

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 8 June 2010

Public Authority: The Police Ombudsman for Northern Ireland
Address: New Cathedral Buildings
St Anne's Square
11 Church St
Belfast
BT1 1PG

Summary

The complainant requested information held by PONI relating to an inspection undertaken by the Office of Surveillance Commissioners (the OSC). PONI refused to provide this citing the exemptions at sections 31(1)(a) and 31(1)(g) (law enforcement). Following the Commissioner's intervention PONI disclosed some of the requested information to the complainant. The Commissioner found that the remaining withheld information was exempt under the provisions claimed, and that the public interest in maintaining the exemptions outweighed the public interest in disclosing the information. Therefore the Commissioner does not require any steps to be taken.

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 6 February 2006, the complainant requested the following information from the Police Ombudsman for Northern Ireland (PONI):

"I understand that the Police Ombudsman is subject to inspections by the Office of Surveillance Commissioners. With respect to the latest inspection report, 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. On 7 February 2008 PONI acknowledged the request. It issued a refusal notice on 28 February 2008 citing the exemption at section 23 of the Act. This exemption applies to information relating to, or supplied by, certain specified bodies.
 4. The complainant requested an internal review on 28 February 2008. The complainant indicated to PONI that the OSC was not one of the bodies specified by section 23 of the Act, and therefore, in his view, this exemption could not be claimed.
 5. On 26 March 2008 PONI wrote to the complainant to advise him of the outcome of the internal review. PONI accepted that the exemption at section 23 could not be applied in this case. However, PONI advised that it was continuing to refuse the request, now in reliance on the exemptions at section 31(1)(a) and section 31(1)(g) of the Act.

The Investigation

Scope of the case

6. On 28 March 2008 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the following points:
 - the public authority had failed to demonstrate prejudice as required by section 31 of the Act
 - the public authority had not properly considered the public interest
 - the public authority may be withholding the information because its release might be embarrassing
 - the public authority had not considered whether parts of the information could be provided, with sensitive information redacted.

Chronology

7. The Commissioner wrote to PONI on 8 May 2009 to ask for a copy of the withheld information and for its arguments as to the application of the exemptions cited.
8. The PONI responded to the Commissioner on 20 May 2009 to advise that the withheld information was particularly sensitive. Therefore PONI asked the Commissioner to inspect the withheld information at its premises.
9. Regrettably there was a delay in progressing the investigation. Following a change in the Commissioner's staff, the Commissioner inspected the withheld information at PONI's offices on 15 March 2010.
10. Following the inspection the Commissioner wrote to PONI on 15 March 2010. The Commissioner advised the public authority of his view that some of the withheld information was not exempt and should be disclosed to the complainant. The Commissioner also requested further detailed arguments in relation to the exemptions claimed.
11. PONI responded to the Commissioner's letter on 13 May 2010. At this stage PONI agreed to release the information suggested by the Commissioner. PONI also provided the Commissioner with a detailed submission in relation to the remaining withheld information.
12. The Commissioner notes that PONI also withheld the name of a member of staff. The complainant confirmed to the Commissioner that he was content with this information being withheld. Therefore the Commissioner's decision in this case relates only to the remaining withheld information.

Findings of fact

13. The Office of Surveillance Commissioners (OSC) is not, of itself, a public authority and is therefore not subject to this Act. According to its website¹:

"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:

¹ http://www.surveillancecommissioners.gov.uk/about_covert.html

- *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]"

14. Covert surveillance activities are summarised and explained by the OSC 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."

15. The withheld information in this case consists of the following:
 1. Parts of the OSC report dated 23 August 2006
 2. A covering letter from the OSC to PONI dated 15 September 2006
16. The Commissioner notes that PONI has released the majority of the OSC report, and that the withheld information comprises a number of specific comments.

Analysis

Exemptions

Section 31 – Law Enforcement

17. PONI cited various provisions of section 31 as its basis for refusing to provide the withheld information. These provisions deal with prejudice to various functions:
 - Section 31(1)(a): the prevention or detection of crime
 - Section 31(1)(g): the exercise of the public authority's functions for purposes specified in subsection (2)
 - Section 32(2)(a): ascertaining whether any person has failed to comply with the law
 - Section 32(2)(b): ascertaining whether any person is responsible for any conduct which is improper
 - Section 32(2)(d): ascertaining a person's fitness or competence in relation to the management of bodies corporate or in relation to any profession or activity which he is, or seeks to become, authorised to carry on.
18. Following the Information Tribunal decision in *Hogan v ICO* (EA/2005/0026, EA/2005/0030), the Commissioner uses a three step test to indicate whether prejudice would or would be likely to occur from the disclosure of the information in question:
 1. Identify the prejudice in the exemption;
 2. Consider the nature of the prejudice in question; and
 3. Consider the likelihood of the prejudice in question occurring.

Applicable interests

19. PONI's primary role is to investigate complaints made about police officers. Matters can also be referred for investigation by the Chief

Constable, and all discharges of firearms, all deaths following contact with police, and all fatal traffic collisions involving police are routinely referred by the Chief Constable. In addition, cases can be referred to PONI by the Secretary of State, the Director of Public Prosecutions, the judiciary, the Northern Ireland Policing Board and the Coroner's Office. The functions, duties and powers of PONI² are set out in the Police (Northern Ireland) Act 1998, the Police (Northern Ireland) Act 2000 and the Police (Northern Ireland) Act 2003. PONI can make recommendations to the Director of Public Prosecutions for criminal prosecution and make recommendations and directions in respect of disciplinary action against police officers.

20. Once a case has been forwarded for investigation, PONI investigators will carry out whatever enquiries are necessary in relation to the complaint. As well as identifying and interviewing witnesses, PONI conducts or arranges any required forensic and medical examinations, and will consider the full range of investigative options including house-to-house enquiries, securing available CCTV footage, media appeals, computer analysis etc. PONI has powers to recommend prosecution, or to recommend disciplinary action, as a result of an investigation.
21. In view of this the Commissioner is satisfied that the applicable interests are relevant to sections 31(1)(a) and 31(2)(a), (b) and (d). The Commissioner considers that each of the exemptions claimed by PONI relates to its overall responsibility to investigate complaints of misconduct and possible criminal offences. He therefore considers that the arguments provided by PONI are relevant to the application of all four exemptions, and has gone on to consider the exemptions together.

Nature of prejudice

22. PONI has argued that disclosure of the withheld information would prejudice its investigatory function in that it would give a tactical advantage to any police officer who is or could become subject to a PONI investigation. Given that the OSC report relates to covert surveillance and RIPA, and bearing in mind the nature of the withheld information, the Commissioner accepts PONI's arguments in relation to the nature of the prejudice.

Evidence of prejudice

23. PONI has argued that disclosure of the withheld information would prejudice its functions as set out above. Where the public authority

² <http://www.policeombudsman.org/modules/pages/about.cfm>

has claimed that disclosure *would* give rise to the relevant prejudice then the Tribunal has ruled, in the *Hogan* case, that there is a much stronger evidential burden on the public authority, and the prejudice must be at least more probable than not.

24. In *Hogan*, the Tribunal stated that the "*evidential burden rests 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".

25. Taking into account *Hogan* 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.
26. The Commissioner accepts that covert surveillance is a useful tool in the prevention or detection of crime and investigating misconduct. As noted in "Findings of Fact" above, covert surveillance covers a range of activities. In this particular case, the nature of covert surveillance depends upon PONI achieving and maintaining a tactical advantage over police officers who are trying to avoid detection. 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, adversely affecting PONI's ability to carry out its functions.
27. Having identified the applicable interest and having accepted that disclosure of information about surveillance activities could, theoretically, give rise to a prejudicial effect on these interests, the Commissioner has gone on to consider whether disclosure of the withheld information would result in this outcome.
28. The Commissioner has considered the remaining withheld information, and notes that it comprises specific, detailed information. The Commissioner has carefully considered whether

disclosure of this specific information would prejudice PONI's ability to carry out investigations and fulfil its functions.

29. The Commissioner is unable to provide a detailed analysis of PONI's arguments as it would not be possible to do so without reference to the withheld information. However, in the Commissioner's view, the withheld information is extremely sensitive and its disclosure of it would undermine PONI's tactical advantage and ability to use covert surveillance operations successfully.
30. In light of the above, the Commissioner is satisfied that the exemptions at sections 31(1)(a) and 31(2)(a), (b) and (d) are engaged in relation to the withheld information.

Public interest arguments in favour of disclosing the requested information

31. Sections 31(1)(a) and 31(2)(a), (b) and (d) are qualified exemptions and are therefore subject to the public interest test under section 2(2)(b) of the Act. Section 2(2)(b) provides that exempt information must still be disclosed if:

"in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosure of the information".

32. In its letter to the Commissioner of 13 May 2010 PONI accepted that there was some public interest in disclosing the withheld information. PONI was of the view that disclosure would demonstrate openness and accountability.
33. PONI also indicated that the management of intelligence in the policing and security environment in Northern Ireland is particularly sensitive. To disclose the withheld information would demonstrate that PONI is operating within the law, which would contribute to public confidence in the police complaint system.
34. In his request for internal review dated 28 March 2008 the complainant expressed his view that the withheld information may contain some serious criticisms of PONI, and on this basis it ought to be disclosed. The complainant reminded PONI that embarrassment was not a proper basis for withholding information. The complainant did accept at this stage that "sensitive information" may need to be redacted.
35. In his complaint to the Commissioner the complainant also made the following general comments as to the public interest in disclosure:

"The public has few opportunities to judge whether activities under RIPA carried out in its name are being executed properly, but this report presents one such opportunity. There is therefore a very strong public interest in ensuring that the Ombudsman is acting within the law, particularly in such a sensitive area as this".

Public interest arguments in favour of maintaining the exemptions

36. PONI identified a number of public interest factors in favour of maintaining the exemptions as follows:
- it would not serve the public interest to disclose information which could undermine the methodologies employed by the police complaints system
 - it would not serve the public interest to assist those under investigation and provide them with a distinct tactical advantage which could help them evade detection
37. PONI also argued that the public interest is served by holding organisations which use covert surveillance techniques to account through mechanisms such as the OSC.

Balance of the public interest arguments

38. The Commissioner has considered whether the public interest in maintaining sections 31(1)(a) and 31(2)(a), (b) and (d) in relation to the withheld information outweighs the public interest in disclosing it.
39. The Commissioner believes there is a strong public interest in ensuring that PONI retains a tactical advantage over police officers who are, or could become, the subject of the range of investigations undertaken by PONI. This argument is relevant to the all exemptions cited under sections 31(1)(a) and 31(2)(a), (b) and (d). The Commissioner notes that PONI aims to deliver a police complaints system in which the public and police officers can have confidence. Therefore the Commissioner accepts that it is a strong argument, that PONI should not disclose information which would prejudice investigations, thus potentially damaging confidence in the investigatory process. There is a strong public interest in ensuring criminal investigations against police officers are effective, police bodies comply with the relevant law that governs their conduct and investigations that lead to disciplinary action or professional sanctions are also effective.
40. The Commissioner acknowledges that there is a competing public interest in increasing the public's understanding of the operation of

covert surveillance and this would enable the public to hold PONI to account for their use of covert surveillance. The fact that other mechanisms, such as the OSC, exist to hold public bodies to account for their use of surveillance does not negate these public interest factors in favour of disclosure. The Commissioner also agrees with the complainant that embarrassment is not an appropriate ground for withholding information. However the Commissioner is satisfied that disclosure of the withheld information in this particular case would actually harm investigations, rather than cause embarrassment or discomfort. The Commissioner appreciates that he may not disclose the nature of the withheld information, but would stress that he has considered it in detail.

41. For the reasons set out above the Commissioner is satisfied that the withheld information has been properly withheld by PONI. He is satisfied that the public interest in maintaining each of the exemptions cited clearly outweighs the public interest in disclosure.

The Decision

42. 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) and 31(2)(a), (b) and (d) to the withheld information.

Right of Appeal

43. 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 8th day of June 2010

Signed

**Steve Wood
Head of Policy Delivery**

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

Legal Annex: Relevant statutory obligations

1. **Section 1(1)** provides that:

(1) Any person making a request for information to a public authority is entitled –

- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
- (b) if that is the case, to have that information communicated to him.

2. **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,
- (c) the administration of justice,
- (d) the assessment or collection of any tax or duty or of any imposition of a similar nature,
- (e) the operation of the immigration controls,
- (f) the maintenance of security and good order in prisons or in other institutions where persons are lawfully detained,
- (g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2),

(2) The purposes referred to in subsection (1)(g) to (i) are-

- (a) the purpose of ascertaining whether any person has failed to comply with the law,
- (b) the purpose of ascertaining whether any person is responsible for any conduct which is improper,
- (c) the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise,
- (d) the purpose of ascertaining a person's fitness or competence in relation to the management of bodies corporate or in relation to any profession or other activity which he is, or seeks to become, authorised to carry on.