasting Corporation (BBC)

Address: Room 2252
White City
201 Wood Lane
London
W12 7TS

Decision (including any steps ordered)

1. The complainant has requested information as to whether the BBC undertakes surveillance aimed at detecting the unlicensed reception of live television broadcasts which are transmitted via the internet, and received by a person using a computer or similar device. The BBC withheld this information under section 31(a), (b), (d) and (g) and 31(2)(a) of the Freedom of Information Act 2000 (FOIA).
2. The Commissioner's decision is that the BBC has correctly applied section 31(1)(a), (b), (d) and (g) with subsection 31(2)(a) in this case.
3. The Commissioner requires no steps to be taken.

Request and response

4. On 4 October 2011, the complainant wrote to the BBC and requested information in the following terms:
 1. Does the BBC, or its licensing agent, undertake surveillance aimed at detecting the unlicensed reception of live television broadcasts which are transmitted via the internet, and received by a person using a computer or similar device.
 2. If so, according to which legislation, or system of regulation, does the BBC monitor its use of surveillance for this purpose? In particular, does it refer to the (unamended) terms of Part II of

Regulation of Investigatory Powers Act 2000, or does it refer to the RIPA (British Broadcasting Corporation) Order 2001.

3. According to which legislation, or system of regulation, does the BBC monitor its use of "general detection" of the sort referred to in the authorisation forms?
 4. What is the most general degree of postcode specificity permitted for an authorisation of general detection?
 5. Which degree of postcode specificity is most frequently used for such authorisation?
 6. What changes did the BBC make in order to address the criticism by the Surveillance Commissioner referred to above?
 7. Is it now the case that the person authorising general detection will review separately the case of each property encompassed by the authorisation?
 8. How frequently are the BBC's surveillance procedures reviewed by the Office of the Surveillance Commissioners, and when was the most recent occasion?
5. On 2 November the BBC responded to point 1 of the request. It withheld the information requested under section 31(1)(a), (b), (d) and (g) and 31(2)(a) FOIA. It said that points 2 and 3 of the request did not give rise to an entitlement under FOIA but it provided background information in relation to these questions. It answered points 4 to 8 of the request under FOIA.
6. The complainant requested an internal review of the BBC's decision in relation to points 1 and 2 of the request. On 10 January 2012 the BBC wrote to the complainant with the details of the result of the internal review it had carried out. It upheld its original decision.

Scope of the case

7. The complainant contacted the Commissioner to complain about the way points 1 and 2 of his request for information had been handled.
8. During the course of the Commissioner's investigation the BBC did respond to point 2 of the request under FOIA and therefore he has not considered this part of the request any further in this Notice.

9. The Commissioner has considered whether the BBC was correct to apply section 31(1)(a), (b), (d) and (g) with subsection 31(2)(a) to withhold the information requested at point 1 of the request.

Reasons for decision

10. 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)

11. 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,

12. The Commissioner uses a three step test to indicate whether prejudice would or would be likely to occur from the disclosure of the information in question.

- 1. Identify the prejudice in the exemption
- 2. consider the nature of the prejudice in question
- 3. consider the likelihood of the prejudice in question occurring.

13. The BBC has stated that 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.

14. The BBC has explained that its responsibility to enforce the licensing regime arises as a consequence of its powers to issue TV licences and to collect and recover licence fees under sections 364 and 365 of the Communications Act 2003. This responsibility was expressly confirmed by the Home Office in 1991, the year in which the BBC became the statutory authority for the licensing regime. It is a criminal offence to install or use television receiving equipment to receive television programmes without a valid licence. TV Licensing investigates and prosecutes unlicensed use of television receiving equipment.

The nature of the prejudice

15. The BBC has said that the requested information in this case forms part of the methodology and strategy of the BBC's enforcement of the licence fee. The Commissioner is aware that the request relates to a specific type of detection. It is the view of the BBC that this information is exempt under sections 31(1)(a)(b)(d) and (g) and 31(2)(a) of the FOIA as, once disclosed, the information could assist a person in attempting to evade detection and therefore prejudice the enforcement strategy.

16. The BBC has referred to arguments which have been considered in previous cases. The BBC said that the Tribunal in EA/2010/0087 accepted that "uncertainty" as to the likelihood of enforcement action being taken was a key part of the overall enforcement strategy:

"The deterrent is connected with public perception about detection and enforcement tactics, and uncertainty as to the likelihood of enforcement action being taken. Disclosure of the precise numbers of search warrants obtained over a number of years would clearly undermine that uncertainty. Disclosure would therefore have a detrimental affect on the BBC's enforcement strategy. [38]

Given part of the BBC's strategy lies in maintaining a level of uncertainty, this strategy would be undermined, so that at the very least their enforcement and prevention strategies would be prejudiced." [44.c]

17. It also said that undermining uncertainty (as to the likelihood of enforcement action being taken) serves to undermine the enforcement strategy itself. In describing how this would occur, the Tribunal identified that disclosing the number of search warrants "would provide a piece of information that potential evaders would also factor in when considering whether to pay the licence fee. It would or would be likely

to have the effect of enabling those who would evade the licence fee to feel that they could make an assessment of the likelihood of being caught." [44.b]

18. The BBC argued that a similar situation exists in the present case, where the requested information again forms part of the enforcement strategy, specifically whether surveillance is undertaken in respect of the type of television receiver specified by the applicant. It is the view of the BBC that the requested information in this case would be used by potential evaders when assessing the likelihood of detection and considering whether to pay the licence fee. The Tribunal in EA/2010/0087 was satisfied that "uncertainty encourages compliance" [60]; in the present case, disclosure of the information would undermine 'uncertainty' by indicating whether the surveillance is or is not undertaken; in either case, disclosure would 'provide a piece of information' that potential evaders 'would factor in' to their considerations.
19. The BBC has provided the Commissioner with further submissions in support of the above, these submissions are contained in the Confidential Annex attached to this Notice.
20. The Commissioner considers that uncertainty does encourage compliance and therefore disclosure which would provide the public with information about a specific type of surveillance would remove that uncertainty which would be likely to affect the rate of compliance.

The likelihood of the prejudice

21. To support its assertion that disclosure would prejudice its law enforcement activity in relation to the licence fee, the BBC has explained that there is strong evidence of a body of the public who object to having to pay the licence fee and seek to avoid paying it. It believes there is a willingness among these people to share information about how to avoid payment, including online discussions about the detection and enforcement tactics deployed in order to collect the licence fee. It provided the Commissioner with evidence of this which has not been detailed in this Notice.
22. The BBC argued that there is a clear link between the disclosure of the information and the prejudice it has described. On the basis of the evidence it has presented, it is of the view that this prejudice would be likely to occur.
23. The Commissioner considers that based upon the evidence provided by the BBC, which was discussed in detail by the Tribunal in

EA/2010/0087, he considers that disclosure of the requested information would be likely to lead to the prejudice claimed occurring.

24. The Commissioner therefore finds that section 31(1) (a), (b), (d) and (g) are engaged.

Public interest test

25. Section 31 is a qualified exemption and the Commissioner must therefore decide if the public interest in maintaining the exemption outweighs the public interest in disclosure of the information.

Public interest arguments in favour of disclosing the requested information

26. The BBC recognises that there is a public interest in accountability and transparency, particularly where this contributes to increasing awareness and understanding of the BBC's use of its statutory powers in respect of the licensing regime. However, the use of surveillance for the purposes of detection is strictly regulated by the Regulation of Investigatory Powers Act 2000 and the Regulation of Investigatory Powers (British Broadcasting Corporation) Order 2001. The Order is the only legal mechanism by which the BBC can undertake surveillance for the purposes of detection, and the Order does not make allowance for the BBC to undertake either "directed" or "intrusive" surveillance, only for surveillance as defined in s2 of the Order. It is also important to note that the BBC's compliance with this legislation is monitored by an independent body, the Office of Surveillance Commissioners (OSC). Each use of detection must be authorised, and the most recent OSC report in 2010 noted that all authorisations it examined were of a high standard. The BBC additionally has a number of policies in place to ensure that it is compliant with the legislation, including a RIPA policy which is subject to an annual audit conducted by a BBC department independent of Television Licensing. As such, there are already sufficient safeguards to ensure that the BBC is exercising its functions appropriately and proportionately and that people are not being unfairly subjected to detection.
27. The BBC also recognises that there is a public interest in the license-fee paying 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 being obtained. It is in the public interest that the TV Licensing system is efficiently run. However, this public interest is satisfied to a greater extent by existing procedures and publications. For example, the BBC is required to satisfy the National Audit Office ('NAO') as to the value for money of the collection and enforcement arrangements and is

accountable for the economy, efficiency and effectiveness of such arrangements; information is also published in the TV Licensing Annual Review:

www.tvlicensing.co.uk/about/our-performance-AB6/

It argued that this public interest factor is further addressed by the detailed financial information published in the BBC's Annual Report and Accounts, and in the BBC Television Licence Fee Trust Statement for the Year Ending 31 March 2011:

http://www.bbc.co.uk/bbctrust/our_work/annual_report/index.shtml

http://downloads.bbc.co.uk/annualreport/pdf/bbc_ar_online_2010_11.pdf

http://downloads.bbc.co.uk/aboutthebbc/reports/pdf/licence_fee_trust_statement_2010_11.pdf

In respect of this factor, the BBC again believes there are sufficient safeguards in place to ensure that value for money is being obtained, and that the disclosure of the requested information in this case adds little benefit to the information which is already routinely published.

Public interest arguments in favour of maintaining the exemption

28. The BBC has a duty to enforce the television licensing system and it is essential that effective deterrents against evasion are maintained for this purpose. The BBC has put forward evidence that disclosure would be likely to prejudice the BBC's enforcement activities, and has explained how this would be likely to lead to a significant loss of revenue. It is in the public interest that the BBC is able to detect and prosecute licence fee evasion and there is therefore a strong public interest in maintaining the deterrent effect.
29. It argued that the public interest in keeping the costs of the BBC's enforcement activities to an absolute minimum is equally strong. Any reduction in the deterrent effect would have a negative effect on legitimate licence fee payers, which would not be in the public interest. The BBC would receive less of the allocated licence fee to use to fulfil its public purposes; and it would need to spend more of the licence fee on additional enforcement measures.

Balance of the public interest arguments

30. The Commissioner considers that there is a public interest in openness, transparency and accountability in relation to the BBC's licensing regime as it affects a significant proportion of the population. He also considers that there is a public interest in disclosure of information which would enable the public to scrutinise how public funds are being utilised by the BBC and that the licensing regime is operating at the best value for money. The Commissioner does however consider that the BBC does have a number of checks and balances in place to ensure that it is operating its licence regime correctly and fairly and also the BBC does already publish financial information on this regime which goes some way to meeting the public interest arguments set out above.
31. In contrast the Commissioner considers that there is a very strong public interest in the BBC being able to enforce the television licensing system and in not disclosing information which could impede the deterrent effect. He also considers that there is a very strong public interest in not increasing the cost of the BBC's enforcement activities as this would have a negative impact up licence fee payers which is a significant proportion of the public.
32. In this case the Commissioner considers that the public interest in favour of disclosure is outweighed by the public interest in maintaining the exemption.

Right of appeal

33. 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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

34. 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.
35. 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

**Pamela Clements
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