

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 7 March 2012

**Public Authority:** The British Broadcasting Corporation ('the BBC')

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

### Decision (including any steps ordered)

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1. The complainant has requested specific information about TV Licence enforcement. The BBC provided him with general information, but the complainant was not happy with the answer to three of his questions. The BBC explained that it did not hold any further relevant recorded information that could address those enquiries.
2. During the course of his investigation, the BBC provided a further detailed explanation about the issues of concern as an attempted informal resolution to the complaint. The complainant accepted the content of the explanation, but still wanted a decision notice.
3. The Commissioner finds that the BBC did not on the balance of probabilities hold any further relevant recorded information that answered the remaining three questions. He requires no remedial steps to be taken.

### Request and response

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4. The complainant wrote to the BBC on 13 April 2011 and asked seven questions. The three that are relevant were worded as follows:

*'[1] (With reference to two previous responses - RFI 2006000476 and RFI2007000351) Would lack of co-operation by failing to respond to your threatening letters and by denying access to an agent without a search warrant, and with absolutely no possibility of detection evidence whatsoever (since for example in my case no TV reception equipment is installed) be construed as visiting officers being 'obstructed' (as in the 14 March 2007 response) and thereby*

*justify your application to a court to obtain a search warrant? If not, what was meant by 'obstructed' and what was implied by the use of the word 'solely'?*

**[2]** *Can you please clarify whether, if access to the premises continues to be denied, and there continues to be no response to the myriad of threatening letters to be sent, this would be sufficient to constitute a reason to assume TV receiving equipment is in use, and constitute grounds for you to apply for a search warrant, even without any other evidence whatsoever, e.g. from detection equipment or by observing a TV aerial on the roof for example (which obviously I do not have), or would you regard this as simply 'non-cooperation', as described in your responses to RFI 2006000476 and RFI2007000351 referred to above?*

**[3]** *You will be aware that the House of Commons Public Account Committee has on several occasions criticised the BBC's policy of seeking to intimidate those such as myself who do not possess TV receiving equipment. In response to a question during evidence given to the Committee on 1 July 2002 the then Head of Revenue Management, Ms Zarin Pete! [sic], stated (para. 27 of the Committee's Minutes) 'if a person has written to us a few times before, saying they have not got a television, you would probably say there is no need for detection'. (In my case I have notified you on at least five occasions.) Could you please confirm whether this is still your policy, and if so, combined with the lack of other evidence whatsoever, you would therefore not seek to apply for a search warrant in those circumstances?'*

5. The BBC responded on 17 May 2011. It provided a general explanation about its enforcement strategy and for the questions of interest, it said the following:
  - It does not hold the relevant recorded information requested because each application for a search warrant is unique and there is no single answer to the questions as they are phrased;
  - It explained that it sought search warrants as a last resort when the evidence means it is likely that a television is under use; and
  - It explained that its policy was to seek a search warrant when there were reasonable grounds for believing that an offence under section 363 of the Communications Act 2003 has, or is being committed (although its policy in Scotland is a little different and it explained why).
6. The complainant requested an internal review. In relation to the three questions that are subject to the complaint, he said:

- That he considered it was not a satisfactory explanation in terms of policy: he considered there must be a single answer since your policy cannot vary on any one aspect from case to case;
  - That he did not view it as a question of holding information but rather one of explaining what the BBC means in its policy pronouncements; and
  - He then explained his motivations for making the said requests and said that they should be easy to answer.
7. On 8 June 2011 the BBC communicated the results of its internal review. For the questions relevant to this complaint, it said:
- For request [1], it explained that the requestor was incorrect with his assumption that there was a single reason for obtaining a search warrant. The obtaining of a search warrant was a bespoke process which required reasonable grounds of suspicion that the offence was being committed.
  - It explained that the request was effectively asking the BBC whether it would apply for a warrant in certain circumstances and the BBC does not hold information that would relate to those circumstances. It confirmed that its explanation was accurate and its position correct.
  - For request [2], it explained that its answer indicated clearly when a search warrant would be sought. It explained that it also uses a necessity and proportionality test when assessing whether detection equipment is appropriate. It confirmed that it held no further relevant recorded information that could answer this request.
  - For request [3], it explained that the response cited by the complainant is correct, but that its context as part of a House of Commons questions and answer session meant that it did not offer a comprehensive description of the policy. It explained that it would visit the occupiers and if they are not allowed to then they will consider whether specific detection is appropriate in terms of the necessity and proportionality test.

### **Scope of the case**

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8. On 14 June 2011 the complainant referred the three requests to the Commissioner. He explained that he needed clear answers to be given to his questions under FOIA and that:

*“it is a nonsense for the BBC to claim they “do not hold” the information. If they make certain statements in their FOI responses*

*then they should be able to defend them, and the underlying policy cannot vary from case to case."*

9. On 29 September 2011 the complainant confirmed that he understood that the FOIA only applied to relevant recorded information and that the scope of the Commissioner's investigation would be to determine:

1. *Whether the BBC holds further relevant recorded information for the three enquiries; and*
2. *The operation of any procedural provisions of the Act.*

10. After the Commissioner's intervention, the BBC issued a new detailed response to the complainant on 23 January 2012. It provided a very detailed explanation of when it would seek a search warrant and the following explanation about why it doesn't hold further relevant recorded information for the three remaining questions:

*'I should first explain that the Freedom of Information Act grants access to recorded information - information held by the public authority at the time of the request - and there is no requirement under the Act for a public authority to create information in response to a request. In each of your questions 1-3, you have outlined a very specific set of circumstances and asked what action TVL would take in those circumstances, particularly, whether the circumstances would lead to a search warrant being requested.*

*The information that you seek in response to your questions is not held by the BBC - this is because your questions have defined certain circumstances very precisely, and these precise circumstances are not set out or addressed in the TVL policies and procedure documents which contain information about the circumstances when a search warrant may be requested. Furthermore, each decision to apply - or not apply - for a search warrant is based on full consideration of all the circumstances particular to that case, and the existence of different circumstances may lead to different decisions being taken. The only way to provide the exact information that would answer your questions would be to create new information by composing a response that addresses the specific circumstances you have defined, and as I have noted above, there is no requirement under the Act to do this.'*

11. On 7 February 2012, the complainant explained 'Clearly if this [response] had happened I may not have needed to approach your organisation at all, as [individual A redacted]'s detailed explanation is in stark contrast to the two unhelpful replies I received earlier from the BBC, firstly on 17 May 2011 from [Individual B redacted] and secondly the Internal Review decision by [Individual C redacted] dated 8 June'.

He confirmed that he continued to want a decision notice about how the three requests were handled by the BBC.

## Reasons for decision

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12. Section 1(1) states that:

*"Any person making a request for information to a public authority is entitled –*

*(a) to be informed in writing by the public authority whether it holds information of the description specified in the request,*

*(b) if that is the case, to have that information communicated to him"*

13. It should be noted at this stage that FOIA only offers the complainant the right to recorded information that is held at the date of the request (in this case, 13 April 2011). This is because information that does not already exist cannot be said to be held. The FOIA imposes no obligation to create new information.

14. In determining whether the BBC holds further relevant recorded information, the Commissioner considers the standard of proof to apply is the civil standard of the balance of probabilities.

15. In deciding where the balance lies in cases such as this one, where the complainant has asked him to consider the public authority's response with regard to whether or not the requested information is held, the Commissioner may look at:

- the interpretation of the request;
- the scope, quality, thoroughness and results of any searches undertaken by the BBC; and
- any other explanations offered as to why the information is not held.

16. The interpretation of the request is obvious in this case. The complainant's three requests focus on whether the BBC would apply for a search warrant in the particular circumstances that he states. The requests focus on the application of the BBC's policy in a given area.

17. The BBC has explained that it understood the request to focus on its application of the following four policies in the defined circumstances specified by the complainant:

1. The TVL 'No Licence Needed' (NLN) Policy;
  2. The TVL Search Warrants Policy;
  3. The TVL Enforcement Visiting Procedures; and
  4. The BBC Policy on the Authorisation and Operation of Detection Equipment under the Regulation of Investigatory Powers Act 2000.
18. The BBC explained that the circumstances that the complainant stated do not cohere with its four policies in this area. The policies are not therefore determinative about whether it would seek a search warrant in the circumstances that the complainant states.
19. Instead, the BBC on a bespoke basis takes these conditions into account, along with other relevant conditions to determine whether the conditions in its four policies are met and whether the strict legal tests to get search warrants are satisfied.
20. The BBC also explained that it had checked with the relevant departments to ensure that there are no training manuals or working instructions that discuss how to deal with the exact conditions that the complainant has laid out. It confirmed that there are no such things.
21. The BBC also explained that all documents of this nature were categorised by their key words which could then be searched. It used the following search terms 'search warrants', 'warrants', 'no licence needed' and 'obstruction' to look for relevant recorded information. These searches found the four policies, but nothing else.
22. The BBC then carefully read the four policies. It noted that request one was linked to the circumstances about what was 'obstruction'. It therefore conducted a further key word search of 'obstruct' (which would have found references to obstruct, obstructs, obstructing, obstructed and obstructing) across the four policies. It carefully considered whether the references to obstruct in the request matched any references to those words in the policy. It did not and explained to the Commissioner why this was so with reference to the policies themselves.
23. The Commissioner considers that the BBC is correct that it doesn't have recorded information that will definitively answer the complainant's three questions one way or another. He also considers that logically the BBC is also correct in stating that it is feasible that in the conditions he states (given that other conditions are likely to determine whether it seeks a search warrant) that the BBC could in the circumstances outlined by the complainant sometimes seek a search warrant and sometimes not, depending on whether the other conditions are satisfied.



24. The BBC explained that it has now offered the complainant three explanations about the circumstances and means in which it will seek a search warrant. It explained that it considers that this was the right approach to attempt to address the enquiry even where it did not hold the relevant recorded information that he seeks.
25. The BBC also explained what it required to undertake its functions in this area – the four policies that it had. It did not consider that it required the exact answers to the complainant's questions for any legal or business reason.
26. The BBC explained that the only way it could be certain that it did not have a case where only the circumstances stated by the complainant were taken into account, would be to check every single file where it considered taking enforcement action that it holds. It explained that it had 126,000 files and even if it took a minute to check one, it would take work well over the costs limits (of 18 hours) to check them all.
27. However, even if it undertook this work, it would not necessarily mean that future cases where these exact circumstances existed would be dealt with the same way, as other conditions that exist may change its view on the application of the policy. In conclusion, there isn't a single recorded answer to the questions that have been posed and the BBC does not hold one.
28. Having considered the above, the Commissioner considers that the BBC has demonstrated that on the balance of probabilities that it does not hold any relevant recorded information that could answer the complainant's questions and upholds BBC's position in this regard.
29. He also notes that the BBC offered a detailed explanation to the complainant outside of its obligations under the FOIA and considers that this was a good example of providing additional accountability when it was not required under FOIA. He wants to emphasise that this was a very good example of providing advice and assistance.

## Right of appeal

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30. 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](mailto:informationtribunal@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm)

31. 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.
32. 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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