



IN THE FIRST-TIER TRIBUNAL **Case No. EA/2011/0114**

GENERAL REGULATORY CHAMBER INFORMATION RIGHTS

ON APPEAL FROM:

Information Commissioner's Decision Notice No: FS50317117

Dated: 31st March 2011

Appellant: Chief Constable of Hampshire Constabulary

Respondent: Information Commissioner

Second Respondent: The Independent Police Support Group

Heard on the papers at Field House on 26th September 2011

and thereafter on 23rd November 2011

Date of decision: 13th December 2011

BEFORE:

Fiona Henderson (Judge)

Henry Fitzhugh

And

David Wilkinson

Subject matter: FOIA – s 31(3) – duty to confirm or deny

Cases:

England & London Borough of Bexley v Information Commissioner EA/2006/0060 & 0066

Baker v IC and the Cabinet Office and the National Council of Civil Liberties EA/2006/0045

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

Case No. EA/2011/0114

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal allows the appeal in part and amends the Decision Notice FS50317117 dated 31st March 2011 as follows for the reasons set out in main body of the Decision.

SUBSTITUTED DECISION NOTICE

Dated: 12th December 2011

Public authority: Chief Constable of Hampshire Constabulary
Police Headquarters,
West Hill,
Romsey Road,
Winchester,
Hampshire SO22 5DB.

Name of Complainant: The Independent Police Support Group

The Substituted Decision:

1. For the reasons set out in Confidential Annex 2, the substituted decision is that in relation to the first limb of the information request s31(3) is not engaged and the Chief Constable of Hampshire Constabulary has breached s1(1)(a) FOIA in failing to confirm or deny whether the information is held.
2. In relation to the second limb of the information request, the Tribunal is satisfied that s31(3) is engaged and that the public interest in maintaining the exclusion from the duty to confirm or deny outweighs the public interest in disclosing whether the information is held.

Action Required:

The Chief Constable of Hampshire Constabulary shall comply with s1(1)(a) FOIA in relation to the first limb of the information request within 35 days from today.

Signed

Fiona Henderson (Judge)

Dated this 13th day of December 2011

REASONS FOR THE DECISION

Introduction

1. The Professional Standards Department (PSD) of Hampshire Constabulary is responsible for investigating suspected misconduct in relation to its Police Staff and Officers. Executive Authority is an investigative tool whereby permission is granted by a Chief Officer¹ for covert surveillance function² to be introduced in cases of serious misconduct where the criminal threshold for directed surveillance under the Regulation of Investigatory Powers Act 2000 (RIPA) is not met. It is not provided for by way of a statute and unlike RIPA there is no statutory oversight.
2. Where during the course of an investigation authorised under Executive Authority procedure, criminal conduct by the subject(s) is identified, the Executive Authority must be immediately cancelled and an appropriate RIPA authorisation obtained. The availability of Executive Authority as an option for the PSD is outlined in the force's procedure "*Executive Authority concerning staff Issues*". This is available to all staff on the intranet. The Appellant considers that knowing that this investigative tool can be used is a significant deterrent to wrong doing amongst its employees. It is accepted by the Appellant that this is an intrusive tool. However, they argue that it can only be used in extreme cases where a subject is suspected of inappropriate activities.

The Appellant's *Policy and Procedure for use of Executive Authority* (paragraph 14) states that Executive Authority:

"..applies to covert techniques conducted during the investigation of serious misconduct by police officers, and in circumstances outside of the workplace where such misconduct relates to a breach of Police Regulations 2003 (for example, restrictions on private life, incompatible business interest), or in relation to abuse of the Pension Regulations and attendance management procedures."

¹ The head of PSD or Assistant Chief Constable TO or SO

² This includes the use of directed surveillance and/or deployment of a covert human intelligence source but will not be granted in relation to any activity taking place on residential premises or in a private vehicle other than the extent to which persons outside the curtilage of residential premises, or outside of a private vehicle would ordinarily be able to view.

Request for Information

3. The Independent Police Support Group (IPSG) requested the following information (in the two limbs clearly specified) from the Appellant on 4th March 2010:

“In the last 3 years, how many times has an ‘Executive Authority’ been authorised to conduct surveillance against police officers.

Please provide details of the misconduct alleged and the outcome of each operation with regards to any sanction imposed.”

4. By letter dated 16th March 2010 the Appellant neither confirmed nor denied that it held the Requested Information relying upon the following FOIA exemptions:
- section 40(5),³
 - section 30(3),⁴
 - section 31(3) on the basis that complying with the duty to confirm or deny would, or would be likely to, prejudice the prevention or detection of crime and the apprehension or prosecution of offenders (section 31(1)(a) and (b)) and
 - section 44(2) FOIA⁵
5. The IPSG applied for an internal review on 17th May 2010. The Appellant conducted an internal review the conclusions of which were dated 11th June 2010 which upheld this refusal notified to the Appellant on the same grounds.

The Complaint to the Information Commissioner

6. The Appellant Complained to the Commissioner. In his Decision Notice FS50317117 dated 31st March 2011 the Commissioner:
- Held that none of the exemptions from the duty to confirm or deny were engaged;
 - In relation to s31(1)(a) and (b) any information that might be held by the Appellant relevant to the request would not relate to criminal investigations;

³ Personal information

⁴ Investigations and proceedings conducted in relation to criminal matters by public authorities

⁵ Information covered by prohibitions on disclosure

- Required the Appellant to confirm or deny whether the requested information was held.

The Appeal to the Tribunal

7. The Appellant appealed dated 26th April 2011. In its grounds of Appeal (and clarified in its amended grounds of appeal dated 8th June 2011) the Appellant raised an additional exemption namely that the duty to confirm or deny was engaged pursuant to section 31(3) FOIA by reference to sections 31(1)(g) and 31(2)(b) FOIA, because confirmation or denial would, or would be likely to, prejudice the exercise of its functions for the purpose of ascertaining whether any person is responsible for any improper conduct.
8. In an amended response dated 27 June 2011, the Commissioner accepted that, in light of the matters set out in the Appellant's amended grounds of appeal:
 - section 31(3) FOIA was engaged in this case by reference to sections 31(1)(g) and 31(2)(b) FOIA.
 - the Commissioner was satisfied that the public interest in maintaining the exclusion from the duty to confirm or deny outweighs the public interest in disclosing whether the information is held.
9. The Tribunal joined IPSP to this appeal on 10th June 2011. In their response dated 5th July 2011 they set out their grounds opposing the Appeal which can be summarized as arguments:
 - a) Challenging that confirming or denying would be likely to cause prejudice and
 - b) Arguing that the public interest lies in confirming or denying that the information is held.

Legal Submissions and Analysis

10. Under the Freedom of information Act:
 - 1) *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...

6) in this Act, the duty of a public authority to comply with subsection (1)(a) is referred to as the duty to confirm or deny.

11. The exemption to the duty to confirm or deny is found in s31 FOIA:

(1) Information which is not exempt information by virtue of section 30⁶ is exempt information if its disclosure under this Act would, or would be likely to, prejudice—

(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—

...

(b) the purpose of ascertaining whether any person is responsible for any conduct which is improper,

....

(3) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice any of the matters mentioned in subsection (1).

12. The Tribunal is satisfied that in respect of each limb of the information request it must determine:

- ii) Whether section 31(3) is engaged by reference to s 31(1)(g) and 31(2)(b).
- iii) If so whether the public interest is in favour of Not Confirming or Denying that the information is held.

13. The Tribunal accepts the Commissioner's submission that the "function" identified by

⁶ Investigations and proceedings conducted in relation to criminal matters by public authorities

a public authority for the purposes of section 31(1)(g) must be a function which is:

- (i) designed to fulfil one of the purposes specified in section 31(2) FOIA and,
- (ii) imposed by statute (or in the case of a government department, authorised by the Crown) and,
- (iii) specifically entrusted to the relevant public authority to fulfil (rather than just a general duty imposed on all public authorities).

14. The Tribunal accepts that the remit of the Professional Standards Department, (which is the department that would carry out surveillance under Executive Authority in cases where it is authorized), is responsible for investigating misdemeanours and misconduct alleged to have been committed by Officers and members of staff. The PSD's remit is regulated within a statutory framework governed by the Police Reform Act 2002, and linked to the Police Act 1996 and the Police Conduct Regulations 2008.

15. The Tribunal is satisfied therefore that if information were held in relation to this request it would fall to be considered under s31.

16. The Appellant argues that confirming or denying whether the information is held would allow people to make deductions that would prejudice their ability to ascertain whether Officers and members of staff are responsible for any conduct which is improper.

17. They argue that confirming that the information is held would have the following effect:

- Allow those who have been investigated to know that Executive Authority may have been used against them.
- Allow individuals to adapt their behaviour to avoid detection. (Cross referencing the published disciplinary offences and the fact that it had been used might indicate the types of behaviour it was used to investigate).
- It risks alerting those who are currently subject to an ongoing investigation that they may be the subject of Executive Authority.

18. The IPSTG argue that the exemption would not be engaged because:

- Officers and Staff are informed that they have been subject of an investigation and are served a discipline notice outlining the allegation, and their rights.
- The force publishes an internal newsletter regarding cases dealt with and the names of Officers disciplined.
- The fact that Executive Authority is a tool available to the PSD is known within the force as it is published on the intranet.

19. The Tribunal notes that confirmation of the fact of an investigation and the availability of an investigative tool, is not the same as confirmation that Executive Authority has been used. The information that an investigation has taken place (without disciplinary action being taken) is limited to the individuals concerned who have no duty to share that information, and circulation of the disciplinary list is limited to within the force, whereas disclosure under FOIA is to the World at Large.

20. The Tribunal accepts that confirmation that Executive Authority has been used might indicate to someone who knows that they have been investigated that it may have been used on them especially if they consider the seriousness of their misdemeanour when compared to the published list of those disciplined. However, since they would not know of others who had been investigated but not disciplined, confirmation that Executive Authority was used (even in a small Authority) would not provide unequivocal confirmation that it had been used in any particular case.

21. The Appellant argues that denying that the information is held would have the following effect:

- To provide unequivocal confirmation to those who have been doing wrong that they have NOT been subject to Executive Authority.
- This might embolden wrong doers and encourage potential wrong doers.
- Cross reference to the list of those disciplined, would allow staff and Officers to know the types of offence which have not attracted Executive Authority in the past and might encourage them to act in certain misconduct areas with relative impunity.

- Reduce the efficacy of the deterrent effect by influencing the mindset of officers and staff minded to pursue “wrongdoings” based on the propensity of the force to use this law enforcement technique against its employees.
22. In relation to the first limb of the request, the Tribunal is not satisfied that s31(3) is engaged for the reasons set out in Confidential Schedule 2⁷.
23. There is no dispute that in relation to the second limb of the request, confirming or denying that the information is held would indicate whether Executive Authority had in fact been used during the time specified. This is because of the terms of the request. If the Appellant holds information of the “outcome of the operation”, that can only be because there must have been an operation (which within the terms of the request would include the use of Executive Authority). In relation to limb 2 of the request the Tribunal is satisfied that s 31(3) FOIA is engaged because confirming or denying that the information is held would indicate whether Executive Authority had been used and the Tribunal is satisfied for the reasons set out above that this would prejudice the prevention and detection of misconduct.

The public interest test in relation to limb 2 of the request

24. Section 31(3) FOIA is a qualified exemption and therefore subject to the public interest test as set out in s2(1)(b) FOIA:

(1) Where any provision of Part II states that the duty to confirm or deny does not arise in relation to any information, the effect of the provision is that where...

(b) in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the public authority holds the information,

section 1(1)(a) does not apply.

⁷ This decision is accompanied by 2 confidential schedules. The first is disclosable to all the parties but is to remain confidential in all other respects and is not for promulgation. The second confidential schedule is not for disclosure to the public or the second respondent until after the Appellant has complied with the substituted decision notice.

26. In considering public interest factors applicable the Tribunal agrees with the approach set out in *England & London Borough of Bexley v Information Commissioner EA/2006/0060 & 0066*, at paragraph 65 which provides:

(f) In considering public interest factors in favour of maintaining the exemption, they relate to the particular interest which the exemption is protecting..⁸.

(g) The public interest factors in favour of disclosure are not so restricted and can take into account the general public interests in the promotion of transparency, accountability, public understanding and involvement in the democratic process.

Factors favouring compliance with s1(1)(a)

27. The IPSP argues that:

- i. There is a need for informed public debate to further public understanding and involvement in the democratic process:
 - It is argued that there is no clear legal basis for Executive Authority (unlike RIPA which is founded in statute),
 - It does not appear that there was any consultation with Hampshire Police Authority (other than informing them that it was going to be implemented),
- ii. There is a lack of Transparency. The IPSP raise concerns that the procedure is being misused, it is supposed to be used only for serious misconduct falling short of criminal matters and only when this is the least intrusive or only way of obtaining the evidence. However, there is no way of knowing if:
 - a) It is being used for minor misconduct cases,
 - b) It is being used in conflict with the principle that it should only be used where evidence can be obtained through the least intrusive means.
 - c) It is being used when criminal conduct is suspected and a RIPA authorization should be sought (e.g. whilst falsely claiming sick pay can constitute misconduct it can also constitute a criminal offence).⁹

⁸ In the *Bexley* case it was the prevention of crime

- d) It is being used as a fishing expedition in cases where an investigation has failed to turn up evidence of wrongdoing.
- e) It is being used in a way that breaches Article 8 of the European Convention of Human Rights.

iii. There is a lack of Accountability

- The Authorising Officer for Executive Authority is the Head of PSD who is of Superintendent rank,
- The person authorizing the Executive Authority has no distance from the investigation as generally it authorized by the head of the investigating department,
- There is no statutory oversight or independent scrutiny or monitoring (unlike RIPA) with monitoring of the use of Executive Authority being conducted by the Authorising Officer.
- Subjects of Executive Authority have fewer avenues of complaint (e.g. their right to appeal to the IPCC is more limited than that of the general public).

28. The Tribunal notes that these are arguments largely in favour of disclosure of the substantive information requested (if it is held). It is not apparent that these public interests would be significantly advanced by the answer that information is or is not held. However, the Tribunal does consider this to be an argument relating to the public interest in transparency since the successful use of s31(3) FOIA stops an information request in its tracks and in the event that information is held, would prevent the consideration of the public interests in relation to the substantive information by the Tribunal. The public interest test requires the Tribunal to consider the public interest in all the circumstances of the case and the Tribunal is satisfied therefore that it is appropriate to consider the wider implications of complying with s1(1)(a).

⁹ The Tribunal notes that there is support for the IPSG's argument on this point because the "wrong doings" that are said by the Appellant to be considered serious enough to investigate and consequently for which Executive Authority may be granted include a "criminal offence".

29. Whilst the Tribunal accepts the principle that there is a need for informed public debate, the matters raised by the IPSTG in this regard can all be argued from material already available and are unlikely to be significantly advanced by the information requested.
30. The Appellant (supported by the Commissioner) accepts that there is a public interest in transparency and accountability but argues that the weight of these factors is negated by virtue of the facts that there is some external supervision and monitoring. For example whilst surveillance other than RIPA does not fall within the Office of the Surveillance Commissioner's (OSC) remit, they would look at what police forces around the country are doing regarding Executive Authority when visiting and inspecting forces. Additionally the Tribunal notes that the Appellant's own procedure (02103) states that:

3.14.1 Any staff member subject of covert surveillance activity authorised under Executive Authority may challenge its validity through application of the grievance procedure. In cases where the member of staff becomes the subject of misconduct proceedings, a right of challenge will exist under those proceedings.

3.14.2 Any person who considers that covert surveillance or interception of communications has been carried out, other than in accordance with the law, has a right of complaint to the Investigatory Powers Tribunal.

Factors in favour of non compliance with s1(1)(a)

31. The Appellant repeats the matters set out in paragraphs 17 et seq which can be summarized as the argument that to confirm or deny would undermine ongoing investigations, reveal policing techniques, their level of use and risk identification of individual cases. It would either compromise the tactic or undermine its deterrent effect. Consistency they argue is in the public interest as it prevents inadvertent disclosure at a future date if a similar request is received at a later stage as inferences may be drawn from failing to state whether information is held in circumstances where s 1(1)(a) has previously been complied with.

32. The IPSTG repeats its arguments as rehearsed at paragraph 18 above namely that the weight of these arguments is reduced by the information already disseminated within the force and to the subjects of investigation.
33. Upon consideration of all the material and arguments before it the Tribunal is satisfied that the balance of public interest lies in upholding the exemption to s1(1)(a) as set out in s31(3) FOIA.

Conclusion and Remedy

34. The Tribunal is satisfied that in relation to the first limb of the information request s31(3) is not engaged and the Appellant has breached s1(1)(a) FOIA in failing to confirm or deny whether the information is held. In relation to the second limb of the information request, the Tribunal is satisfied that s31(3) is engaged and that the public interest in maintaining the exclusion from the duty to confirm or deny outweighs the public interest in disclosing whether the information is held.

Signed:

Fiona Henderson

Judge

Dated this 13th day of December 2011