

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 3 November 2016

Public Authority: Home Office
2 Marsham Street
London
SW1P 4DF

Decision (including any steps ordered)

1. The complainant has requested information concerning the Home Office's use of the Regulation of Investigatory Powers Act 2000 (RIPA) when investigating its own staff. The Home Office would neither confirm nor deny (NCND) holding any information, citing the exemptions at sections 31(3) (law enforcement), 23(5) (information supplied by, or relating to, security bodies) and 24(2)(national security) of the FOIA.
2. The Commissioner's decision is that the Home Office was entitled to NCND whether it held the requested information by virtue of section 31(3) of the FOIA. No steps are required.

Background

3. The Home Office has explained that it has powers available under the terms of RIPA that it may use when conducting investigations; these powers can apply to its own staff where the circumstances require it.
4. It explained these to the Commissioner as follows:

"The sections of RIPA applicable to the Home Office in respect of the information requested.

Certain functions in the Home Office as set out in statute have powers to use investigatory powers, these include:

- *Immigration and border security investigations and functions*
- *Security and intelligence in detention services*

- *Anti-corruption investigation and functions*

In performing the above functions, Home Office investigators of a designated rank and position may have the following powers under the Regulation of Investigatory Powers Act 2000 (RIPA) for specific statutory purposes:

Acquisition of communications data (Part 1, Chapter 2, section 22 of RIPA):

- *for the purpose of preventing or detecting crime or preventing disorder;*
- *in the interests of public safety;*
- *where a person has died or is unable to identify themselves because of a physical or mental condition.*

To conduct directed surveillance (Part 2, section 28 of RIPA):

- *for the purpose of preventing or detecting crime or preventing disorder;*
- *in the interests of the economic well-being of the UK;*
- *in the interests of public safety (use of directed surveillance for this purpose is restricted to investigations pertaining to detention services only).*

To conduct intrusive surveillance (Part 2, section 32 of RIPA, as amended by section 55(2) of the Crime and Courts Act 2013):

- *for the purpose of preventing or detecting serious crime.*

To manage covert human intelligence sources (Part 2, section 29 of RIPA):

- *for the purpose of preventing or detecting crime or preventing disorder;*
- *in the interests of the economic well-being of the UK;*
- *in the interests of public safety.*

Authority to use investigatory powers can only be granted by an accredited Authorising Officer of an appropriate rank stipulated by Parliament. These investigatory powers could potentially be used to investigate internal corruption where it is necessary and proportionate to do so and providing the investigation concerns one of the above statutory purposes".

5. The Commissioner has recently investigated a similar request made to the Department of Transport. Her decision in that case can be found on her website¹.

Request and response

6. On 4 January 2016 the complainant wrote to the Home Office and requested information in the following terms:

"Under the Freedom of Information Act 2000, please can you provide me with:

The individual number of RIPA requests made to the department where the subject was one of its own members of staff per month, for each of the last two years. To clarify, this concerns all RIPA requests made to the department to use RIPA powers on a subject that was a member of staff, be they permanent or freelance staff or employees of a company where work was being outsourced to.

Please provide a break down as to which requests were granted and which were not and what part of RIPA the request was being made under e.g. whether the request was a section II request (requesting surveillance and the use of covert human intelligence) or section I request (partly concerning the acquisition of communications data) or referred to another section.

Where possible please provide the reason for RIPA requests. For instance, Part II of RIPA refers to surveillance and the use of covert human intelligence sources and Part I of RIPA refers to the acquisition of communications data.

Please send me the data requested in the form of an Excel spreadsheet or as a csv file.

If you are able to supply some of this information more quickly than other items, please supply each item when you can rather than delay everything until it is all available.

¹ https://ico.org.uk/media/action-weve-taken/decision-notices/2016/1625027/fs_50622492.pdf

If it is necessary for any reason to redact any information, please redact the minimum necessary and send me the rest of the material, explaining the legal grounds for each redaction.

If there are any clarifications requested or exemptions cited for certain parts of the request, please provide responses for others in the meantime, as advised by the Information Commissioner.

If you need any clarification then please email me.

Under your section 16 duty to provide advice and assistance I would expect you to contact me if you find this request unmanageable in any way so we can negotiate how best to proceed".

7. The Home Office responded on 9 March 2016. It would NCND that it held the requested information by virtue of sections 23(5), 24(2) and 31(3) of the FOIA.
8. Following an internal review the Home Office wrote to the complainant on 29 May 2016. It maintained its position.

Scope of the case

9. The complainant contacted the Commissioner on 7 June 2016 to complain about the way his request for information had been handled. The Commissioner required further information from him which was provided on 2 August 2016.
10. The complainant asked the Commissioner to consider the application of the exemptions. The Commissioner will therefore consider whether the Home Office is entitled to NCND holding the information requested based on the exemptions cited.

Reasons for decision

Section 31 – law enforcement

11. Section 31(1)(a) states that:

*"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..."*

12. Section 31(3) provides an exclusion from the requirement to confirm or deny whether information is held if to do so would, or would be likely to, prejudice any of the functions in sections 31(1); the Home Office relied on section 31(1)(a), the prevention or detection of crime. As it did not specify the level of likelihood of this prejudice occurring, the Commissioner has relied on the lower level of prejudice, ie that confirmation or denial "*would be likely*" to prejudice the prevention or detection of crime.
13. When considering a prejudice based exemption the Commissioner will:
 - identify the applicable interests within the relevant exemption;
 - identify the nature of the prejudice and that the prejudice claimed is real, actual and of substance;
 - show that there is a causal link between disclosure and the prejudice claimed; and,
 - decide whether prejudice would or would be likely to occur.
14. Confirming or denying whether or not it holds the requested information would effectively disclose whether or not the Home Office has used RIPA for undertaking any investigations into its own staff. As such, the Commissioner accepts that this relates to the prevention or detection of crime and that this is an applicable interest.
15. The Commissioner will now consider whether issuing a confirmation or denial in response to the request would be likely to result in a real and significant likelihood of prejudice to the prevention or detection of crime.
16. In its explanation for citing this exemption, the Home Office stated that:

"Revealing the number of instances where the Home Office has granted authorisations under RIPA would reveal the extent of the department's use of this investigative tool and could undermine any ongoing investigations. Many individuals intent on committing a criminal offence constantly assess the covert investigative capabilities of the law enforcement bodies. Providing a confirmation or denial in response to this specific request would give an indication of the extent of use, and reasons for RIPA applications. This would have the effect of allowing individuals access to information that would assist them to modify their behaviour to the detriment of an investigation. This is particularly true in relation to staff members who may be committing offences. As the request is specifically about members of staff, confirmation or denial would allow staff to estimate whether or not their behaviour had been detected.

Staff within the Home Office are fully aware of the high standards expected of officials in public office, and the serious consequences of any breach of trust and criminal activity. Any members of staff engaging in criminal activity will try to be alert to the Department's capability when investigating any such suspected offences. Therefore, disclosing the nature and extent of the Department's use of its covert powers under RIPA for internal investigations could undermine our ability to detect and prosecute any such individuals."

17. In its internal review the Home Office added:

"Those intent on damaging national security or committing a criminal offence attempt to assess the Department's ability in this area, and any indication of the frequency of, or reasons why, covert techniques are used, or the extent to which the Department utilises them has the potential to provide those intent on criminal activity with intelligence which could be used by them to modify their behaviour to the detriment of an investigation. This is particularly true in relation to staff members who may be committing offences. Revealing the number of cases (if any) that are being/have been investigated could potentially alert staff to the fact that they are or are not being investigated, or that they are or are not likely to be identified for potential abuse of their position".

18. As evidenced in the "Background" section above, it is clear to the Commissioner that the Home Office has a statutory basis for granting authorisations under RIPA. The Commissioner therefore accepts that confirmation or denial could inform Home Office staff as to the likelihood of any criminal activity they are involved with being investigated under the remit of RIPA and that this could prejudice its ability to effectively prevent or detect crime. For example, were the figure actually zero, ie the Home Office had not used RIPA to investigate any staff during the last two years so did not hold any information, then any staff who were (or had recently been) involved in crimes of the nature described above could safely assume that their activities had gone unnoticed. This could therefore encourage the continuance of such behaviour, or possibly even its escalation. Very low figures would also give out a similar message to staff, ie that such activities were very unlikely to be discovered.

19. As previously determined in case FS50622492 (see paragraph 5 above):

"The Commissioner's view is that how strong or effective RIPA is as a deterrent is tied to the knowledge of how frequently it is used. If it is known that it is rarely or never used then its deterrent value may be diminished. Conversely, if it is known that it is used frequently that may increase its deterrent value but such an increase in deterrence must be off-set against the possibility that it

will cause some individuals to alter their criminal behaviour to avoid detection”.

The Commissioner's view is mirrored in this case which is essentially for the same information albeit from a different public authority.

20. Based on the reasoning above the Commissioner is satisfied that the envisaged prejudice is real and significant and that this it would be likely to occur. Furthermore, she is satisfied that there is a causal link between the information requested and the prejudice claimed and she therefore accepts that the exemption is properly engaged.

Public interest test

21. Section 31(3) is a qualified exemption and therefore the Commissioner must consider whether, in all the circumstances of the case, the public interest in confirming or denying whether information is held outweighs that in issuing an NCND response.

Public interest arguments in favour of confirmation or denial

22. The Home Office acknowledged the public interest in transparency about the work of the department and that confirmation or denial would ensure full accountability regarding its work. The Commissioner also recognises that disclosure could further public debate in this area.

Public interest arguments in favour of maintaining the exclusion

23. The Home Office has argued that there is a public interest in ensuring its ability to prevent and detect crime is not compromised and has concluded that it is therefore not in the public interest to know the frequency of the Home Office's use of its powers under RIPA.
24. The Home Office has also argued that it is not in the public interest for it to release any details which could be used by those intent on, or actually engaged in, criminal activities to avert detection or to be encouraged (or not) to continue their illegal activity.

Balance of the public interest

25. The Commissioner finds that the balance of the public interest in this case is the same as for that in case FS50622492 (see paragraph 5 above) and she repeats several of her arguments in that case to support this below. She accepts that confirming or denying if information exists would potentially assist those who would gain from knowing whether it is possible they are, or could in the future be, under surveillance. The information could help individuals gauge the extent to which covert

surveillance is undertaken which could lead to the alteration of behaviour and methods which may frustrate attempts to investigate offences and criminal behaviour.

26. As in the earlier case, the Commissioner acknowledges there is a legitimate and important public debate to be had about the scope and extent of powers available under RIPA and there is a need for transparency and accountability in this regard. However, she again notes that this interest is partly met by work undertaken at the Office of Surveillance Commissioners (OSC), which carries out regular inspections of the use of RIPA powers and publishes an annual breakdown of all authorisations sought by offence type, although not by public authority. Any breaches of the legislation must be reported to the OSC and are included in its annual report to the Prime Minister – the report being available to the general public. The Commissioner therefore considers that there is already existing independent oversight of the exercise of RIPA powers.
27. Whilst the Commissioner does consider each case on its own merits, she cannot ignore the previous decisions made on requests for information on the use of RIPA powers and the importance of ensuring consistency in the approach taken to these cases, particularly when, by its very nature, RIPA is intended to allow public authorities to conduct covert surveillance. The Commissioner therefore considers that disclosure of information about the use of RIPA powers or, in this case, confirming or denying if RIPA powers have been used, would not be in the public interest as it would undermine the purpose of the powers and therefore their effectiveness in detecting and preventing crime.
28. In reaching a decision, the Commissioner accepts that confirming or denying if the requested information is held will likely assist those engaged in or contemplating unlawful activity and that where there is criminal activity there are invariably victims. In the circumstances of this case, the Commissioner is of the view that this factor, combined with the other factors discussed above, outweighs the benefits such as transparency that confirming or denying if the information is held, would bring. The Commissioner therefore finds that the Home Office correctly relied on section 31(3) of the FOIA to neither confirm nor deny it held the requested information and the public interest favours maintaining the exemption.
29. As she has reached this conclusion the Commissioner has not found it necessary to consider the other exemptions cited.

Right of appeal

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: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

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

Carolyn Howes
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