

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 17 December 2015

Public Authority: Chief Constable of Thames Valley Police

Address: Thames Valley Police HQ

Oxford Road

Kidlington

Oxfordshire

OX5 2NX

Decision (including any steps ordered)

1. The complainant has requested information concerning the use of RIPA (the Regulation of Investigatory Powers Act 2000) by Thames Valley Police ("TVP"). TVP initially refused the request as being 'vexatious' under section 14(1) of the FOIA. Following the Commissioner's decision overturning this exclusion, TVP then refused to provide the requested information citing section 31(1)(g) with 31(2)(a) of the FOIA. The Commissioner's decision is that TVP has correctly applied this section and the balance of the public interest favours maintaining the exemption. He requires no steps to be taken.

Background

2. This case is as a result of a previous decision FS50578306¹ which the Commissioner has made. This request was originally found to be 'vexatious' by TVP, a position which was not upheld by the

¹ https://ico.org.uk/media/action-weve-taken/decision-notice/2015/1432033/fs_50578306.pdf

Commissioner. This current decision notice therefore relates to the position taken by TVP following that previous decision.

3. The request makes reference to a Report published by the Interception of Communications Commissioner's Office "IOCCO". This can be found online².
4. IOCCO have confirmed that: *"In the 3 year period covered by the inquiry 19 police forces sought communications data in relation to 34 investigations into suspected illicit relationships between public officials (sources) and journalists"*.

Request and response

5. In response to decision notice FS50578306, on 5 August 2015 TVP provided a fresh response to the complainant's request concerning RIPA applications. This was in respect of a narrowed version of his original request as follows:

"Confirm or deny if they are one of the 19 forces that has used RIPA to access information/records about journalists and who they contact

If it is a confirmation, how many cases

What is the breakdown amongst journalists – national, regional/local/freelances".

6. In its response TVP found that the information requested was exempt by virtue of section 31(1)(law enforcement) of the FOIA; it did not state which subsection.
7. In view of the time spent on the previous case and the overturning of the original exclusion cited, the Commissioner has used his discretion and investigated this complaint without an internal review.

² <http://www.iocco-uk.info/docs/IOCCO%20Communications%20Data%20Journalist%20Inquiry%20Report%204Feb15.pdf>

Scope of the case

8. The complainant contacted the Commissioner on 9 August 2015 to complain about the way his request for information had been handled. He asked the Commissioner to consider the citing of section 31(1) his opening grounds of complaint being as follows:

"I wish to appeal against this decision on the grounds that the information required is so general and lacking in details that Thames Valley Police cannot properly rely on this exemption and there remains a public interest in further information being released about police activity the Government has decreed that, whilst not illegal or unlawful, was not what was intended under RIPA. As you will know, the Government has told police forces they can no longer approve their own applications to retrieve information about journalists' sources and must seek judicial approval.

I would like to stress that my application seeks no information about any specific investigations, either past or present. It merely seeks to find out if Thames Valley Police has been one of 19 forces using RIPA in a way the Government has now banned, on how many occasions and what sector of the media was concerned".

Reasons for decision

Section 31 – investigations and proceedings

9. TVP has cited 31(1)(g) of the FOIA. This states that:

"Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice—

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

10. The function it has cited with this is that at 31(2)(a) which states:

"the purpose of ascertaining whether any person has failed to comply with the law..."

11. To engage this exemption a public authority must:

- demonstrate that it has been entrusted with a function to fulfil one of the purposes listed in subsection (2)

- confirm that the function has been specifically designed to fulfil that purpose; and
 - explain how the disclosure would prejudice that function.
12. As with any prejudice based exemption, a public authority may choose to argue for the application of regulation 31(1)(g) on one of two possible limbs – the first requires that prejudice ‘would’ occur, the second that prejudice ‘would be likely’ to occur.
 13. TVP has advised the Commissioner that it believes the likelihood of prejudice arising through disclosure is one that ‘would be likely to’ occur. This limb places a lower evidential burden on TVP.
 14. It is important to remember that section 31(1)(g) does not just apply to the public authority to whom a request for information has been made. The exemption refers to functions being exercised “*by **any** public authority*”. This means that the prejudice does not have to relate to the public authority who is dealing with the request but can relate to another public authority who is exercising a function for a relevant purpose. On this occasion TVP has advised that the function being relied on is in relation to itself.
 15. As a police force TVP clearly has powers to conduct criminal investigations and also has regulatory powers in respect of its staff. It has advised the Commissioner that: “*The activity associated with this request is governed by the Regulation of Investigatory Powers Act 2000*”. Although not mentioned by TVP, the Commissioner also considers the offence of Misconduct in Public Office³ to be relevant in this case.
 16. In its report the IOCCO stated, in paragraph 4.2, that it: “*... required copies of the applications for communications data submitted in the past 3 years where the intention was to investigate the leaking of information to a journalist*”. In paragraph 4.3 it added that it sought: “*... any communications data acquired on any communications address that sought to prove contact between a journalist and a public official with a view to identifying a journalistic source*”. IOCCO also clarifies in its report that, of the 34 police investigations identified, there were 242 parties who were suspected of being sources for journalists, 126 of whom were police officers or staff (paragraph 7.4, figure 1).

³ http://www.cps.gov.uk/legal/l_to_o/misconduct_in_public_office/#a02

17. It is therefore clear to the Commissioner that the IOCCO was seeking to establish which forces had conducted enquiries in order to identify those parties which it suspected had 'leaked' information to the press.
18. Although the IOCCO is not a body which is itself covered by the FOIA, the Commissioner used his discretion to contact it in case it was able to offer any further comment. This was particularly in view of the fact that it had made specific reference to the Metropolitan Police Service as one of the 19 forces who had used RIPA in its Report yet had not mentioned any of the others. The Commissioner sought to ascertain whether or not there was any particular reason for this. He was advised by the IOCCO that it had been its own decision as to what to include in the Report and that it had not been placed under any restriction in that regard. However, it added that it was not in a position to assess whether further disclosure might be prejudicial as it was only looking at RIPA applications relating to determining journalistic sources and not the wider investigations themselves.
19. Any information provided by TVP in an actual submission to IOCCO would necessarily relate to its own powers to investigate potential leaks of information to the media and it would be able to use the statutory provisions of RIPA to do so (although the Commissioner notes that since the issuing of the report such use has been reconsidered). The Commissioner is merely noting that at the time it would have the power to do so were it deemed necessary.
20. In relation to any perceived prejudice which disclosure would be likely to cause, TVP advised the complainant as follows.

"Disclosing information held would undermine ongoing investigations, reveal policing techniques and risk the identification of individuals. Revealing information about a RIPA application may in itself be all the information offenders wish to acquire to hinder policing. This awareness would help subjects avoid detection, and inhibit the prevention and detection of crime. This is also relevant to journalists and news organisation employees, likely to be committing offences under their remit.

In order to counter criminal behaviour, it is vital that the police and other agencies have the ability to work together, where necessary covertly, in order to obtain intelligence within current legislative frameworks to ensure the successful arrest and prosecution of those who commit or plan to commit crimes.

The Police Service is committed to demonstrating proportionality and accountability regarding surveillance techniques, to the appropriate authorities. However, if the police service were to

disclose information, other covert surveillance tactics will either be compromised or significantly weakened. The impact could undermine any on-going investigations and any future investigations, as it would enable targeted individuals/groups to become surveillance aware. This would help subjects avoid detection, and inhibit the prevention and detection of crime.

The prevention and detection of crime is the foundation upon which policing is built and the police have a clear responsibility to prevent crime and arrest those responsible for committing crime, or those that plan to commit crime. To do this, the police require evidence and that evidence can come from a number of sources, some of which is obtained through covert means. Having obtained sufficient evidence, offenders are charged with offences and placed before the courts. Disclosing the information held pertinent to this request, could directly influence the stages of that process, and jeopardise current investigations or prejudice law enforcement.

Any information identifying the focus of policing activity could be used to the advantage of criminal organisations. Information that undermines the operational integrity of these activities will adversely affect public safety and have a negative impact on law enforcement”.

21. In agreement with the complainant, the Commissioner considers the majority of these arguments to be generic and irrelevant to the requested information. However, he does accept that disclosure could undermine ongoing investigations (if there were any) and could help subjects avoid detection, thereby inhibiting the prevention and detection of crime (irrespective of whether or not there were any ongoing investigations). This position is reinforced by the following argument which was provided to the Commissioner during his investigation:

“RIPA is a covert process and as such falls into a very sensitive area of police activity. We are aware that the entire Police Service have received [sic] this request and it has been confirmed by IOCCO that only 19 forces have used RIPA in the circumstances outlined. There are a number of forces that have not used RIPA and any confirmation by the 19 forces would mean that an individual who is committing offences in the force area which has not used RIPA is likely to give them an indication that they are successfully evading justice and are likely to continue with their methods of criminality”.

22. Furthermore, the Commissioner notes that the IOCCO Report (at paragraph 7.18) indicates that 2 of the related investigations remained 'live' and a further 3 were still under consideration. Therefore,

responding to the request could reveal information about a 'live' investigation thereby being potentially detrimental to that investigation.

23. Also the Commissioner accepts that disclosure of the withheld information would identify whether or not TVP was one of the 19 forces and reveal how many investigations had been undertaken. In so doing this would in effect 'tip off' any parties who have acted as a journalistic source in TVP's force area as to whether or not they may be under any sort of suspicion. This could mean that react accordingly in an effort to evade detection or that they carry on with their activities in the understanding that the force remains unaware. The Commissioner therefore accepts that there is a causal relationship exist between the potential disclosure and the applicable interests stated.
24. Based on the arguments provided, the Commissioner accepts that disclosure would be likely to result in the prejudicial effects to TVP's function described at sections 31(2)(a) of the FOIA.
25. As section 31 is a qualified exemption, the next step is for the Commissioner to consider whether in all of the circumstances of the case the public interest in disclosure outweighs the public interest in maintaining the exemption.

Public interest test

Arguments in favour of disclosing the information

26. TVP provided the following arguments in favour of disclosure:

"Disclosing information that is held in response to this request, would lead to better public awareness into the intricacies of RIPA legislation and applications submitted under Part 1 Chapter 2 of RIPA. The use of RIPA to identify journalistic sources is not without controversy. The mere existence of the IOCCO inquiry shows how serious the issue is. Disclosure of the information held, or facts around that, would give far greater detail than that published in the IOCCO findings, which would enable an even more accurate and informed public debate.

Releasing specific details of investigations would ensure that anyone affected by those investigations, but currently unaware of that fact, would be empowered to take steps to either protect sources or journalistic material. It would also enable better informed public scrutiny of a forces use of RIPA in different circumstances (in this case communications data and identification of journalistic sources)".

27. The Commissioner also notes the following arguments which were submitted by the complainant.

"... any journalist who may have been acting in a way that could lead to a criminal investigation would already have taken these notional steps to thwart a potential investigation. Releasing the information I have sought would not alert them to anything other than Thames Valley Police is one of the 19 forces".

"...my request focusses on the time period the IOCCO report covered, ie three years prior to October 2014. It is now August 2015 and, given the number of arrests and prosecutions the police and CPS have carried out in the past three years, it is doubtful there is a current case in Thames Valley at such a critical point that the release of the very general information sought will hinder. As above, if the information was released, it is not going to suddenly lead Journalist X to have a sudden realisation they may be part of an investigation".

"...On its final balancing test, I would submit Thames Valley Police has demonstrated it is unable to apply the test in a dispassionate manner. It claims: "In this case there is no requirement to satisfy any public concern over the legality of police operations and the tactics we may or may not use." This, unfortunately, is an example of the line all police forces and representatives have repeated. I accept again that the IOCCO report did not find any police forces had acted illegally or unlawfully, but police forces cannot try to claim that is a clean bill of health with regards their use of RIPA. The IOCCO recommended their practice of only seeking an internal approval should stop and judicial oversight for applications was needed and the Government accepted this. Whilst forces did not break the law, they certainly did not adhere to Parliament's intention as to the use of RIPA and further information about this, particularly when you factor in freedom of express and Article 10 of the European Convention then there is indisputably a public interest in knowing more information".

Arguments in favour of maintaining the exemption

28. TVP provided the following arguments in favour of maintaining the exemption:

"By releasing information held [sic] would compromise the effective delivery of operational law enforcement. Tactics could be compromised which could hinder the prevention and detection of crime. This extends to the protection of witnesses and victims in those investigations, who are likely to be identified either by the

disclosure, or by small pieces of information which can be linked to other data available via the public domain, either by those who wish to frustrate any such investigation or identify such individuals. There is a public need that IOCCO powers and regulatory actions continue to remain effective. The relationship between Chief Officers and IOCCO is enshrined in statute. It operates in a confidential environment. To maintain its effectiveness there must therefore be a mutual expectation of confidentiality”.

Balance of the public interest

29. The Commissioner will firstly weigh up the arguments submitted by the complainant, as cited above. He notes that the focus of several of his arguments relate to the journalists who would be a necessary part of any related applications that TVP made under the terms of RIPA. However, the Commissioner understands the focus to be different, as he has gathered specifically from the wording that the IOCCO uses in its Report. It is apparent to the Commissioner that the focus of the RIPA requests made by the 19 forces concerned is actually to uncover any internal leaks to the press by either their staff or other ‘public officials’, rather than on the journalists themselves as recipients of that information; indeed, at paragraph 7.8 of the Report, the IOCCO specifies that of the 34 investigations identified:

“... 10 investigations did not seek data on any journalist i.e. they only sought communications data attributable to the source to help establish if there was an illicit relationship”.

30. It is the Commissioner’s view that the main purpose of the investigations were not to identify journalists. However, a disclosure would enable public officials to ascertain whether or not their activities were under suspicion were the requested information to be disclosed. Were TVP to reveal that it was not one of the 19 forces then any member of its staff, or a public official working in its jurisdiction, who was making unlawful disclosures would know that they had evaded suspicion. Conversely, were it to reveal that it was one of the 19 forces then they may become concerned that they are under suspicion and halt their activity, probably destroying related evidence in the process. Such confirmation or denial of being one of the 19 forces would also draw attention to the rest of the police service as the numbers are narrowed down.
31. The Commissioner also notes the complainant’s observations about the age of the information requested and its lack of currency. However, the Commissioner considers that the above arguments apply to the requested information whatever its age as someone who is leaking information to the press may have been doing so for many years.

32. The Commissioner also notes the complainant's arguments in respect of the controversy surrounding the police service's use of RIPA and the subsequent changes to the practices. There is clearly a strong public interest in the issues raised by IOCCO's report and therefore the Commissioner recognises that this translates into a public interest in disclosure in this case but it is important to consider the circumstances of the issue in the round. However, it is important to recognise that no force was deemed to have acted outside the law and that related applications made under RIPA were only a fraction of the overall applications made by forces. The investigation by the IOCCO and the subsequent findings and changes to practices do, in the Commissioner's view, address any allegation of wrong-doing by the police service and this reduces the case for a strong public interest in disclosure.

33. In balancing the public interest TVP argued:

"The Police Service will not divulge whether information is or is not held if to do so would compromise law enforcement. As much as there is public interest in knowing that policing activity, particularly applications under RIPA legislation, is appropriate and balanced, this will only be overridden in exceptional circumstances. In this case there is no requirement to satisfy any public concern over the legality of police operations and the tactics we may or may not use. The force is already held to account by independent bodies such as The Office of the Surveillance Commissioner and The Interception of Communications Commissioners Office. These inspections assess each constabulary's compliance with the legislation and a full report is submitted to the Prime Minister and Scottish Ministers containing statistical information. It is therefore our decision that the balance lies in favour of non disclosure of information held in response to this request, by virtue of Section 31(1) of the FOIA".

34. The Commissioner considers the main harm regarding TVP's compliance with the request is that of 'tipping off' those parties who have acted improperly and released information to the press, and who may still be doing so. This is across the whole police service rather than just in the policing boundaries of TVP itself. He recognises the obvious harm that could be caused were the parties concerned made aware that they may (or may not) be under suspicion and the effect that this could have across the 34 investigations and 19 forces identified by the IOCCO. Any such confirmation regarding the precise content of a force's submission to the IOCCO would serve to tip off those parties concerned as to whether or not they need to be 'on alert'. Furthermore, the Commissioner recognises that the changes to practices which have occurred since the publication of the report, and the more stringent steps that a police force now needs to go through, to have a RIPA request authorised means that any perceived weaknesses in the working

of applications made under RIPA regarding this sort of application have now been addressed.

35. Having weighed the complainant's arguments against the position of TVP, on balance the Commissioner considers that the public interest in favour of disclosure is outweighed by the public interest in favour of maintaining the exemption. He therefore concludes that section 31(1)(g) with subsection (2)(a) of the FOIA was correctly applied in this case and TVP was entitled to withhold the requested information.

Right of appeal

36. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

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

37. 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.
38. 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

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