

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 12 September 2016

Public Authority: Department for Transport
Address: Great Minster House
33 Horseferry Road
London
SW1P 4DR

Decision (including any steps ordered)

1. The complainant has requested information on the Department for Transport ("DfT") use of powers under the Regulation of Investigatory Powers Act 2000 ("RIPA") in conducting investigations into its own staff. The DfT refused to either confirm or deny if the information was held on the basis of sections 30(3) and 31(3).
2. The Commissioner's decision is that the DfT has correctly applied the exclusion from the duty to confirm or deny if information is held set out in section 31(3) and that the public interest favours maintaining the exemption. She requires no steps to be taken.

Request and response

3. On 4 January 2016, the complainant wrote to the DfT and requested information in the following terms:

"The individual number of RIPA requests made to the department where the subject was one of its own members of staff per month, for each of the last two years. To clarify, this concerns all RIPA requests made to the department to use RIPA powers on a subject that was a member of staff, be they permanent or freelance staff or employees of a company where work was being out-sourced to.

Please provide a break down as to which requests were granted and which were not and what part of RIPA the request was being made under e.g. whether the request was a section II request (requesting

surveillance and the use of covert human intelligence) or section I request (partly concerning the acquisition of communications data) or referred to another section.

Where possible please provide the reason for RIPA requests. For instance, Part II of RIPA refers to surveillance and the use of covert human intelligence sources and Part I of RIPA refers to the acquisition of communications data."

4. The DfT responded on 29 January 2016. It stated that it could neither confirm nor deny whether it held the requested information as to do so would be likely to prejudice the prevention and detection of crime and the pursuance of civil proceedings, and could compromise security measures and cause a direct threat to the public, by virtue of sections 23(5), 24(2), 30(3) and 31(3) of the FOIA.
5. Following an internal review the DfT wrote to the complainant on 24 March 2016. The DfT accepted it had incorrectly relied on the exclusions at sections 23(5) and 24(2) from the duty to confirm or deny if information was held but maintained that the exclusions at sections 30(3) and 31(3) were still applicable.

Scope of the case

6. The complainant contacted the Commissioner on 29 March 2016 to complain about the way his request for information had been handled.
7. The Commissioner considers the scope of her investigation to be to determine if the FCA was correct to neither confirm nor deny if information was held either by virtue of the exclusions at section 30(3) or section 31(3).

Reasons for decision

Section 31 – law enforcement

8. Section 31(1) 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, -

(a) the prevention or detection of crime,

9. Section 31(3) provides an exclusion from the requirement to confirm or deny whether information is held in relation any information which, if held, would be likely to prejudice any of the functions in sections 31(1). In this case, the DfT relied on section 31(1)(a) as it considered any information if held would be likely to prejudice the prevention or detection of crime.
10. In determining whether prejudice would or would be likely to occur by confirming if the information is held, the Commissioner will consider the nature and likelihood of the prejudice in question occurring.
11. The request asked for the number of RIPA requests made to the DfT where the subject was a member of its own staff, including details of the sections of RIPA the request fell under and the reason for the request.
12. In this case, the DfT argues that information, if it were held, would be held as part of an investigation into possible wrongdoing or fraudulent activity with a view to preventing or detecting crime.
13. The DfT has explained that it has powers under RIPA, some of which apply to its agencies. Statutory Instruments (or Consolidating Orders) exist which set out the bodies able to utilise RIPA surveillance powers, specifically directed surveillance and covert human intelligence sources¹ and communications data².
14. It is clear to the Commissioner that the DfT and its agencies have a statutory basis for granting authorisations under RIPA. For example, the accident investigation branches (Air, Marine and Rail) can lawfully acquire communications data (as set out in section 21(4) of RIPA) in the interests of public safety (section 22(2)(d) of RIPA). This may be utilised where the accident investigation branch is conducting an investigation to determine the cause of an accident with a view to improving safety and preventing future accident and part of the investigation is ascertaining whether the use of telecommunications data by drivers/pilots played any part in the accident.
15. However, in this case the request is for information on RIPA requests relating to members of the DfT's own staff. The DfT argues this will include its agencies, such as the Driving & Vehicle Standards Agency (DVSA) and has explained to the complainant that the DVSA has powers

¹ http://www.legislation.gov.uk/uksi/2010/521/pdfs/uksi_20100521_en.pdf

² http://www.legislation.gov.uk/uksi/2010/480/pdfs/uksi_20100480_en.pdf

to conduct investigations which may lead to a decision by the DfT to charge someone with an offence or lead to instituting criminal charges. In explaining this further, the DfT gave the example of the DVSA investigating whether there has been fraudulent activity in the fields of MOT testing or driving tests.

16. The Commissioner notes that section 28 of the RIPA, relating to directed surveillance, requires that this only occurs where it is necessary for a number of reasons including "*for the purpose of preventing or detecting crime or of preventing disorder*" (section 28(3)(b)). This is mirrored in other sections of RIPA relating to different types of surveillance i.e. for communications data section 22 has similar provisions and section 29 provides specified grounds for the use of covert human intelligence sources.
17. Therefore, revealing whether the DfT holds the requested information could reveal information on the extent to which and the circumstances in which requests have been made to the DfT. This, the DfT argues, would be likely to prejudice its ability to prevent and detect crime.
18. The DfT argues that confirming or denying if the information is held will pose a "real and significant" risk because providing individuals with information about the probability of RIPA surveillance may lead to those intent on committing offences to modify or adapt their methods to avoid detection. Therefore, there is a real risk that efforts to prevent and detect crime would be likely to be prejudiced.
19. The Commissioner's view is that how strong or effective RIPA is as a deterrent is tied to the knowledge of how frequently it is used. If it is known that it is rarely or never used then its deterrent value may be diminished. Conversely, if it is known that it is used frequently that may increase its deterrent value but such an increase in deterrence must be off-set against the possibility that it will cause some individuals to alter their criminal behaviour to avoid detection.
20. In a previous case³ the Commissioner considered this issue and found that:

"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

³ FS50463085

engage behaviour that would warrant the use of RIPA In knowing the figures it enables those with criminal intent to use them in determining the possibility of detection. 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”.

21. It is for the reasons given above that the Commissioner finds the exemption is engaged.

Public interest arguments in favour of disclosure

22. The complainant argues that there is a need for transparency about the scale of investigations being undertaken by public authorities and that confirming or denying if the information is held will increase transparency and assist in the public debate about the legitimacy of any such investigations. Consequently, the complainant believes confirming or denying if the information is held would further the chances of individuals receiving a fair trial by knowing the extent of any surveillance.
23. The DfT recognises there is a public interest in openness and transparency with regard to the operation of RIPA in order to assure the public that its use is appropriate and proportionate.

Public interest arguments in favour of withholding the information

24. The DfT has explained that the powers available to it under RIPA are not specifically related to its staff but do not preclude them either. The RIPA powers the DfT has can therefore be used in relation to staff and the DfT believes confirming or denying if its powers have been used in relation to one particular group of individuals would undermine the use of the neither confirm nor deny exclusion in relation to other groups of individuals.
25. The DfT also argues that confirming or denying if relevant information exists would affect its enforcement capabilities, specifically its ability in certain circumstances to prevent or detect fraudulent or criminal activities in the fields of MOT testing and driving tests. The DfT considers this could put individuals at risk and there is a very strong public interest in protecting the integrity of investigations and operations in this area.

Balance of the public interest arguments

26. The Commissioner accepts that confirming or denying if information exists would potentially assist those who would gain from knowing whether it is possible they are or could in the future be under surveillance. The information could help individuals gauge the extent to which covert surveillance is undertaken which could lead to the alteration of behaviour and methods which may frustrate attempts to investigate offences and criminal behaviour.
27. However, the Commissioner does also acknowledge there is a legitimate and important public debate about the scope and extent of the powers available under RIPA and there is a need for transparency and accountability in relation to the exercise of these powers.
28. That being said, the public interest in transparency and accountability is already met to some extent as the Office of Surveillance Commissioners (OSC) carries out regular inspections of the use of RIPA powers and publishes an annual breakdown of all authorisations sought by offence type, although not by public authority. All members of an organisation that has carried out or given assistance in the interception of communications are required to provide any information and assistance to enable the Commissioners to carry out their functions. All breaches of legislation or Codes of Practice are reported to the Commissioners and included in their annual report to the Prime Minister and these annual reports are available to the public through the OSC website. The Commissioner therefore considers there is already existing independent oversight of the exercise of RIPA powers.
29. The Commissioner has also considered the public interest in relation to RIPA powers in previous decisions. In FS50488117 relating to the use of RIPA within prisons the Commissioner upheld the Ministry of Justice's (MOJ) use of section 31(3) to neither confirm nor deny it held the information requested. The Commissioner accepted there was a legitimate public interest in understanding more about the use of powers under RIPA, as she does in this case, but that confirming or denying if the information was held would assist those wishing to commit crimes or offences by helping them understand the extent and frequency with which surveillance occurs.
30. The Commissioner has also considered the public interest in another case involving Thames Valley Police⁴ and found that it had correctly

⁴ FS50592915

applied section 31 to withhold information on its use of RIPA powers. In that case the Commissioner concluded that "*[s]he does not accept that disclosure could undermine ongoing investigations (if there were any) and could help subject to avoid detection, thereby inhibiting the prevention and detection of crime (irrespective of whether or not there were any ongoing investigations)*".

31. Whilst the Commissioner does consider each case on its own merits, she cannot ignore the previous decisions made on requests for information on the use of RIPA powers and the importance of ensuring consistency in the approach taken to these cases, particularly when by the very nature of it; RIPA is intended to allow public authorities to conduct covert surveillance. The Commissioner therefore considers that disclosure of information about the use of RIPA powers or, in this case, confirming or denying if RIPA powers have been used would not be in the public interest as it would undermine the purpose of the powers and therefore their effectiveness in detecting and preventing crime.
32. In reaching a decision, the Commissioner is swayed by the fact that she accepts that confirming or denying if the requested information is held will likely assist those engaged in or contemplating unlawful activity and that where there is criminal activity there are invariably victims. In the circumstances of this case, the Commissioner is of the view that this factor combined with the other factors discussed above, outweighs the benefits such as transparency that confirming or denying if the information is held, would bring. The Commissioner therefore finds that the DfT correctly relied on section 31(3) to neither confirm nor deny it held the requested information and the public interest favours maintaining the exemption.
33. The Commissioner notes that the DfT sought to rely on section 30(3). She has not gone into detail about this exclusion from the duty to confirm or deny if information is held as in this case she was not minded to accept the DfT had sufficiently demonstrated it had the statutory basis for undertaking investigations with a view to charging a person with an offence or determining if a person charged with an offence is guilty of it. As sections 30 and 31 of the FOIA are mutually exclusive, the Commissioner determined it was appropriate to only consider the arguments presented in relation to section 31.

Right of appeal

34. 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

35. 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.
36. 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

Jill Hulley
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