

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 19 August 2013

Public Authority: Ministry of Justice
Address: 102 Petty France
London
SW1H 9AJ

Decision (including any steps ordered)

1. The complainant has requested information regarding the use of the Regulation of Investigatory Powers Act 2000 within prisons.
2. The Commissioner's decision is that the Ministry of Justice ("MOJ") was correct to rely on section 31(3) to neither confirm nor deny it held some of the requested information and where it did confirm it held requested information it correctly relied on section 31(1)(a) not to communicate it to the complainant.

Background

3. The Regulation of Investigatory Powers Act 2000 ("RIPA") makes provision for, and about, the interception of communications in England and Wales.
4. Section 4(4) of RIPA provides for the lawful interception of communications in prisons (in England and Wales) to be carried out under rules made under section 47 of the Prison Act 1952.

Request and response

5. The complainant's request for information (made on 1 August 2012) and the MOJ's final position, as stated to the complainant on 28 February 2013, is as follows –

Request

- i. "How many applications under RIPA have been made to carry out surveillance in prisons in 2012 and so far in 2013?"

MOJ's Reply

The MOJ confirmed it held this information but stated that it was exempt from release by virtue of section 31(1)(a) of FOIA as its disclosure would be likely to prejudice the prevention and detection of crime. The public interest test, it found, was best satisfied by withholding the information.

Request

- ii "How many applications were approved?"

MOJ's Reply

The MOJ neither confirmed nor denied whether it held this information. It relied on section 31(3) of FOIA because it believed such confirmation or denial would be likely to prejudice the prevention or detection of crime under section 31(1)(a) of FOIA. The public interest test, it found, was best satisfied by neither confirming nor denying it held the requested information.

Request

- iii "Did any of the applications involve surveillance of MPs and/or their communications?"
- iv How many applications involving MPs and/or their communications were approved?
- v. Please disclose whether any MPs have been subject to surveillance during this timeline and, if so, how many? This may include surveillance of correspondence and communications."

MOJ's substantive Reply (to the above 3 queries)

The MOJ neither confirmed nor denied whether it held this information. It relied on section 31(3) of FOIA because it believed confirmation or

denial would be likely to prejudice the prevention and detection of crime, and the maintenance of security and good order in prisons (sections 31(1)(a) and (f) of FOIA). The public interest test, it found, was best satisfied by neither confirming nor denying it held the requested information.

Scope of the case

6. The complainant contacted the Commissioner on 1 March 2013 to complain about the way his request for information had been handled.
7. As part of his investigation the Commissioner asked of, and received from the MOJ, the following -
 - A copy of the withheld information (but not the requested information that attracted a neither confirm nor deny response) clearly marked to show which FOIA exemptions it was relying on.
 - Detailed explanations for the parts of the FOIA it relied upon.
8. In its detailed explanations the MOJ now explained that it did hold the information as per request (ii) above but relied on section 31(1)(a) not to communicate it to the complainant.
9. The MOJ also referred the Commissioner to his previous decision FS50463085¹ to support its case. However the Commissioner takes cognisance that he is not bound by his previous decisions and each case is decided on its own merits.

Reasons for decision

10. Section 1 of FOIA provides two distinct but related rights of access to information that impose corresponding duties on public authorities. These are:
 - the duty to inform the applicant whether or not requested information is held and, if so,

¹ http://www.ico.org.uk/~media/documents/decisionnotices/2013/fs_50463085.ashx

- the duty to communicate that information to the applicant.

11. Request (i)

How many applications under RIPA have been made to carry out surveillance in prisons in 2012 and so far in 2013?

Request (ii)

In the context of request (i) how many applications were approved?

12. In relation to these requests the MOJ confirmed it held the information. However, it stated that it was exempt from release by virtue of section 31(1)(a). It explained that in withholding the information it should not be implied that an authorisation was sought or granted, as the withheld statistical information may include the number zero.

13. Section 31 provides that

'(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—

the prevention or detection of crime,

14. When considering the application of a prejudice-based exemption, such as those in section 31 which have been cited in this case, the Commissioner adopts the three step process laid out in the Information Tribunal case of Hogan v the ICO and Oxford City Council (EA/2005/0026, EA/2005/0030) (the "Hogan/Oxford CC case"):

'The application of the 'prejudice' test should be considered as involving a numbers of steps. First, there is a need to identify the applicable interest(s) within the relevant exemption.....Second, the nature of 'prejudice' being claimed must be consideredA third step for the decision-maker concerns the likelihood of occurrence of prejudice' (paragraphs 28 to 34).

15. The MOJ considers that releasing this information will pose a "real and significant risk" because it will provide additional information to those seeking to commit crime in and/or from prisons. It is information that they would not otherwise have possessed and would enable them to calculate the likelihood that their actions will be subject to surveillance. The MOJ added that it is important to note that other information which they would need to calculate that likelihood is already in the public domain, such as the prisoner population, prison staff numbers and number of prisons in England and Wales.

16. It considered that would-be miscreants, knowing the probability of "RIPA" surveillance, would more carefully consider and/or adapt their methods in order to avoid detection and thus succeed in their criminal attempts. Therefore there is, it says, a "real and significant risk" that efforts to prevent and detect crime would be likely to be prejudiced.
17. The complainant stated (in his request for a review) that the MOJ had not backed its claims with any evidence. He also argued that the release of statistical information cannot prejudice the prevention or detection of crime in that as surveillance under RIPA is permitted it remains a deterrent regardless of how often it is or is not used. Financial resources, he went on to say, may determine how often RIPA is used and this will surely fluctuate, so releasing data for a given time could not be a predictor of how often it may be used in the future. Finally, the complainant averred that other public authorities had been more forthcoming on their use of RIPA.
18. To determine whether the exemption is engaged the Commissioner must do so on the balance of probabilities. That is, is it more likely than not that publically disseminating the information would be likely to prejudice the prevention or detection of crime?
19. The Commissioner agrees with the complainant that the MOJ has not provided evidence to support its assertions. However this is not fatal to the MOJ case as the exemption itself is predicated on what is likely to happen rather than what has happened.
20. The Commissioner agrees less when the complainant says that RIPA will always be a deterrent. The Commissioner's view is that how strong or effective RIPA is as a deterrent is very dependent on the knowledge of how frequently it is used. If it is known that it is rarely or never used then its deterrent value is surely diminished. Conversely if it is known that it is used very frequently that may increase its deterrent value however such an increase in deterrence must be off-set against the distinct possibility that it will cause some to alter their criminal behaviour to avoid detection.
21. The Commissioner reiterates, after re-considering it, his view on this issue as he did in FS50463085, namely that:

"The Commissioner accepts the contention of the MOJ that providing the times it has authorised operations/investigations would be likely to prejudice the prevention or detection of crime. He accepts that knowing these figures would provide useful intelligence to those that are or would engage behaviour that would warrant the use of RIPA In knowing the figures it enables those with criminal intent to use them in determining the possibility of detection.

If the figure(s) are low it is reasonable to conclude that those with criminal intent will likely be emboldened to commit the offence knowing or believing that the likelihood of detection is therefore diminished. Conversely if the figure is high then those with criminal intent, believing the likelihood of detection is therefore high, are likely to modify their behaviour so as to avoid detection”.

22. It is for the reasons given above that the Commissioner finds the exemption engaged.
23. However, section 31 is a qualified exemption so the public interest test set out in section 2(2)(b) must be applied. That is, though the exemption is engaged, the information can only be withheld if the public interest in maintaining the exemption outweighs the public interest in disclosure. In respect of this, the MOJ put forward the following considerations.
24. Public interest considerations favouring disclosure:
 - Disclosure would provide greater transparency and enable the public to appreciate the frequency of the use of powers available under RIPA and the resources required to tackle crime in prisons. This would increase general understanding of the need for such tactics and the circumstances in which the powers are necessary and proportionate. Disclosure may provide opportunities for public discussion on crime in prisons.
 - In the interests of transparency it is important that authorities, at the very least, release data showing how often they are using the RIPA legislation to carry out surveillance.
25. Public interest considerations favouring withholding the information
 - It is more in the public interest to withhold this information because it could be used to subvert the effective use of RIPA powers by indicating the extent to which powers can be used over a specific period. This information would prove invaluable to those engaged in criminality within prisons, either as individuals or as part of an organised crime group, and would indicate or confirm the extent to which covert surveillance was undertaken. This could lead criminals to alter their behaviour and methods, which could in turn frustrate investigations and our ability to counter criminality in prisons.
 - The fact that there are these powers is a matter of public record but the extent of usage across the prison estate may provide tactical advantage to criminals.

- The consequences of this are unlikely to be limited to crime in prisons but will also affect communities. This is because prisoners will not have been rehabilitated upon their release from prison, meaning a greater risk to the public.
 - It should also be remembered that the prison service has finite resources and therefore needs to target its investigative capability to address the threats posed by serious criminality. Anything that gives information to criminals is likely to mean that the MOJ will not easily be able to recover the initiative.
26. The Commissioner notes the view of the Information Tribunal that the only valid public interest arguments in favour of maintaining an exemption are those that relate specifically to that exemption (Christopher Martin Hogan and Oxford City Council v Information Commissioner EA/2005/0026 and 0030 ("Hogan"), paragraph 59).
27. Conversely, the Commissioner notes, this restriction does not apply to those factors favouring the release of information. The Information Tribunal in Hogan made this point at paragraph 60 where it said:
- "While the public interest considerations against disclosure are narrowly conceived, the public interest considerations in favour of disclosure are broad-ranging and operate at different levels of abstraction from the subject matter of the exemption."
28. The Commissioner reiterates, after re-considering it, his view on this issue as he did in FS50463085 namely that:

"... The public interest factors that favour the release of the information rightly have an enduring appeal. RIPA ... regulates the interception by the State of an individual's communications with others and thus is highly intrusive. It is plainly in the public interest that such intrusion is itself monitored to ensure that it occurs where it is reasonably necessary and, above all, that it is done lawfully. The Commissioner does not doubt that releasing the information would facilitate the public's ability to gauge how and to what extent intercepts are used within a prison environment. The counter-point to this, of course, is that releasing the information also likely facilitates those prisoners intent on committing further criminal acts.

In the context of the immediately preceding paragraph the Commissioner takes cognisance of the involvement of the Interception of Communications Commissioner and his duty with regard to the monitoring of interceptions within prisons. This is conducted by way of inspections of prisons by his staff. The primary objective of the

inspections is to ensure that any interceptions are carried out lawfully and that a recognised regime is in place to facilitate those inspections. This scrutiny and monitoring of prison intercepts significantly goes some way to meet the public's need for transparency and accountability as discussed in the preceding paragraph."

29. It is for the reasons given above that the Commissioner finds that the public interest in maintaining the exemption outweighs the public interest in releasing the information.
30. Requests -
 - (iii) Did any of the applications involve surveillance of MPs and/or their communications?
 - (iv) How many applications involving MPs and/or their communications were approved?
 - (v) Please disclose whether any MPs have been subject to surveillance during this timeline and, if so, how many? This may include surveillance of correspondence and communications.
31. In relation to these requests the MOJ neither confirmed nor denied whether it held the information and relied on section 31(3) of FOIA to do so.
32. Where compliance with the duty to confirm or deny under section 1(1)(a) would, in itself, disclose sensitive or potentially damaging information that falls under an exemption then FOIA allows a public authority to respond by refusing to confirm or deny whether it holds the requested information. This is called a 'neither confirm nor deny' response.
33. Section 31(3) sets out the exemption from the duty to confirm or deny the existence of information requested if that confirmation or denial is likely to prejudice any of the matters covered by the provisions of section 31.
34. The Commissioner considered that there is an inherent ambiguity to the request as laid out in paragraph 30 above. Was the complainant referring to MPs who themselves had been incarcerated, or those merely visiting imprisoned constituents or both. Ultimately the MOJ considered both situations.
35. The MOJ explained that confirming whether it held the information would, in itself, disclose sensitive information. If it confirmed information was held it would become public knowledge if MPs have been subject to RIPA surveillance and, given the small numbers of MPs

that have been imprisoned, this information could potentially be linked to them.

36. It went on to say that admitting or denying that it held details about specific investigations would confirm those investigations had or had not taken place. This, in turn, could give those potentially under surveillance extra information with which to determine whether or not they were being investigated. As with the first half of the request this could then cause further criminality to be committed or criminal methods to be altered to avoid detection.
37. The MOJ maintains that the arguments against disclosure are even stronger for information on surveillance of any MP visit. The MoJ believes that given the relatively small number of MPs who communicate with and visit prisoners, releasing statistical information about the number (including zero) detailed in surveillance applications could be used to determine to a greater degree of accuracy the likelihood that the inmate were under surveillance.
38. The Commissioner accepts the veracity and logic of the MOJ's arguments on both the above points. That is, confirming or denying whether there have been applications for the surveillance of incarcerated Members of Parliament, or of Members of Parliament visiting imprisoned constituents, would assist those (if there are such) who would gain from knowing whether it is possible or probable that they are under surveillance.
39. Where a qualified exemption applies and the public authority does not wish to confirm nor deny that it holds the requested information, the decision to give a 'neither confirm nor deny' response is itself subject to the public interest test.
40. The MOJ explained that despite the legitimate public interest in understanding more about the use of powers under RIPA, the release of this information would give an advantage to criminals wishing to continue their activities. The information could help individuals gauge the extent to which covert surveillance was undertaken which could lead to the alteration of behaviour and methods which may frustrate attempts to investigate criminal behaviour.
41. On balancing the issues the Commissioner determines that in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny does outweighs the public interest in disclosing whether the public authority holds the information.
42. Such information would prove invaluable to those engaged in criminality within prisons, either as individuals or as part of an organised crime

group, and would facilitate the gauging of the extent to which covert surveillance was undertaken. This could lead criminals to alter their behaviour and methods, which could in turn frustrate the ability of investigations to counter criminality in prisons.

43. The Commissioner is swayed by the fact that he accepts that confirming or denying the remaining requested information is held will likely assist those engaged in – or contemplating - criminal activity, and that where there is criminal activity there are invariably innocent victims. In the circumstances of this case, the Commissioner is of the view that this factor outweighs the benefits, such as transparency, that “confirming or denying” would bring. The Commissioner therefore finds that the MOJ correctly relied on section 31(3) to neither confirm nor deny it held the requested information as laid out in paragraph 30, and the public interest favoured the maintenance of the exemption.

Right of appeal

44. 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

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

45. 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.
46. 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

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