

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 22 April 2014

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

Decision (including any steps ordered)

1. The complainant has requested information about surveillance in prisons. The public authority provided some information but withheld the remainder under sections 31(1)(a) (prejudice to the prevention or detection of crime) and (f) (prejudice to the maintenance of security and good order in prisons) of the FOIA. The Commissioner has investigated and concluded that the exemptions are not engaged.
2. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation:
 - Disclose the requested information.
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.

Background

4. The request can be followed on the 'What do they know' ("WDTK") website¹.
5. The complainant made a similar request to the Scottish Prison Service. This can also be followed on WDTK². On this occasion he was provided with the requested information.
6. The Commissioner has previously issued two decisions which relate to similar information requests made to this public authority³⁴.
7. Reference is made to 'RIPA', ie the Regulation of Investigatory Powers Act 2000⁵. According to the Home Office⁶:

"RIPA is the law governing the use of covert techniques by public authorities. It requires that when public authorities, such as the police or government departments, need to use covert techniques to obtain private information about someone, they do it in a way that is necessary, proportionate, and compatible with human rights".

8. Reference is also made to 'NOMS'; the National Offenders Management Service is a part of the Ministry of Justice.

Request and response

9. On 12 October 2012, the complainant wrote to the public authority and requested information in the following terms:

"With reference to Prison Service Instruction 22/2012: 'Secret' Surveillance of Prisoners, I would like to request the following under Freedom of Information legislation.

¹https://www.whatdotheyknow.com/request/targeted_people_within_hm_prison

²https://www.whatdotheyknow.com/request/targeted_people_within_scottish

³[http://www.ico.org.uk/~media/documents/decisionnotices/2013/fs_50488117.ashx](http://www.ico.org.uk/~/media/documents/decisionnotices/2013/fs_50488117.ashx)

⁴http://www.ico.org.uk/~media/documents/decisionnotices/2013/fs_50463085.ashx

⁵ <http://www.legislation.gov.uk/ukpga/2000/23/contents>

⁶ <https://www.gov.uk/surveillance-and-counter-terrorism>

According to the publicly released version of the document, under the section entitled Mandatory Action:

1.12 Overt CCTV cameras must not be used for pre planned target use against prisoners or visitors unless supported by an appropriate RIPA authorisation.

Can you confirm that targets would include specific people or groups of people who are put under surveillance within prison, as the document seems to indicate?

Can you tell me how many specific people have been authorised to be put under surveillance within HM Prison Service at date of writing?

Can you tell me how many of these were not pre-planned, and how many were pre-planned?"

10. The public authority responded on 26 November 2012. It provided a partial disclosure but refused to provide the numbers of authorisations citing sections 31(1)(a) and (f) of the FOIA. During an earlier investigation by the Commissioner, which did not reach decision notice stage, the public authority changed its reliance on section 31 to section 12 (cost limit). It then became apparent that there had been a misinterpretation of the request. The statement "... *how many specific people have been authorised to be put under surveillance ... at date of writing?*" had been interpreted by the public authority as meaning since this type of surveillance had commenced, whereas the complainant had intended it to mean on the actual day of writing.
11. With the agreement of both parties, the public authority reconsidered the request and issued a fresh response on 28 January 2014. In this it reverted to its earlier position of citing sections 31(1)(a) and (f).

Scope of the case

12. The complainant contacted the Commissioner on 29 January 2014 to complain about the way his request for information had been handled. He asked the Commissioner to consider the public authority's citing of sections 31(1)(a) and (f).

Reasons for decision

Section 31 – law enforcement

13. Section 31(1) of the FOIA 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, ...*
- (f) the maintenance of security and good order in prisons or in other institutions where persons are lawfully detained".*

14. Consideration of the section 31 exemption is a two-stage process. First, the exemption must be engaged as a result of prejudice being likely to occur. Secondly, the exemption is qualified by the public interest, which means that, unless the public interest in the maintenance of the exemption outweighs the public interest in disclosure, the information should be disclosed.

The prejudice test

15. The Commissioner has followed the approach as set out in his guidance with respect to the prejudice test, namely to:

- identify the applicable interests within the relevant exemption;
- identify the nature of the prejudice; and
- decide on the likelihood of the occurrence of prejudice.

Applicable interests

16. The relevant applicable interests in this exemption are the prevention or detection of crime and the maintenance of security and good order in prisons.

17. The public authority has explained that:

"RIPA allows NOMS to undertake covert surveillance for the purposes of the prevention or detection of crime or on the grounds of protecting the public. Applications for the authorisation of covert surveillance may specify persons to be subject of covert surveillance. However, that is not necessarily always the case".

18. The Commissioner is satisfied that the prejudice the public authority is envisaging in this case is relevant to the particular interests the exemptions are designed to protect. This is because lawful use of

surveillance is relevant to the prevention or detection of crime. Furthermore, the knowledge that surveillance may be being conducted is likely to act as a deterrent thereby ensuring the ongoing maintenance of security and good order in prisons.

The nature of the prejudice

19. The Commissioner has next considered whether the public authority has demonstrated a causal relationship between the disclosure of the information at issue and the prejudice that sections 31(1)(a) and (f) are designed to protect. Disclosure must at least be capable of harming those interests in some way, ie have a damaging or detrimental effect on it.
20. In correspondence with the complainant, the public authority has explained:

"... the statistical information you have requested would be likely to be used to subvert the effective use of RIPA powers by indicating the extent to which powers may be used over a specific period. This information 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. If the statistics provided were low when compared to the numbers of prisoners and/or prison establishments in England and Wales, criminals may consider that the deterrent of covert investigations is diminished; if the numbers were high, criminals may alter their criminal behaviour to avoid detection, with the result that investigations would be likely to be frustrated and our ability to counter criminality in prisons reduced. It should also be remembered that NOMS has finite resources and therefore needs to target its investigative capability to address the threats posed by serious criminality. Any information that presents information to criminals about investigative techniques would be likely to mean that NOMS will not easily be able to recover the initiative".

21. The Commissioner accepts that there is a causal relationship between the requested information and the exemption cited.

The likelihood of prejudice

22. In correspondence with the Commissioner, the public authority confirmed that it considers that prejudice *would be likely* to result - rather than *would* result - if the requested information was disclosed.

Is the exemption engaged?

23. In order to engage these exemptions, the prejudice that the public authority envisages must be real, actual and of substance. If the consequences of disclosure would be trivial or insignificant, there is no prejudice.
24. He also considers that the authority must be able to show how the disclosure of the specific information requested would, or would be likely to, lead to the prejudice. If the authority cannot show that the prejudice would or would be likely to occur, then the exemption is not engaged.
25. The information in question provides the number of active surveillance authorisations, targeting individual people, within the entire prison service on a particular day. There are around 130 prisons across England and Wales, containing an average of 80,000 prisoners and 30,000 staff, any of which could have been subject to an active surveillance authorisation on the day specified by the complainant. However, whatever the number of authorisations there were on that day, knowledge of that figure could not be used to deduce how many authorisations there would be on any other day. The request as worded is just a snapshot of a moment in time.
26. Whilst the Commissioner accepts that knowing this information for a longer period of time, or on a repetitive basis, could allow for a fuller picture of surveillance activity to be formed, the Commissioner does not find that the public authority has evidenced that prejudice to the prevention or detection of crime or the maintenance of security and good order in prisons is a real and significant likelihood as an outcome of disclosure. However, he does note that he may find differently if the information were requested for specific establishments, additional dates or a longer time period.
27. It follows that he does not find the exemptions engaged.

Right of appeal

28. 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: GRC@hmcts.gsi.gov.uk

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

29. 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.
30. 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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