

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 11 March 2013

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

Decision (including any steps ordered)

1. The complainant requested information from the public authority regarding its use of the Regulation of Investigatory Powers Act 2000 and the Regulation of Investigatory Powers Act 2000 Scotland within prisons.
2. The Commissioner's decision is that the public authority 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. The corollary provision for Scotland is the Regulation of Investigatory Powers Act 2000 Scotland ("RIPSA").
 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 1952¹.
-

¹ See section 4(4) RIPSA for the corollary position in Scotland - <http://www.legislation.gov.uk/ukpga/2000/23/section/4>

Request and response

5. On 26 March 2012, the complainant wrote to the Ministry of Justice ("MOJ") and, in the context of "HM Prison Service", requested information in the following terms:
 - "1. How many times has your authority authorised operations or investigations under RIPA or RIPSAs in the periods:
 - a) 1st March 2009 – 28th February 2010
 - b) 1st March 2010 – 28th February 2011
 - c) 1st March 2011 – 29th February 2012
 2. In each instance, please state the nature of the offence (e.g. graffiti, fly tipping etc.).
 3. Please also provide details of how many resulted in prosecutions and convictions."
6. The MOJ responded on 24 April 2012. In relation to the first question it confirmed that information was held but relied upon section 31(1)(a) not to communicate it to the complainant. For the second and third questions it refused to confirm or deny whether the requested information was held and relied on section 31(3) to do so.
7. The outcome of the MOJ's internal review (as requested by the complainant on 16 May 2012) was to uphold its original decision and this was communicated to the complainant on 15 June 2012.

Scope of the case

8. On 5 September 2012 the complainant contacted the Commissioner to complain about the way his request for information had been handled.

Reasons for decision

9. 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,

- the duty to communicate that information to the applicant.

Section 31(1)(a)

10. The MOJ has informed the complainant that it holds the information as per his request 1 but relies on section 31(1)(a) not to provide the complainant with it.

11. 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—

(a) the prevention or detection of crime,

(b) the apprehension or prosecution of offenders...'

12. The MOJ explained (in a letter to the Commissioner dated 26 November 2012) its reliance on section 31(1)(a) as follows:

"In the initial response, we confirmed that we held data in relation to the first question but indicated that in taking this approach, the data held may be zero (that is an application may have been made but rejected or indeed no application made at all). The fact is that there is a requirement in the RIPA legislation on public authorities who are listed as organisations that can use covert investigative techniques to hold central records. Therefore, we considered it appropriate to confirm that we hold data for this part of the question, but that any details were subject to exemption under Section 31(1)(a) of the Freedom of Information Act.

...the release of the information would be likely to have a prejudicial effect on the prevention or detection of crime in prisons. Any statistical information would be likely to alert criminals and prisoners of the capability of NOMS (*i.e. the National Offenders Management Service*) in managing the threat posed by criminality in prisons both from organised crime and staff corruption. The fact that NOMS has these powers is a matter of public record but the extent to which we use them across the prison estate may highlight weaknesses in operational response and provide tactical advantage to criminals as they may conclude that risks were worth taking in view of the information provided."

13. Where possible the Commissioner expects a public authority to provide evidence that supports its contention that the prejudice envisaged by an exemption would occur. However, since the prejudice test relates to something which might happen in the future rather than something

which has already happened, it is not possible in most cases to provide certain or near certain proof.

14. 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/RIPSA. In knowing the figures it enables those with criminal intent to use them in determining the possibility of detection.
15. 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. It is for these reasons that the Commissioner finds the exemption engaged.
16. 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.
17. The MOJ informed the Commissioner that it took into account the public interest factors that disclosure would provide greater transparency and enable the public to appreciate the frequency of the use of powers available under RIPA/RIPSA. This would increase general understanding of the need for such tactics and the circumstances in which the powers are necessary and proportionate.
18. Regarding maintaining the exemption the MOJ considered that the requested information, if released, could be used to subvert the effective use of RIPA/RIPSA powers by indicating the extent to which powers can be or are used over a specific period. The information, it believed, would be likely to prove invaluable to those engaged in criminality within prisons, either as individuals or as part of an organised crime group, and would confirm the extent to which covert surveillance was undertaken. The MOJ explained that this is clearly not in the public interest and a strong reason for maintaining the exemption.
19. 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).

Conversely, the Commissioner notes, this restriction when applying the public interest test 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.”

20. There is, for example, a general public interest in promoting transparency, accountability, public understanding and involvement in the democratic process. FOIA is a means of helping to meet that public interest, so it must always be given some weight in the public interest test.
21. Indeed, the public interest factors that favour the release of the information rightly have an enduring appeal. RIPA/RIPSA 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.
22. In the context of the immediately preceding paragraph the Commissioner takes cognisance of the involvement of the Interception of Communications Commissioner² and his duty with regard to the monitoring of interceptions within prisons³. 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

² <http://www.intelligencecommissioners.com>

³ <http://www.intelligencecommissioners.com/sections.asp?sectionID=2&chapter=5&type=top>

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.

23. On the facts of this matter, the Commissioner's considered decision is that the public interest in maintaining the exemption does outweigh the public interest in releasing the information. Having found that the exemption is engaged the Commissioner accepts that releasing the information would be likely to prejudice (a) the prevention or detection of crime and/or (b) the apprehension or prosecution of offenders. There is an obvious public need not to assist those prisoners (and any errant staff), who would do harm to others, by providing them with information as to how frequently intercepts are undertaken. In addition, one of the key public interest factors for releasing the information, public scrutiny, is significantly addressed by the undertakings of the Interception of Communications Commissioner. The Commissioner has therefore concluded that the MOJ was entitled to not communicate the withheld information to the complainant.

Section 31(3)

24. As laid out above (paragraph 5) the complainant requested, that where RIPA / RIPSAs had been utilised, that the MOJ:
- In each instance, state the nature of the offence (e.g. graffiti, fly tipping etc.).
 - Provide details of how many resulted in prosecutions and convictions.
25. The MOJ's position is to neither confirm nor deny that this requested information is held.
26. 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 the Act 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.
27. 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.
28. In correspondence to the Commissioner the MOJ made the following submission:

“Confirming or denying whether we hold information on offences and prosecutions – let alone the nature of any offences and prosecutions – would make it possible to build a picture of the extent of covert surveillance activity and ensuing prosecutions and convictions, which, in turn, would be likely to lead to changes in behaviour of groups or individuals subject to investigation. For example, if no information was held for either question, it could alert criminals to the fact that their activities were not subject to surveillance. Or, the efficacy of surveillance activity might be revealed were we to confirm we held information for the second question but not for the third. Of course, these examples are illustrative and not to be considered as confirmation one way or another as to whether the information is held or otherwise.”

29. The Commissioner does accept, on the balance of probabilities, the fundamentals of the MOJ’s submission. That is, he agrees that confirming whether it holds information as to the nature of the offence, or resulting prosecutions and convictions would be likely to prejudice the prevention or detection of crime and/or the apprehension or prosecution of offenders. If the MOJ was to say that it did not hold information as to the type of offences it would be a reasonable deduction that intercepts had not been used. Such knowledge would likely provide succour to those contemplating or actually undertaking activities that RIPA/RIPSA may be utilised to combat. Similarly knowing whether people were prosecuted via the utilisation of RIPA/RIPSA provides information that, the Commissioner considers it reasonable to conclude, would likely assist those contemplating or involved in criminal activities.
30. However, 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.
31. The MOJ noted that confirming or denying whether the requested information was held would provide greater transparency and assist the public in appreciating the use of powers available under RIPA. This would increase general understanding of the need for such tactics and the circumstances in which the powers are necessary and proportionate.
32. The MOJ however was of the view that it was more in the public interest to “neither confirm nor deny” because to do otherwise would subvert the effective use of RIPA powers. 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.

33. 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.
34. The Commissioner is swayed by the fact that he accepts that confirming or denying the 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.

Right of appeal

35. 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

36. 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.
37. 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

Alexander Ganotis
Group Manager – Complaints Resolution
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF