



## Freedom of Information Internal Review Decision

**Internal Reviewer:** Nadia Banno, Litigation Lawyer, BBC

**Reference:** IR2008037 (RFI20080690)

**Date:** 13 August 2010

### Original request and the BBC's decision:

Mr Jackson made the following FOI request on 27 June 2008:

1. *Can you please clarify what a "prosecution statement" is, and under what circumstances such a statement is taken.*
2. *If there are any training materials or other documents provided to whomever takes these prosecution statements, detailing what such a statement is, how to take one, and/or other matters relating to the taking of such, please provide these, or details where they are otherwise currently available.*

At first instance, on 1 August 2008, the BBC responded as follows:

In respect of the first aspect of Mr Jackson's request, he was informed what a prosecution statement is and in what circumstances such a statement is taken.

In respect of Mr Jackson's second question, the relevant documents were listed as:

- *TV Licensing Visiting Procedures*
- *Procurator Fiscal's Guide to TV Licensing*
- *Visiting Officer Work Instructions Quiz*
- *Reply Codes Handout*
- *Visiting Officer Quick Reference Guide*
- *Visiting Officer Legal Overview*
- *What is a 'Code 8'? – Training workbooks and training brief (including 'Recognising what is acceptable as a Code 8')*
- *Code 8 Quiz*
- *Code 8 Presentation for Enquiry Officers*



- *The new 178 record of interview – what's changed?*
- *Conflict Awareness Handouts 1 and 2, training brief and presentation slides*
- *Visiting Officer Induction Programme documentation*

Mr Jackson was informed that copies of any training materials which pertained to the BBC's contractors (in this case Capita), including the majority of the documents listed above, were not held on the BBC's behalf and were thus outside the scope of the FOI Act.

An extract of the *TV Licensing Visiting Procedures* was released to Mr Jackson in redacted form. Redactions were made on the basis that some of the information in the document was exempt pursuant to subsections 31(1)(a), (b), (d), (g), (2)(a) – the law enforcement exemption – of the FOI Act:

### **Request for Internal Review and Delay**

Mr Jackson requested an internal review on 5 August 2008. Unfortunately, the Information Policy and Compliance (IPC) department did not receive Mr Jackson's request and this was not discovered until Mr Jackson followed up with IPC on 2 October 2008. On 6 October 2008, Mr Jackson re-submitted his request for an internal review. He requested clarification of which documents were believed to be out of scope and also asked for the redactions in the *TV Licensing Visiting Procedures* to be reviewed.

At this stage I must address the issue of the prolonged delay on the BBC's part in not responding substantively to Mr Jackson's request for an internal review until now. It has been one year and 10 months since Mr Jackson re-submitted his request for an internal review. This is completely unacceptable. Mr Jackson should have received a response from the BBC within 30 working days. Even though the BBC was not in a position to respond to Mr Jackson within that set timeframe, a delay of a further 30 working days may have been acceptable, but we are 22 months down the line. I will set out briefly the reasons for this delay though I should make it clear that they provide no excuse for the failure to respond to Mr Jackson in an acceptable timeframe.

Mr Jackson's request for an internal review was referred to an internal reviewer on 7 October 2008. On that day, Mr Jackson was emailed by an IPC adviser confirming his request was being handled and that he would receive a response within 30 working days at the latest. On 4 November 2008, an IPC Adviser emailed Mr Jackson to inform him that there was a delay in issuing the internal reviewer's decision and it was anticipated that they would be able to



respond by no later than 5 December 2008. On 7 November 2008, Mr Jackson emailed the IPC Adviser drawing their attention to the Information Commissioner's Guidance regarding response timeframes. Mr Jackson complained that the BBC had had his request for an internal review since 5 August and unless he received a satisfactory response he would refer the matter to the Information Commissioner. The IPC department responded the same day informing Mr Jackson that his comments had been noted. Some time later (the email correspondence on the IPC file is not complete) Mr Jackson again followed up the delay in receiving a response. An IPC Adviser apologised for the delay and informed Mr Jackson that they would write to update him again on 15 May 2009 if they had not issued a decision by that time. On 28 July 2009, Mr Jackson asked for an update stating that it was now over two months since the last date by which he'd been promised a reply and over a year since his original request. An IPC adviser responded on 30 July 2009 apologising for the long delay which was due to staff changes within the Television Licensing Unit<sup>1</sup> and that they hoped to provide a response by September 2009. There is no other correspondence on the file that IPC has passed to me.

From 7 October 2008 until 20 May 2010, Mr Jackson's request for an internal review was left with the same internal reviewer to determine. Unfortunately, that internal reviewer had a very large workload and though she made significant progress in reviewing the relevant documents, she was unable to complete the internal review during the extended time period. On 20 May 2010, I was approached by a Senior Adviser in IPC who asked that I determine the internal review instead. I agreed to on the basis that I determined matters afresh as it would not be appropriate for me to consult with the initial internal reviewer or work from her papers as I had to come to my own decision. I have had care of this matter since then, reviewing the significant number of redactions to the *TV Licensing Visiting Procedures* and establishing which documents are held by the BBC and which are held by Capita (I should also mention that I was on leave for a fortnight during this time).

The delay in providing Mr Jackson with an internal review response is a clear breach of the FOI Code of Practice (22 February 2007), in which the Information Commissioner stipulates that in no case should an internal review take more than 40 working days to answer. The delay also constitutes a breach of section 10 of the FOI Act if this section is considered applicable to internal reviews in addition to initial requests for information.

In my view, though the initial internal reviewer should have returned the work back to the IPC department as soon as it became clear to her that she would not be able to complete her

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<sup>1</sup> For the reasons outlined below, I do not consider that the TV Licensing Unit was responsible in a material way for the significant delay in responding to Mr Dean's request for an internal review.



decision, the IPC department has the ultimate responsibility for ensuring that the BBC complies with its FOI obligations. In this regard, the IPC department failed the requestor and the BBC. The IPC department monitors all of its FOI requests and knows when they are due. After a certain period of time that a request remains outstanding, the IPC department should take positive steps to ensure a request is answered (even if that means allocating the request to an alternative person). That was not done here until the request was approximately 18 months overdue. The Head of Information Policy and Compliance, James Leaton Gray, is aware of this outstanding request, and I will ensure that he receives a copy of my decision so that he and his team consider whether additional procedures should be implemented to ensure such a delay on the BBC's part does not happen again. I hope this goes some way towards assuring Mr Jackson and other individuals who make FOI requests that the BBC is committed to meeting its obligations under the FOI Act as well as providing a basic customer service.

I have enquired with the IPC department whether Mr Jackson complained to the Information Commissioner about the delay but IPC has not been made aware of any such complaint. Given the long delay in receiving a response from the BBC, it may very well be the case that Mr Jackson has given up and lost interest in pursuing his request. In any event, the BBC has a statutory obligation to respond to Mr Jackson's request and I shall do so now.

### **Internal review decision**

In undertaking this review, I have considered the provisions of the FOI Act and the guidance issued by the Information Commissioner's Office and Department for Constitutional Affairs, together with relevant information held by the BBC's Television Licence Unit. In relation to the information held by the BBC which Mr Jackson has requested, I have reviewed those documents in the form that they were in at the time of Mr Jackson's request, that is, 27 June 2008.

I have considered this FOI request in two parts:

1. Are all the documents listed by the initial decision maker, save for the *TV Licensing Visiting Procedures*, held by the BBC or Capita? If they are held by the BBC are they relevant to Mr Jackson's request?
2. Has the relevant information in the *TV Licensing Visiting Procedures* been provided to Mr Jackson and is the redacted information exempt pursuant to 31 of the FOI Act?



1. Are the documents listed (other than the *TV Licensing Visiting Procedures*) held by the BBC or Capita? If the documents are held by the BBC are they relevant?

In determining whether all of the documents listed by the initial decision maker are held by the BBC, I needed to consider whether those documents were physically held by the BBC or whether the BBC exercised any control over them. I was aided by the Information Commissioner's Guidance on this issue and considered the following factors:

- Does the BBC have access to or use for the documents?
- Is access to the documents controlled by another person?
- Did the BBC provide any direct assistance at its own discretion in creating, recording, filing or removing the information?

At first instance, the *TV Licensing Visiting Procedures* document was deemed to be held by the BBC so I did not need to reconsider its status. As for the remainder of the documents, I am satisfied as a result of my enquiries that all of the documents, save for the *Procurator Fiscal's Guide to TV Licensing*, are not in the physical possession of the BBC nor does the BBC exercise any control over them; nor does the BBC access them or use them in any way; nor did the BBC have any hand in creating those documents. I am assured that those documents have been created by Capita, the outsourced service provider for TV Licensing, in order to train its own staff on how to enforce the TV Licensing procedures and systems and they are not (and have not been) shared with the BBC.

In relation to the *Procurator Fiscal's Guide to TV Licensing*, which the BBC did in fact have input into the creation of, as well as having access to and use for the document, in my view it is not relevant to Mr Jackson's request. It is not a training document which is provided to TV Licensing officers who take prosecution statements. Rather, this document is provided to the Procurator Fiscal (public prosecutor) in Scotland to briefly explain the processes that TV Licensing use to identify unlicensed properties and the process that is undertaken when it is established that an offence has been committed. Therefore, as I have deemed the *Procurator Fiscal's Guide to TV Licensing* not relevant to Mr Jackson's request, I need now only consider whether the correct excerpts of the *TV Licensing Visiting Procedures* have been provided to Mr Jackson and whether the redactions were made on a proper and lawful basis.

2. Has the relevant information in the excerpts of the *TV Licensing Visiting Procedures* been provided to Mr Jackson and is the redacted information exempt pursuant to 31 of the FOI Act?



Only certain sections of the *TV Licensing Visiting Procedures* are relevant to prosecution statements. Having revised the entire document, I am satisfied that the initial decision maker provided all relevant excerpts of that document to Mr Jackson, as well as some irrelevant parts. In the event, I am prepared to release the entirety of the *TV Licensing Visiting Procedures*, with redactions, on the basis that it is already partially in the public domain and it should hopefully give Mr Jackson some more context around TV Licensing Officer's procedures and protocols.

The redacted information in the excerpts of the *TV Licensing Visiting Procedures* was withheld at first instance on the basis that if disclosed, it could be useful to people who wish to evade the licence fee, and therefore, the law enforcement exemption applied as set out in subsections 31(1)(a), (b), (d), (g) and (2)(a) of the FOI Act. These subsections stipulate as follows:

31 *Law enforcement*

- (1) *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);*
- (2) *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.*

I am aided in this decision by the guidance issued by the Department of Constitutional Affairs. The guidance makes clear that this section is not confined solely to the police but also to other public authorities, which would include the BBC in its capacity as the Licensing Authority. I have also noted guidance issued by the Information Commissioner's Office on the application of section 31, which makes clear that the law enforcement exemption will



apply where releasing information may well prejudice efforts to prevent crime by changing public perceptions regarding the detection of crime and enforcement of the law.

It must be taken into account that, whilst the licence fee enjoys considerable support, there is a body of the public who object having to pay it or who seek to avoid paying it. There is a willingness amongst some of these people to share information about how to avoid payment, which includes online discussions about the detection and enforcement tactics deployed in order to collect the licence fee.

Some of the information contained in the *TV Licensing Visiting Procedures* is clearly likely to influence the public's perception of prosecution policies and tactics and is likely, accordingly, to impact on public behaviour regarding the voluntary payment of the TV licence fee. Because of this, it is my view that disclosure of that information would be likely to prejudice the prevention or detection of crime; the apprehension or prosecution of offenders; and the ability of the BBC as the Licensing Authority to collect the licence fee. It is also my view that disclosure of that information would prejudice the BBC in its role in determining whether individuals have failed to comply with the law in respect of the TV licence.

Having concluded that the law enforcement exemption is invoked, it is now necessary to consider the public interest test as section 31 is a qualified exemption. The test is whether 'in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information'.

There are clearly public interest factors in favour of disclosure, namely ensuring that the BBC is exercising its Licensing Authority functions appropriately and proportionately (e.g. that people will not be unfairly prosecuted); ensuring that public funds are being appropriately applied in that the TV licensing system is being efficiently run and value for money is obtained; and providing the public with a better understanding of the BBC's use of its statutory powers as the Licensing Authority relating to TV Licensing prosecutions.

In assessing the extent of this public interest, it is important to bear in mind the other means by which these public interests are to an extent fulfilled. Under the Charter, article 24(2)(m) provides that the BBC Trust has the specific function of "ensuring that arrangements for the collection of the licence fee are efficient, appropriate and proportionate". The Office of Surveillance Commissioners is an independent regulator which monitors the BBC's compliance with legislation regarding detection. Further, the public interest in ensuring that value for money is being obtained is to at least some extent satisfied by the National Audit Office which assesses and reports on the value for money of the BBC's collection and enforcement arrangements. Additional information relating to the cost of the TV licensing system is published by the BBC including in the BBC's annual report and in the TV licensing



annual review. Other information issued by the BBC also ensures that the public has an understanding of the BBC's use of its statutory powers relating to the collection of the licence fee.

In my view, there are strong countervailing factors against full disclosure of the document held by the BBC. The BBC has a duty to enforce the TV Licensing system and it is essential that effective deterrents against evasion are maintained for this purpose. Additionally, it is in the public interest that crimes are detected and, where appropriate, prosecuted. I am satisfied that disclosure of the information sought is likely to influence the behaviour of a body of the public with regard to complying with their TV licence obligations and that this would prejudice the detection and prosecution of TV licence fee evaders. Without an effective deterrent to licence fee evasion, evasion would invariably increase to the detriment of the overall amount of revenue available to the BBC for producing content.

I should make clear that I do not agree with all the redactions in the excerpts of the *TV Licensing Visiting Procedures* which were made by the TV Licensing member of staff who initially answered Mr Jackson's request. Not all of those redactions, in my view, satisfied the test in section 31 of the FOI Act and therefore that information should be disclosed. In order for Mr Jackson to be able to easily identify which previously redacted information is being released to him, I have ensured that that information is highlighted in yellow. Other released information is also highlighted in yellow as I have been concurrently considering a request for the entire *TV Licensing Visiting Procedures* document and those other yellow highlights indicate what further information is now being released by the BBC.

## **Conclusion**

In conclusion, I partially uphold the BBC's original decision that the redacted information sought by Mr Jackson is exempt information pursuant to sections 31(1)(a), (b), (d), (g) and (2)(a) of the FOI Act.

The remainder of the redacted information which I have deemed not to be covered by any exemptions is to be released to Mr Jackson and is highlighted in yellow in the documents.

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