Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 26 November 2009

Public Authority: Independent Police Complaints Commission
Address: 90 High Holborn
London
WC1V 6XX

Summary

In September 2007, the complainant requested a copy of the previous year's report of the Office of Surveillance Commissioners relating to the public authority. It refused to provide this citing provisions of section 31 (Law enforcement exemption) as its basis for doing so. It upheld this position after an internal review. The Commissioner has concluded that the public authority had applied the provisions of section 31 incorrectly to some of the information. The Commissioner has also concluded that the public authority cannot rely on section 40(2) as a basis for withholding some of the requested information. The Commissioner therefore requires the public authority to provide some extracts of the requested report. He also finds that the public authority contravened some of the procedural requirements of the Act.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

The Request

2. On 4 September 2007, the complainant requested the following information:

"*I understand that the IPCC is subject to inspections by the Office of Surveillance Commissioners. With respect to the latest inspection, I would like to request a copy of:*

1. The OSC's covering letter,
2. The report's conclusions,
3. The report's recommendations,
4. If possible, a full copy of the report, and
5. Your response to the OSC."

3. The public authority responded on 5 October 2007 and refused to provide the information citing the exemptions at section 31(1)(a),(b) and (g) by virtue of section 31(2)(b) in support of its position.

4. The complainant requested a review of this refusal in an email dated 6 October 2007. The IPCC sent the outcome of its internal review to the complainant on 1 November 2007 explaining that it upheld its original position.

The Investigation

Scope of the case

5. On 2 November 2007, the complainant contacted the Commissioner to complain about the way his request for information had been handled. Unfortunately, he failed to provide supporting evidence of this request with his initial complaint. He rectified this in an email dated 21 November 2007. The complainant specifically asked the Commissioner to consider the following points whether sections 31(1)(a),(b) and (g) and 31(2)(b) had been correctly applied in this case.

Chronology

6. On 2 September 2008, the Commissioner wrote to the public authority to ask for a copy of the withheld information and for its further arguments as to the application of the exemptions it sought to rely on. The Commissioner also asked information as to how the public authority's section 31(2)(b) functions would be prejudiced by disclosure, what those functions are and where they stem from.

7. The public authority responded on 17 September 2008 and provided a copy of the withheld information and its further arguments as to the application of the exemptions it sought to rely on. It also introduced reliance on section 40(2) (Unfair disclosure of personal data) in relation to some of the information which referred to individuals.

Findings of fact

8. The Office of Surveillance Commissioners (OSC) is not, of itself, a public authority and is therefore not subject to this Act. According to its website:

"*The OSC's aim is to provide effective and efficient oversight of the conduct of covert surveillance and covert human intelligence sources by public authorities in accordance with:*

- *Part III of the 1997 Act* [this is the Police Act 1997]
- *Parts II and III of RIPA* [this is the Regulation of Investigatory Powers Act 2000]".

9. Covert surveillance activities are summarised and explained on the OSC's website as follows:

"***Covert activities***

Part II of the RIPA and RIP(S)A put covert surveillance on a statutory basis enabling the public authorities identified in the legislation, to carry out such operations without breaching human rights.

They identify three categories of covert activity:

1 Intrusive surveillance
This is covert and carried out in relation to anything taking place on any residential premises or in any private vehicle. It involves a person on the premises or in the vehicle, or is carried out by a surveillance device. Except in cases of urgency, it requires a Commissioner's approval to be notified to the authorising officer before it can take effect. The power is available to the same law enforcement agencies as under the 1997 Act.

2 Directed surveillance
This is covert but not intrusive (and not an immediate response to events) but undertaken for a specific investigation or operation in a way likely to obtain private information about a person. It must be necessary and proportionate to what it seeks to achieve and may be used by the wide range of authorities identified in the legislation.

3 Covert Human Intelligence Sources (CHIS)
The use or conduct of someone who establishes or maintains a personal or other relationship with a person for the covert purpose of obtaining information. The authorising officer must be satisfied that the authorisation is necessary, that the conduct authorised is proportionate to what is sought to be achieved and that arrangements for the overall management and control of the individual are in force. CHIS may be used by the wide range of authorities identified in the legislation.

Authorisations for directed surveillance and CHIS do not have to be notified to Commissioners but must be available for review when Commissioners, Assistant Commissioners and Inspectors visit the

various authorities."[1]

10. The requested information in this case relates to and includes a report made by the OCS following its annual visit to the public authority during which it reviewed the public authority's use of covert surveillance.

11. According to its website, the public authority's role is to "*oversee the whole of the police complaints system, created by the* Police Reform Act 2002"[2]. It also explains that:

"[As] *well as being responsible for complaints about the police, we are also responsible for the way serious complaints against members of Serious Organised Crime Agency (SOCA), HM Revenue and Customs (HMRC) and UK Border Agency (UKBA) staff are handled*".

Analysis

Exemptions

12. The public authority cited section 31(1)(a), (b) and (g) as the basis of withholding the requested information. These exemptions are engaged where disclosure

"*would, or would be likely to, prejudice*

(a) the prevention and detection of crime;

(b) the apprehension or prosecution of offenders; …

(g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2)."

13. The public authority added that the purpose specified in section 31(2) was set out in section 31(2)(b), namely "*ascertaining whether any person is responsible for any conduct which is improper*". It explained that it had been created by the Police Reform Act 2002 and paraphrased the description of its remit as set out on its website (see 'Findings of Fact' above). It also explained that "*via various legislative additions and amendments* [its remit] *has been extended to investigate criminality and/or misconduct involving members of SOCA, HMRC and* [UKBA]".

14. Having investigated this point, the Commissioner is satisfied that the exercise of the public authority's functions includes a remit to investigate criminality or misconduct by SOCA, HMRC or the UKBA. For example, the Commissioner understands that Section 55 of the

[1] http://www.surveillancecommissioners.gov.uk/about_covert.html
[2] http://www.ipcc.gov.uk/index.htm

Serious Organised Crime and Police Act 2005 amended Part 2 of the Police Reform Act to extend the public authority's investigatory remit to include investigation of criminality or misconduct at SOCA.[3]

15. In the Commissioner's view, where the public authority can demonstrate that disclosure would prejudice the exercise of its investigatory functions in this regard, it can rely on section 31(1)(g) subject to a public interest test.

16. When considering the application of a prejudice-based exemption, 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 considered ……..A third step for the decision-maker concerns the likelihood of occurrence of prejudice*" (paragraphs 28 to 34).

Section 31 – Law Enforcement

17. This Notice will now set out the Commissioner's approach in relation to sections 31(1)(a), (b) and (g) in this case when following the three steps described above.

Step 1 – relevant applicable interests

18. In the case of the exemption under section 31(1)(a), the relevant applicable interest is the prevention or detection of crime. In the case of the exemption under section 31(1)(b), the relevant applicable interest is the apprehension or prosecution of offenders. In the case of the exemption under section 31(1)(g), the relevant applicable interest in this case is the exercise of the public authority's functions for the purpose of ascertaining whether any person is responsible for any conduct that is improper.

Step 2 – nature of the prejudice

19. When considering the nature of the prejudice, the Commissioner has considered the Tribunal's further comments in the Hogan/Oxford CC case (paragraph 30):

"*An evidential burden rests with the decision maker to be able to show that some causal relationship exists between the potential disclosure and the prejudice and that the prejudice is, as Lord Falconer of Thoronton has stated, "real, actual or of substance" (Hansard HL, Vol. 162, April 20, 2000, col. 827). If the public authority is unable to*

[3] http://www.opsi.gov.uk/ACTS/acts2005/en/05en15-b.htm

discharge this burden satisfactorily, reliance on 'prejudice' should be rejected. There is therefore effectively a de minimis threshold which must be met."

20. Therefore, the Commissioner takes the view that, for the exemption to be engaged, the disclosure of the information must have a causal effect on the applicable interest, this effect must be detrimental or damaging in some way, and the detriment must be more than insignificant or trivial.

21. If he concludes that there is a causal relationship between potential disclosure and the prejudice outlined in the exemptions *and* he concludes that the prejudice that could arise is not insignificant and is not trivial, the Commissioner will then consider the question of likelihood. In doing so, he will consider the information itself and the arguments put forward by the public authority in this regard.

Step 3 – standard of proof

22. Where the public authority has claimed that disclosure is only *likely* to give rise to the relevant prejudice then, in accordance with the Tribunal's decision in the case of *John Connor Press Associates Limited v The Information Commissioner* (EA/2005/0005), "*the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk*". Where the public authority has claimed that disclosure *would* give rise to the relevant prejudice then the Tribunal has ruled, in the Hogan/Oxford CC case, that there is a stronger evidential burden on the public authority, and the prejudice must be at least more probable than not.

23. It is not clear from the public authority's submissions whether it is arguing that prejudice would arise or whether it is arguing that it would be likely to arise. It set out both options in its refusal notice and in its letter to the Commissioner dated 17 September 2008.

24. Where the level of prejudice has not been specified by the public authority then the lower threshold should be used unless there is clear evidence that the higher level should apply. In *McIntyre v The Information Commissioner and the Ministry of Defence* (EA/2007/0068), which involved the application of the section 36 exemption, the Tribunal specified which standard of proof should apply when the level of prejudice was not designated by the public authority's qualified person:

"*Parliament still intended that the reasonableness of the opinion should be assessed by the Commissioner but in the absence of designation as to level of prejudice that the lower threshold of prejudice applies, unless there is other clear evidence that it should be at the higher level.*"

25. Having considered the lack of clarity on the public authority's part, the Commissioner has decided that he will consider whether the lower threshold "would be likely to" applies.

Evidence of likely prejudice

26. In the Hogan/Oxford CC case as noted above, the Tribunal referred to the evidential burden that rested with the decision maker to be able to show that some causal relationship exists between the potential disclosure and the prejudice. However, in *England v ICO and London Borough of Bexley* (EA/2006/0060 & 0066) the Tribunal stated that it was impossible to provide:

"*evidence of the causal link between the disclosure of the list* [of empty properties] *and the prevention of crime*. *That is a speculative task, and as all parties have accepted there is no evidence of exactly what would happen on disclosure, it is necessary to extrapolate from the evidence available to come to the conclusion about what is likely*".

27. Taking into account the Hogan/Oxford case and other adjudications of the Tribunal, the Commissioner takes the view that, although unsupported speculation or opinion will not be taken as evidence of the nature or likelihood of prejudice, neither can it be expected that public authorities must prove that something definitely will happen if the information in question is disclosed. Whilst there will always be some extrapolation from the evidence available, the Commissioner expects the public authority to be able to provide some evidence (not just unsupported opinion) to extrapolate from.

28. The Commissioner has assessed the weight of the public authority's arguments based on the three-step test outlined above.

29. The public authority's arguments make specific reference to the detail of the report and therefore the Commissioner does not propose to set them out in full in this Notice. The public authority argues that it is self-evident that the prejudice set out in all three exemptions would be likely to arise as a result of disclosure.

30. The Commissioner would describe the information as containing details as to policies and procedures. It also contains detailed resource information.

31. Applying the model of the three-step process outlined above, the Commissioner has focussed his attention on matters which relate to the interests applicable in the exemptions.

32. In the Commissioner's view, and in the context of this case, there is considerable overlap between the exemptions in section 31 which the public authority seeks to rely on. The Commissioner accepts that covert surveillance is a useful tool in the prevention and detection of crime, the apprehension or prosecution of offenders and in ascertaining

whether persons who are subject to scrutiny by the public authority are responsible for any conduct which is improper. As noted in Findings of Fact above, covert surveillance covers a range of activities. The nature of covert surveillance in this context depends upon law enforcement officers achieving and maintaining a tactical advantage over those who seek to commit criminal offences, over those who are under investigation for alleged criminality or, where they are also subject to scrutiny by the public authority, over those who are responsible for any conduct which is improper. Any action, including disclosure of information, which puts at risk this tactical advantage, could, in the Commissioner's view, give rise to a variety of significant and non-trivial outcomes which would be likely to adversely affect the public authority's role in investigating complaints about the police and other public bodies such as SOCA, HMRC and UKBA.

33. He has concluded that there is a causal relationship, in theory, between the disclosure of the information contained in the withheld information which relate to the carrying out of covert surveillance activities by the public authority and the risk of undermining the effective investigation of complaints about the police and other bodies. Effective investigation of complaints depends, in the Commissioner's view, on avoiding the prejudicial outcomes described in all three exemptions that the public authority seeks to rely on.

34. Having identified the applicable interests and having accepted that disclosure of detailed operational and administrative information about surveillance activities could, theoretically, give rise to a prejudicial effect on the interests set out in all three exemptions, the Commissioner went on to consider whether disclosure of the withheld information would be likely to result in one or more of these prejudicial outcomes.

35. The Commissioner considered the withheld information and has also considered the submissions of the public authority. Having done so, the Commissioner would agree that the disclosure of some of the withheld information would be likely to give rise to the prejudicial outcomes set out by the public authority. It provides significant operational and resource detail about the public authority's use of covert surveillance. It also describes in some detail the areas of responsibility of named employees and these individuals' qualifications to fulfil certain roles within the public authority. This detail also provides significant operational and resource detail about the public authority. The names of the individual employees and the operational and resource detail are inextricably linked such that it would not, in the Commissioner's view, be possible to separate them in a way that produces two separate sets of information that are meaningful.

36. The Commissioner finds that disclosure of this information at the time of the request would be likely to have undermined the tactical advantage held by the public authority in investigating complaints about the police and other bodies. He also accepts that disclosure at the

time of the request would be likely to have frustrated its purpose in ascertaining whether any person who was subject to its scrutiny was responsible for improper conduct.

37. The Commissioner is therefore satisfied that the information in question engages sections 31(1)(a), (b) and (g). Having concluded that certain parts of the withheld information engage sections 31(1)(a), (b) and (g), the Commissioner went on to consider whether the public interest in maintaining these exemptions outweighed the public interest in disclosure.

38. Before doing so, the Commissioner would note that he has identified some parts of the withheld information where the arguments as to the risk of prejudice are not persuasive. This information contains high level and general descriptions of the work of the public authority and includes the names of the public authority's officials. It also includes the names of OSC officials who conducted the investigation. The Commissioner fails to see how any of the prejudicial outcomes described in sections 31(1)(a), (b) or (g) would have been likely to arise as a result of disclosure of this other information. It does not describe the operation of covert surveillance at the public authority or the resources available to it for this activity. The information which, in the Commissioner's view, is not exempt under sections 31(1)(a), (b) or (g) is listed in a Confidential Appendix to this Notice. He will consider the application of other applications that have been cited in relation to some of this information later in this Notice.

39. This Notice will now consider whether the public interest in maintaining the exemptions at sections 31(1)(a), (b) and (g) outweigh the public interest in disclosure.

Public interest arguments in favour of disclosing the requested information

40. The public authority identified the following arguments in favour of disclosure.

- Increase accountability as to how the public authority carries out its investigatory functions to enhance its core purpose of dealing with complaints effectively.

41. The complainant identified the following arguments in favour of disclosing the requested information.

- There is a strong public interest in ensuring that the public authority is acting within the law on such a sensitive matter. He drew particular attention to the fact that the public authority investigates other public authorities who carry out covert surveillance and commented that this added weight to this public interest in disclosure.

- The evidence as to likely prejudice is not compelling and therefore the public interest in avoiding this prejudice (if it would arise) is not particularly strong.

- Embarrassment of public officials cannot be used as a factor in the public interest for maintaining the exemption and, if that is the case here, such arguments cannot hold weight.

42. The complainant also highlighted generic arguments as to the public interest in disclosure that had been set out in the Commissioner's own guidance on this subject which was available at the time of the complaint[4]. (The Commissioner would note that his guidance on this topic has recently been updated[5] to include relevant examples from particular cases.)

43. The complainant also argued that the public authority should be able to disclose a redacted version of the report where it is concerned about the prejudicial impact of full disclosure.

Public interest arguments in favour of maintaining the exemptions

44. The public authority identified the following arguments in favour of maintaining the exemptions.

- It would not be in the public interest to release information where there is a real risk that this would undermine ongoing investigations.

- There is a compelling public interest in avoiding the negative impact that disclosure would be likely to have on the effectiveness of the public authority.

45. The public authority elaborated on its arguments as to the balance of public interest with specific reference to the withheld information.

Balance of the public interest arguments

46. In considering the balance of public interest, the Commissioner has focussed on the level of harm that would be likely to arise through disclosure of that information which, in his view, attracts the exemptions at sections 31(1)(a), (b) and (g). He has set out the information to which this refers in a Confidential Appendix to this Notice.

47. He believes there is a compelling public interest in ensuring that the public authority retains a tactical advantage over those who are, or

---

4 http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/awareness_guidance_3_-_public_interest_test.pdf

5 http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/fep038_public_interest_test_v3.pdf

could become, the subject of covert surveillance conducted by it. He also believes there is a compelling public interest in ensuring that specific operations are not likely to be compromised by disclosure of the withheld information in a manner which is set out in each of the three exemptions. The Commissioner accepts that these interests would be served by maintaining the exemptions at sections 31(1)(a), (b) and (g).

48. He acknowledges that there is a competing public interest in satisfying concerns about the operation of covert surveillance. There are widespread concerns about such activities being conducted in a lawful and proportionate manner and about the management of Covert Human Intelligence Resources. However, he does not believe that this public interest carries as much weight as the public interest in avoiding the likely risk of compromise to covert surveillance activities that would arise from disclosure of some of the withheld information.

49. The Commissioner is satisfied, therefore, that the information in the Confidential Appendix which is identified as being exempt under sections 31(1)(a), (b) and (g) has been properly withheld by the public authority. He is satisfied that the public interest in maintaining this exemption outweighs the public interest in disclosure. In reaching this decision he has given particular weight to the level of harm to covert surveillance activities that would be likely to result from disclosure.

Section 31(1)(a), (b) and (g) - Conclusion

50. The Commissioner has concluded that sections 31(1)(a), (b) and (g) are not engaged for some of information . The Commissioner has set out which information this conclusion applies to in a Confidential Appendix to this Notice. However, the Commissioner has concluded that some of the information within the report was correctly withheld under 31(1)(a), (b) and (g). He has also identified which information this conclusion refers to in the Confidential Appendix.

Section 40(2) – Unfair Disclosure of Personal Data

51. Section 40(2) provides an exemption for information which is the personal data of an individual other than the applicant, and where one of the conditions listed in section 40(3) or section 40(4) is satisfied. One of the conditions listed in section 40(3)(b) is where the disclosure of the information to any member of the public of manual data would contravene any of the principles of the Data Protection Act 1998 (DPA). Section 40 is set out in full in a Legal Annex to this Notice.

52. The public authority introduced reliance on this exemption in its letter to the Commissioner dated 17 September 2008. It argued that it could rely on it in relation to information about individuals "*who perform specialist functions under RIPA*". The Commissioner assumes it is referring to information about its own officials and officials of the OSC.

53. As outlined above, the Commissioner is satisfied that some information relating to individuals who perform specialist functions under RIPA is inextricably linked with other information that is exempt under sections 31(1)(a), (b) and (g). He has already concluded that this information has been correctly withheld by the public authority under those exemptions. When considering the application of section 40(2) in this case, the Commissioner only examined that information which was not, in his view, inextricably linked with information that is exempt by virtue of sections 31(1)(a), (b) and (g). The information in question is identified in a Confidential Appendix to this Notice.

54. The first principle of the DPA requires that the processing of personal data is fair and lawful, *and*:

- at least one of the conditions in DPA schedule 2 is met, and
- in the case of sensitive personal data, at least one of the conditions in DPA schedule 3 is met.

55. When analysing the application of this exemption in this case the Commissioner followed the following process.

- is it personal data as defined in DPA?
- if so, would disclosure of the personal data be fair?
- if so, can one of the DPA Schedule 2 conditions for processing be met?

Is the information personal data as defined in DPA?

56. Section 1 of the DPA defines personal data as being:

"*data which relate to a living individual who can be identified from those data or those and other information in the possession of or which is likely to come into the possession of the data controller and includes expressions of opinions about the individual and indications of the intentions of any other person in respect of that individual".*

57. When considering whether the information is personal data, the Commissioner had regard to his own published guidance: "Determining what is personal data"[6].

58. In the Commissioner's view, each individual's name is, of itself, their personal data. The name relates to an identifiable living individual and, in this context, it tells the reader that this individual was actively involved in the matters covered in the report. The Commissioner recognises that this involvement was in a professional capacity. However, he is satisfied that, in this context, the record of each

6 http://www.ico.gov.uk/upload/documents/library/data_protection/detailed_specialist_guides/personal_data_flowchart_v1_with_preface001.pdf

individual's involvement was biographically significant such that a record of their involvement constitutes their personal data.

59. The Commissioner is therefore satisfied that the remaining information to which section 40(2) has been applied is personal data as defined in the Act.

60. The public authority argued that the disclosure of individuals' personal data found in the report would breach the first data protection principle of the DPA. It explained that it would be unfair to do so. It added that no condition set out in DPA Schedule 2 or Schedule 3 could be satisfied.

61. DPA Schedule 3 only falls to be considered where the personal data is also sensitive personal data as defined in DPA section 2. This provision is set out in a Legal Annex to this Notice. The Commissioner recognises that much of the information within the report covers sensitive matters relating to covert surveillance. However, the Commissioner did not identify any information in the withheld information which satisfies the definition of sensitive personal data in DPA section 2.

Would disclosure of the personal data be fair?

62. The individuals in question can be divided into two categories. The first category is that of Surveillance Inspector (an official of the Office of Surveillance Commissioners). The second category is that of other individuals involved in the inspection in a professional capacity.

63. When considering whether disclosure would be fair, the Commissioner has had regard to his own published guidance[7].

64. This guidance suggests a number of issues that should be considered when assessing whether disclosure of information would be fair, namely:

- the individual's reasonable expectations of what would happen to their personal data;
- the seniority of any staff;
- whether the individuals specifically refused to consent to the disclosure of their personal data;
- whether disclosure would cause any unnecessary or unjustified distress and damage to the individuals;
- the legitimate interests in the public knowing the requested information weighed against the effects of disclosure on the individuals.

7 http://www.ico.gov.uk/upload/documents/library/data_protection/detailed_specialist_guides/personal_data_flowchart_v1_with_preface001.pdf

65. Furthermore, the Commissioner's guidance suggests that when assessing fairness, it is also relevant to consider whether the information relates to the public or private lives of the third party. The guidance suggests that:

"*Information which is about the home or family life of an individual, his or her personal finances, or consists of personal references, is likely to deserve protection. By contrast, information which is about someone acting in an official or work capacity should normally be provided on request unless there is some risk to the individual concerned*".

66. When considering whether disclosure would, in this case, be fair, the Commissioner has considered the expectations of the persons and the degree to which the release of the information would infringe on their privacy.

67. When assessing the expectations of the individuals concerned the Commissioner considers it appropriate to take into account the type of information that is already in the public domain about the parties. He has also considered the level of detriment to the privacy of the persons if the requested information were to be released.

Fairness - OSC officials

68. The Commissioner notes that at the time of the request the OSC published the names of all Surveillance Commissioners, Assistant Surveillance Commissioners and Surveillance Inspectors in its Annual Report which was most recent at that time (namely its Annual Report for 2005-6). It also published the names of its officials within its Secretariat. This Annual Report identifies four full-time and two part-time Surveillance Inspectors by name. It also identifies three Assistant Surveillance Commissioners by name. At the time of drafting this Decision Notice, it continued to make this information available in its annual reports.[8]

69. While the Commissioner notes that the OSC's Annual Report does not link these officials with specific inspections, he fails to see how the disclosure of this link would be unfair in this case. He also finds it difficult to follow the public authority's arguments as to fairness in relation to these individuals as set out above. The public authority seems to suggest that the individuals might have carried out their duties as public officials in a different way had they known their names were to be disclosed in this way. The Commissioner is not certain as to how this point relates to their privacy.

70. Anyone accessing the published version of this requested report and the OSC's 2005-6 Annual Report could reasonably deduce that the Assistant Surveillance Commissioner whose name was withheld from disclosure here was one of three named individuals and the name of

[8] http://www.surveillancecommissioners.gov.uk/about_annual.html

the Surveillance Inspector whose name was withheld from disclosure here was one of six named individuals.

71. The Commissioner also notes that requests for OSC reports have been made to other public authorities by this complainant and others. The Commissioner understands that many of those authorities have not withheld the names of Surveillance Inspectors or Assistant Surveillance Commissioners that may be included in the OSC reports.

72. The Commissioner also notes that the OSC continues to publish the names of its staff including some who appear to have relatively junior roles. It also publishes the names of staff who have left the OSC in the reporting period.

73. Similarly, had the Commissioner identified any other obvious detriment to the privacy of the individuals concerned arising from disclosure he would have taken this into consideration when assessing fairness in this case even if the public authority had not done so itself. He did not identify any other obvious detriment in this case. He therefore concluded that disclosure of the OSC officials' names would be fair.

Fairness – public authority's officials

74. The public authority did not advance any detailed arguments as to why disclosure of this information would be unfair. The Commissioner would observe that the public authority had been subject to the requirements of the Act for over two years as at the date of the request. As such, any employee of the public authority, particularly one in a relatively senior role such as the individual in this case, would reasonably expect that personal data about them may fall within the scope of a request under the Act. The fairness or otherwise of a disclosure under the Act of their personal data will depend on the circumstances of each case and the nature of the personal data requested.

75. In the Commissioner's view, disclosure would inform the reader that this individual, operating at a senior level within the public authority, received this report in the course of their duties. The Commissioner fails to see how such a disclosure would give rise to any detriment to this individual's privacy. As such the Commissioner finds that disclosure of this individual's name and contact details would be fair.

76. As noted above, the public authority did not make any further arguments as to why the disclosure of other personal data relating to its officials would be unfair. The Commissioner has considered the personal data in question. It sets out named individuals' involvement in matters covered by the report relating to the use of covert surveillance, at a senior, more general level rather than specific cases. The Commissioner does not consider that the disclosure of their involvement would be unfair. The individuals are senior members of

staff and the Commissioner believes that no detriment to their privacy would arise as a result of disclosing their involvement in general terms.

77. The first component of the first data protection principle also requires processing to be lawful. Having concluded that disclosure of all the personal data contained in the report would be fair, the Commissioner went on to consider whether disclosure would be lawful. Disclosure under the Act is unlawful where, for example, a statutory prohibition applies such as the statutory prohibition on making public the name of a person who has alleged that a sexual offence has been committed against them. The Commissioner has not identified any statutory prohibition that would apply in this case nor has any been drawn to his attention. The Commissioner has therefore concluded that disclosure of all the personal data in the report would be both fair and lawful in this case.

Can a Schedule 2 condition for processing be satisfied?

78. In order for disclosure to in accordance with the first data protection principle, one of the conditions in schedule 2 of the DPA must also be satisfied. While the Commissioner has concluded that disclosure would be fair and lawful, he must satisfy himself that a schedule 2 condition for processing can be satisfied. If none can be satisfied then disclosure would contravene the requirements of the first data protection principle and the information in question would be exempt from disclosure under section 40(2). In this case, the Commissioner considers that the most relevant condition is the sixth condition. This states that:

"*the processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject*".

79. In deciding whether the sixth condition would be met in this case the Commissioner has considered the decision of the Information Tribunal in *House of Commons v ICO & Leapman, Brooke, Thomas* (EA/2007/0060 etc). In that case the Tribunal established the following three-part test that must be satisfied before the sixth condition will be met:

- there must be legitimate interests in disclosing the information;
- the disclosure must be necessary for a legitimate interest of the public;
- even where disclosure is necessary it nevertheless must not cause unwarranted interference or prejudice to the rights, freedoms and legitimate interests of the data subject.

80. It further clarified, at paragraph 55, that "*The public interest in disclosure of official information is an interest which is relevant for the purposes of condition 6"*. The Commissioner will therefore go on to consider these tests.

81. He does not identify any specific harm in releasing the information in this case, and he considers that the release of the names would be fair. The Commissioner considers that – given the benefits of transparency and accountability - a legitimate interest arises from the disclosure on request of information by public bodies. More specifically, there is legitimate interest in the public knowing which senior officials the Surveillance Commissioners met when carrying out their investigation. The Commissioner further finds that disclosure is necessary for the public to be able to establish accountability of those senior staff involved. He also finds, in this case, that there would be no unwarranted interference or prejudice to the rights, freedoms and legitimate interests of the senior-level individuals concerned.

Section 40(2) - Conclusion

82. The Commissioner is persuaded by the public authority's arguments as to the application of section 40(2) in relation to personal data which is not already exempt under sections 31(1)(a), (b) and (g).

Procedural Requirements

83. In failing to provide the information which is listed as not being exempt under sections 31(1)(a), (b) and (g) in the Confidential Appendix to this Notice within 20 working days of the complainant's request, the Commissioner finds that the public authority contravened the requirements of section 1(1)(b) and section 10(1) of the Act. These provisions are set out in a Legal Annex to this Notice.

The Decision

---

84. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act.

- It correctly applied sections 31(1)(a), (b) and (g) in relation to some of the withheld information.

However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act.

- It incorrectly relied upon sections 31(1)(a), (b) and (g) and section 40(2) in relation to other information which is also listed in a Confidential Appendix to this Notice. In failing to provide

this information within twenty working days of the date of the complainant's request, it contravened the requirements of sections 1(1)(b) and 10(1) of the Act.

Steps Required

85. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:

- disclose to the complainant that information which is identified in the Confidential Appendix to this Notice as being information which should be disclosed under the Act.

86. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

87. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Right of Appeal

88. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@tribunals.gsi.gov.uk.
Website: www.informationtribunal.gov.uk

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.

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

Dated the 26th day of November 2009

Signed ……..

Steve Wood
Assistant Commissioner

Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

Legal Annex

Freedom of Information Act 2000

S.1 General right of access

Section 1(1) provides 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, and

(b) if that is the case, to have that information communicated to him.'

…

S.10 Time for Compliance

Section 10(1) provides that –

'Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.'

…

S.31 Law enforcement

Section 31(1) provides 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,

(b) the apprehension or prosecution of offenders,

…

(g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2),

Section 31(2) provides that –

'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,

…

Section 70 - Exemptions applicable to certain manual data held by public authorities

Section 70(1) provides that –

"*After section 33 of the [1998 c. 29.] Data Protection Act 1998 there is inserted—*

'33A Manual data held by public authorities
(1) Personal data falling within paragraph (e) of the definition of "data" in section 1(1) are exempt from—

(a) the first, second, third, fifth, seventh and eighth data protection principles,

(b) the sixth data protection principle except so far as it relates to the rights conferred on data subjects by sections 7 and 14,

(c) sections 10 to 12,

(d) section 13, except so far as it relates to damage caused by a contravention of section 7 or of the fourth data protection principle and to any distress which is also suffered by reason of that contravention,

(e) Part III, and

(f) section 55'."

….

Data Protection Act 1998

S.2 Sensitive personal data

Section 2 provides that -

In this Act "sensitive personal data" means personal data consisting of information as to—

(a) the racial or ethnic origin of the data subject,

(b) his political opinions,

(c) his religious beliefs or other beliefs of a similar nature,

(d) whether he is a member of a trade union (within the meaning of the [1992 c. 52.] Trade Union and Labour Relations (Consolidation) Act 1992),

(e) his physical or mental health or condition,

(f) his sexual life,

(g) the commission or alleged commission by him of any offence, or

(h) any proceedings for any offence committed or alleged to have been committed by him, the disposal of such proceedings or the sentence of any court in such proceedings.