



**IN THE FIRST-TIER TRIBUNAL**  
**GENERAL REGULATORY CHAMBER**  
**INFORMATION RIGHTS**

**Case No. EA/2012/0168**

**ON APPEAL FROM:**

The Information Commissioner's  
Decision Notice No: FS50431580  
Dated: 31 July 2012

**Appellant:** BRIAN BOWDITCH

**First Respondent:** INFORMATION COMMISSIONER

**Second Respondent:** THE BRITISH BROADCASTING CORPORATION

**On the papers:** 6 November 2012

**Date of decision:** 30 November 2012

**Before**

**ROBIN CALLENDER SMITH**  
Judge

and

**ROGER CREEDON**  
**RICHARD FOX**  
Tribunal Members

**Representations**

For the Appellant: Mr Brian Bowditch  
For the Respondent: Information Commissioner's Office  
For the Additional Party: BBC Litigation Department

**Subject matter:**

**FOIA 2000**

s.31 (a) (b) (d) and (g)  
s.32 (2) (a)

**Cases:**

*Richard Bowden v Information Commissioner and British Broadcasting Corporation*  
(EA/2010/0087).

**DECISION OF THE FIRST-TIER TRIBUNAL**

The Tribunal upholds the decision notice dated 31 July 2012 and dismisses the appeal.

**REASONS FOR DECISION**

Introduction

1. Mr Brian Bowditch (the Appellant) wanted to know whether the BBC (the Second Respondent) undertook surveillance to detect the unlicensed reception of live television broadcasts - transmitted via the internet - on computers or similar devices.

The request for information

2. The two (of the eight) questions asked by the Appellant of the BBC on 4 October 2011 which remain relevant to this appeal – referred to here as Question 1 and Question 2 – are:

(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. The BBC responded on 2 November 2011, withholding the information it held within the scope of part 1 of the request on the basis of ss. 31 (1 )(a), (b), (d) and (g) and s. 31 (2)(a) of FOIA, which provide as follows:

(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 ....

4. The information withheld on this basis comprised the disputed information in the appeal. In essence, the BBC's case was that disclosure of the disputed information would be likely to assist those wishing unlawfully to evade the payment of the licence fee which the BBC had a statutory duty to collect. The BBC considered that the public interest favoured the maintenance of these exemptions.
5. The BBC considered that part 2 of the Appellant's request did not give rise to an entitlement to information under FOIA: part 2 only arose if part 1 was answered (the BBC took the same position in response to part 3 of the Appellant's request; it provided answers to parts 4-8).
6. The BBC upheld its position on internal review. The Appellant complained to the Commissioner about the BBC's response to parts 1 and 2 of his request.
7. During the course of the Commissioner's investigation, the BBC sought to resolve the Appellant's complaint concerning part 2 by providing him with information in a letter dated 16 April 2012. The BBC maintained that part 2 of the request was hypothetical, in that it only arose if part 1 was answered, but it provided the Appellant with Part A of the *BBC Policy on the Authorisation and Operation of Detection Equipment under the Regulation of Investigatory Powers Act 2000*. This set out the legislative basis for the BBC's use of detection in relation to television receivers, namely RIPA 2000 as amended by the 2001 Order referred to in part 2 of the request.
8. In letters of 17 and 19 April 2012, the Appellant maintained that he was dissatisfied with the response to part 2 of his request. He proposed, however, that the Commissioner proceed to determine his complaint about part 1 of his request, and that part 2 be re-visited thereafter, if the

Commissioner found in his favour on part 1 and if any information consequently disclosed by the BBC revealed that the answer to his question under part 1 was "yes".

9. The Commissioner duly investigated the BBC's response to part 1 of the Appellant's request. As regards the engagement of the exemptions, he found that (with all of the following factors applying at the time of the request):
  - (i) The BBC's duty to enforce the licensing regime arose as a consequence of its powers to issue television licences and to collect and recover licence fees under sections 364 and 365 of the Communications Act 2003.
  - (ii) It was a criminal offence to install or use television receiving equipment to receive television programmes without a valid licence.
  - (iii) The administration and enforcement of the licence fee system was undertaken on the BBC's behalf by TV Licensing. This is a trading name used by companies carrying out those activities.
  - (iv) Evidence showed there to be a proportion of the public who sought unlawfully to evade paying the licence fee.
  - (v) An important aspect of an effective enforcement strategy was the maintenance of uncertainty as to the likelihood of detection. In other words, uncertainty encouraged compliance. Disclosure of the disputed information would undermine that uncertainty.
10. It followed that the prejudicial consequences listed under ss. 31(1) (a), (b), (d) and (g) and s.31 (2)(a) of FOIA were likely to occur.
11. When considering the public interest, the Commissioner found that there was a public interest in ensuring that the BBC's surveillance powers were being used lawfully and appropriately. This, however, was largely served by other means. The legal regime (namely RIPA 2000 and the 2001 Order) was prescriptive. The Office of Surveillance Commissioners had noted in its most recent inspection report concerning the BBC's use of its

surveillance powers (issued in 2010) that all of the authorisations it examined were of a high standard. The BBC's RIPA policy is also subjected to an annual audit by a BBC department independent of TV Licensing.

12. There was also a public interest in ensuring the efficient use of public funds in the collection of the licence fee. Again, however, this was largely served by other means, namely scrutiny by the National Audit Office, the TV Licensing Annual Review, the BBC's Annual Report and the BBC Television Licence Fee Trust Statement.
13. There was a very strong public interest in the BBC being able to enforce the television licensing system and in not disclosing information which would be likely to undermine the deterrent effect. There was also a very strong public interest in not unduly increasing the cost of the BBC's enforcement activities.
14. The public interest therefore favoured the maintenance of the exemptions.
15. The Commissioner's Decision Notice also included a confidential annex containing information which, in the Commissioner's view, lent strong support to the BBC's case but which could not be disclosed without undermining its reliance on the exemptions under FOIA.
16. The Tribunal was invited to give particular weight to the contents of that annex. The Commissioner recognises that the Appellant is at a disadvantage in not being able to see or challenge the contents of that annex, but this is inevitable in the circumstances of this case.

#### The Appellant's position

17. The Appellant emphasised that his first question was directed to finding out if the BBC made any attempt at all to detect unlicensed use of internet television. If it complied with its statutory obligation, then he presumed that it did.

18. In respect of the Section 31 exemptions he felt he had been misunderstood in the review submissions. In respect of the public interest issues he believed:

that the public interest in this matter strongly outweighs any concerns about compromising the collection process. I have already made a case for this in my request for a review. To be clear, I am not asking about detection methods. (In fact, there is already a substantial scientific literature on methods of eavesdropping on devices such as computers, or on internet traffic. One can get a pretty good idea of the range of methods that may be at the BBC's disposal from publicly available sources.) I would just make the point that television channels available over the internet are already numbered in the hundreds. A considerable degree of eavesdropping precision would be needed to identify such data as a live television broadcast. This is likely to entail a considerable degree of "collateral intrusion" onto private communications and personal data. People have a right to know if such information is likely to be intercepted by the BBC or its agents.

19. More broadly, he believed that the long-term enforceability of the licence fee was an important question. It would feature prominently in the run-up to the Charter Review. All the evidence suggested that the use of internet television would increase, and the next Charter was scheduled to take matters forward to 2026. He believed that if the BBC continued to deny that this was a serious issue, then it would only damage the BBC's credibility. It did not have to give a detailed technical account of its detection methods but should give, in broad terms, some account of how it planned to proceed if the present funding regime was to remain in place.

### Evidence

20. The Tribunal has had the advantage of considering both open and closed information provided by the BBC in respect of this appeal. The Appellant has only had the benefit of seeing the open material.

21. The closed material was considered with the rigorous, critical scrutiny that Tribunal applies to such material, conscious that it is not available to the Appellant (and the public) unless the Tribunal decides that – in whole or in part – that should be the case.



22. This appeal was not such a case.

### Conclusion and remedy

23. Many of the issues of principle raised in this appeal were also considered extensively in *Richard Bowden v Information Commissioner and British Broadcasting Corporation* (EA/2010/0087). The Tribunal reminds itself that if, in all the circumstances, the public interest in maintaining the section 31 exemption outweighs the public interest in the disclosure of the information, the duty to disclose the information under section 1 (1) (b) FOIA does not apply.

24. The Tribunal is satisfied on the balance probabilities that there is a public interest in ensuring that all applicable individuals pay the licence fee and that the BBC receives the licence fee income to which it is entitled. To do otherwise would be to increase the cost of enforcement, reduce the revenue available for the BBC's core purposes of producing quality public service broadcasting, and increase the burden on other licence fee payers, particularly when the amount of the licence fee is set.

25. There is, equally, a public interest in ensuring that public authorities are able to carry out their functions properly, and this is particularly strong in respect of public authorities carrying out their statutory duties. In its guidance on the application of the s.31 exemption, the Ministry of Justice state that *"It is likely to be in only the most exceptional circumstances that it will be appropriate to prejudice the discharge of a legal duty."*

26. There is a general public interest in ensuring that the law is complied with, and that non-compliance is detected and prosecuted. The likelihood that compliance with the television licensing regime would decrease if disclosure were to be required, as set out above, enhances the public interest in ensuring compliance.

27. There is a further public interest in maintaining an effective deterrent against the non-payment of the licence fee, and in encouraging voluntary

payment. By encouraging the public to pay their licence fee voluntarily, this reduces the cost to the BBC, and ultimately the licence fee payer (comprising the majority of the general public), of collection and ensuring compliance.

28. The Tribunal agrees with the BBC submissions that, taken either individually or cumulatively, these are powerful public interests which cannot be displaced without the most powerful justification. Such justification does not exist in this case.

29. Echoing Paragraph 60 of *Bowden*, the Tribunal places considerable weight on all the public interest factors we have had to consider – in particular those above – and observe that when the issue relates to crime prevention, uncertainty itself encourages compliance. By minimising the cost of enforcement this keeps the cost 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.

30. Given all the circumstances of this appeal, the Tribunal is satisfied that having determined the position in respect of the Appellant's Question 1, the Appellant has agreed that Question 2 would only fall to be considered if our answer had been different in respect of Question 1.

31. Our decision is unanimous.

32. There is no order as to costs.

Robin Callender Smith  
Tribunal Judge  
30 November 2012