

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 9 August 2012

Public Authority: Royal Mail Group Ltd
Address: 100 Victoria Embankment
London
EC4Y 0HQ

Decision (including any steps ordered)

1. The complainant has asked Royal Mail Group Ltd (Royal Mail) to confirm the number of applications it has received which were made under the Regulation of Investigatory Powers Act 2000 (RIPA) or the Regulation of Investigatory Powers (Scotland) Act 2000 (RIPSA). This information was requested on a year-by-year basis for the period 2007 to 2011. The Commissioner's decision is that Royal Mail incorrectly claimed that any information held was exempt information under section 31(1)(a) (prevention or detection of crime) of FOIA.
2. In light of his finding, the Commissioner requires the public authority to disclose the information covered by the scope of the request.
3. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

4. On 5 January 2012 the complainant wrote to Royal Mail and requested information in the following terms:

"[...] how many requests under the Regulation of Investigatory Powers Act 2000 (RIPA) and the Regulation of Investigatory Powers Scotland Act 2000 (RIPSA) were made to the Royal Mail organisation in the last

five years. I am also requesting a figure for how many such requests were granted.”

5. The complainant went on to clarify that the information should be provided for each calendar year, with the period beginning on 1 January 2007 and ending on 31 December 2011.
6. On 9 January 2012 the complainant contacted Royal Mail again to make a separate, but related, request. Specifically, he asked Royal Mail to provide details of the requesting authority, offence under investigation and resulting prosecution or conviction for any RIPA and RIPSAs requests granted during the time period described in the earlier request.
7. Royal Mail responded to both requests on 27 January 2012. In terms of the complainant's first request, it confirmed that it held information in relation to the number of requests made under RIPA and RIPSAs for the last three calendar years. However, it refused to disclose this information, citing section 31(1)(a) of FOIA as its basis for doing so.
8. Regarding the second request, Royal Mail advised the complainant that it is compelled to comply with an application under RIPA or RIPSAs unless it is not practicable to do so. For all the remaining elements of the request – namely, the details of requesting authority, offence and resulting convictions or prosecutions – Royal Mail claimed that the cost of compliance would exceed the appropriate limit for the purposes of section 12 of FOIA.
9. On 3 February 2012 the complainant wrote to Royal Mail asking it to reconsider its response, particularly in respect of its reliance on section 31(1)(a) of FOIA. Royal Mail provided the outcome of its internal review on 27 March 2012, apologising for the time taken to complete its review. This upheld its original application of sections 12 and 31(1)(a) of FOIA.
10. As part of its review, Royal Mail responded directly to the arguments advanced by the complainant in favour of disclosure. This included a rebuttal of the complainant's contention that disclosure of the number of requests would not significantly extend Royal Mail's earlier confirmation that it had in fact received requests under RIPA or RIPSAs. Royal Mail explained that its statement which said that it was withholding information did not mean that it had actually received any requests under RIPA or RIPSAs. This was because it considered that statistical information, which the requested information was deemed to be, included the number zero.

Scope of the case

11. The complainant contacted the Commissioner to complain about the way his request for information of 5 January 2012 had been handled. In particular, he asked the Commissioner to consider Royal Mail's refusal to disclose the number of requests made under RIPA and RIPSAs for each of the three calendar years to which any relevant statistical information was held. This complainant did not ask the Commissioner to investigate the handling of his request of the 9 January 2012.

Reasons for decision

12. The successful application of section 31(1)(a) of FOIA is dependent on the meeting of two tests. The first involves a public authority being able to establish that the disclosure of information would, or would be likely to, prejudice the prevention or detection of crime. If this is shown to be the case, the second test requires the demonstration that the public interest in maintaining the exemption outweighs the public interest in disclosure.
13. To judge whether the test of prejudice has been satisfied, the Commissioner will assess the answers to the following questions; (1) What are the applicable interests within the exemption? (2) What is the nature of the prejudice being claimed and how will it arise? (3) What is the likelihood of the prejudice occurring? The Commissioner has considered these questions in turn.
14. RIPA and its equivalent in Scotland, RIPSAs, govern the use of covert techniques by a public authority and the issue of interference with a person's right to privacy. Cases in which private information about someone might be required by a public authority will include, among other reasons, where an investigation is being carried out for the purposes of preventing crime or terrorism.
15. Applications under RIPA or RIPSAs for information may be sent to Royal Mail by a designated public authority. Both RIPA and RIPSAs require that the obtaining of the information is done in a way that is necessary, proportionate and compatible with human rights. Oversight of the conduct of covert surveillance and covert human intelligence sources by

public authorities in respect of RIPA and RIPA is provided by the Office of Surveillance Commissioners¹.

16. The Commissioner recognises that RIPA and RIPA act as important tools for public authorities carrying out investigations with the aim of preventing or detecting crime. To the extent that Royal Mail has argued that disclosure would impair a public authority's ability to discharge an investigation of this nature, the Commissioner is satisfied that the prejudice being claimed is relevant to section 31(1)(a) of FOIA. The next step is therefore for the Commissioner to consider the nature of the potential prejudice.
17. Following the approach of the Information Tribunal, most notably in *Hogan*², the Information Commissioner considers that an evidential burden rests with a public authority to be able to show that some causal relationship exists between the potential disclosure and the prejudice described. Furthermore, this prejudice must be real, actual or of substance.
18. Royal Mail has indicated to the Commissioner that the disclosure of the number of requests made under RIPA or RIPA would increase the opportunity for criminals to ascertain whether their activities are, or are likely to be, under surveillance. This could result in a criminal modifying their behaviour in order to avoid detection. Although Royal Mail accepts that the request data is not current, it maintains that the relevance and significance of the information has not diminished. This is because it considers that the information betrays the trend of the surveillance and investigations that are directed to Royal Mail.
19. The Commissioner acknowledges that the access provisions in FOIA were not designed to undermine, or somehow jeopardise, investigations charged with the real purpose of preventing or detecting crime. He therefore appreciates that in most cases care must be taken to preserve the integrity of an investigation of this kind. However, the Commissioner is also mindful that a public authority should only seek to withhold information where prejudice could arise which, as stated, is real, actual or of substance.

¹<http://surveillancecommissioners.independent.gov.uk/index.html>

²<http://www.informationtribunal.gov.uk/DBFiles/Decision/i42/MrCMHoganandOxfordCityCouncilvInfoComm17Oct06.pdf>

20. In this case the Commissioner considers that Royal Mail has failed to demonstrate that a link exists between the prejudice described and disclosure. Specifically, having analysed the submissions provided by Royal Mail, the Commissioner is unable to envisage how complying with the request could, as suggested, aid those intent on carrying out criminal acts by assisting them to counter law enforcement measures. Instead, the Commissioner has agreed with a principal argument of the complainant which says that disclosure could only alert criminals to surveillance if additional information was also made available, such as the type of criminal activity being monitored. This is not the case here.
21. Furthermore, even if no requests had been made under RIPA or RIPA (which may or may not be the case), the Commissioner does not share the view that disclosure of this fact would necessarily prejudice the prevention or detection of crime. This is because a criminal would not be in a position to conclude from this information that he or she was not being monitored by a public authority but only that a public authority had not deemed it necessary to make a RIPA or RIPA application.
22. The Commissioner has therefore found that the test of prejudice has not been satisfied as the arguments advanced by Royal Mail do not satisfy each of the three questions listed above. On this basis, he must conclude that section 31(1)(a) of FOIA is not engaged. As the application of the exemption has therefore fallen at the first hurdle, it has not been necessary for the Commissioner to consider the public interest in disclosure.
23. When reaching this decision, the Commissioner has been conscious of the serious nature of the prejudice being claimed and his role as a responsible regulator. Accordingly, the Commissioner felt it was appropriate to inform Royal Mail during his investigation that he was unlikely to support its position based on the arguments provided and offer it a further opportunity to bolster its arguments. Royal Mail has, however, chosen not to make any additional representations. The Commissioner has therefore proceeded on the basis of the submissions presented to him.

Right of appeal

24. 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

25. 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.
26. 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

**Gerrard Tracey
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Wycliffe House
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