

## Freedom of Information Internal Review decision

Internal Reviewer	Nicola Cain
Reference	IR2016058 / RFI20161218
Date	13 December 2016

### Requested information

On 21 June 2016 Mr Whitfield requested the following information from the BBC:

*"Please can you supply any information that would help the Public understand the official remit of TV Licensing?*

*Specifically:-*

- 1. Any official/published statements made by the BBC on the remit of TV Licensing.*
- 2. Any internal references to, or discussion of Legislation (or lack thereof) concerning the remit of TV Licensing.*
- 3. Any information pertaining to TV Licensing and the compliance of its activities and remit with Article 8 of the Human Rights Act.*
- 4. Any further information, not covered above, relating to the withholding of similar information during the BBC/BBC Trust response to a complainant within the BBC Trust CAB rulings dated Oct/Nov 2015, page 38 (where Legal Privilege was cited)."*

*("the Requested Information")*

The BBC responded to that request by a letter dated 14 July 2016 ("the Decision"). It explained to Mr Whitfield that, in light of the breadth of the Requested Information, it would take the BBC more than two and a half days to extract it. Accordingly, it explained:

*"Under section 12 of the Act, we are allowed to refuse to handle the request if it would exceed what is referred to as the 'appropriate limit'. The appropriate limit has been set by the Regulations (SI 2004/3244) as being £450 (equivalent to two and a half days work, at an hourly rate of £25). In line with our duty under section 16 of the Act to provide reasonable advice and assistance to you, please note that when considering how to narrow your request, it may be helpful for you to be aware that legally privileged information would never be included in Complaints and Appeals Board bulletins. If you wish to submit a revised request, we would be happy to consider it."*

The BBC did advise the requester that:

*"... information about the role of TV Licensing and the legal basis for the requirement to hold a TV Licence and pay a fee for it is available on the TV Licensing website at <http://www.tvlicensing.co.uk/about/foi-legal-framework-AB16>".*

Mr Whitfield has requested an internal review of the Decision by an email dated 14 July 2016, in which he argues:

*“Clearly matters will arise in FOI requests where a degree of common sense is required in homing in on that information within the BBC’s resources that is most current, most relevant and/or that which the BBC is prepared to publish.*

*In addition, my question (4) could hardly be more specific.*

*I note, in making my request for Internal Review that there exists a duty of helpfulness, which I do not believe has been engaged in this instance”.*

### **Issues on Review**

The issues on this review are:

1. Whether the BBC was correct in holding that the Requested Information is exempt under section 12 of the Freedom of Information Act 2000 (“FOIA”); and
2. Whether the BBC has breached its duty under section 16 FOIA to provide advice and assistance to Mr Whitfield in respect of his request.

### **The section 12 issue**

Section 12 exempts from the scope of the BBC’s disclosure duties under section 1 FOIA any request for information which, in the BBC’s estimate, it cannot comply with within the appropriate limit. As was explained to Mr Whitfield in the Decision, the appropriate limit is £450.<sup>1</sup> In estimating whether or not the cost of complying with the Request will exceed that limit, the BBC is entitled to take into account the costs it reasonably expects to incur in relation to:

- (a) determining whether it holds the information,*
- (b) locating the information, or a document which may contain the information,*
- (c) retrieving the information, or a document which may contain the information,*
- and*
- (d) extracting the information from a document containing it.<sup>2</sup>*

The BBC’s costs are to be calculated at a rate of £25 per hour. Accordingly, if the BBC estimates that it will take more than 18 hours (two and a half working days) for its staff to

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<sup>1</sup> Regulation 3(3), Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (“the 2004 Regulations”).

<sup>2</sup> Regulation 4(3), 2004 Regulations.



identify, locate, retrieve and extract the information sought by the Request it is entitled to refuse it.

I have reviewed the Decision. The decision-maker plainly understood the basis upon which section 12 operates. It explained that the time it would take to locate and extract the information requested (rather than, for example, identify, extract *and send*) would exceed 18 hours.

I have seen nothing which suggests that estimate to be inaccurate. The Requested Information is very broad. It encompasses four categories of information. Those categories are not limited by reference, for example, to a specific date range. Nor are they limited by reference to any specific department, individual or group of individuals in the BBC. The request is, instead, for *any* statements, internal references or information, in the broadest sense, which relate to the remit of the BBC's TV licensing activities.

The breadth of that request places an unreasonable burden on the BBC. In order to comply with it, the BBC would need to review a very large number of documents across a range of its departments. These are likely to include, but not be limited to, TV Licensing, Legal, the Trust Unit and Strategy.

Mr Whitfield's suggestion that his request was impliedly restricted to information which "common sense" suggests is included is, with respect, misconceived. The BBC is required to respond to the precise terms of the requests for information that it receives. It is not required (or even entitled) to construe those requests by providing only that information which it considers is "most current" or "most relevant". It is for the requester to identify, with sufficient precision, the information which he or she considers to be current or relevant.

I also consider Mr Whitfield's complaint in respect of the BBC's refusal to disclose one specific subset of the Requested Information to be without merit. It is true that the information referred to in subparagraph (4) of Mr Whitfield's request is potentially narrower and more concentrated than the remainder of the request; it is, however, qualified by reference to the remainder of the request. The BBC is not required, or indeed entitled, to disaggregate Mr Whitfield's request: it must respond to it in its entirety. If Mr Whitfield wants to make a further, narrower, request, he may do so. The BBC will be required to assess such a request afresh.

Accordingly, for the reasons given above, I find that the BBC correctly applied section 12 to the Request.

### **The section 16 issue**

I turn now to the issue whether or not the BBC has complied with its duty under section 16 FOIA, which provides:

*“(1) It shall be the duty of a public authority to provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to persons who propose to make, or have made, requests for information to it.*

*(2) Any public authority which, in relation to the provision of advice or assistance in any case, conforms with the code of practice under section 45 is to be taken to comply with the duty imposed by subsection (1) in relation to that case.”*

Paragraph 14 of the Section 45 Code provides that where a public authority withholds information under section 12, it should:

*“...consider providing an indication of what, if any, information could be provided within the cost ceiling. The authority should also consider advising the applicant that by reforming or re-focussing their request, information may be able to be supplied for a lower, or no, fee.”*

The Upper Tribunal has provided guidance on the scope of the section 16 duty in circumstances where information is withheld under section 12. In *Commissioner of the Metropolitan Police v Information Commissioner* [2014] UKUT 0479 (AAC) it held that where a part of a request could be complied with within the section 12 cost limit, a requester should be advised as much. It emphasised [31] in particular that the Commissioner:

*“...could have provided helpful advice to enable Mr MacKenzie to narrow his request so that it could be within the cost limit as was suggested in their letter of 13 November 2013 to the Commissioner. We cannot see how this would change the character of the request as suggested by the MPS particularly as the MPS is under an obligation to provide advice and guidance on how to narrow the request itself. Again we do not understand how it can be suggested that it would lead to a vexatious request particularly with its advice and guidance.”<sup>3</sup>*

In light of that guidance, and while I note that the BBC did direct Mr Whitfield to the page on its website providing information about the legal framework for TV Licensing, I consider that the BBC ought to have provided Mr Whitfield with further advice as to whether any information could be provided within the section 12 limit for each part of his request, qualified by for example department, time period, specific issue etc, and advised him of further information which might be accessible by other means, for example by directing him to published information. Although an indication was given to Mr Whitfield that a particular category of information sought, under part 4 of his request, was unlikely to be held, it would have been helpful to express the position more clearly. I can confirm that no information was held in relation to the exclusion from the published decision of the BBC Trust's Complaints and Appeals Board of information protected by legal professional privilege. As was stated in the Decision, *“legally privileged information would never be included in Complaints and Appeals Board bulletins”* and therefore no information was created in relation to its exclusion on this particular occasion.

These steps would have satisfied the duty, identified by the Upper Tribunal above, on the BBC to *“provide advice and guidance on how to narrow the request itself”*.

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<sup>3</sup> This dicta is consistent with the guidance provided by the ICO in its guidance on Requests Where the Cost of Compliance Exceeds the Appropriate Limit [62]-[66].



Accordingly, I find that the BBC did not comply with its duty under section 16. I apologise to Mr Whitfield for that. Further advice and guidance will be provided to Mr Whitfield within 20 working days to remedy this issue.

I also apologise to the requester for the delay in completing this internal review.

### **Appeal Rights**

If you are not satisfied with the outcome of your internal review, you can appeal to the Information Commissioner. The contact details are: Information Commissioner's Office, Wycliffe House, Water Lane, Wilmslow, Cheshire SK9 5AF; Telephone 01625 545 700 or [www.ico.gov.uk](http://www.ico.gov.uk)