

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 6 July 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)

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1. The complainant has requested information concerning the use of RIPA (the Regulation of Investigatory Powers Act 2000) by Thames Valley Police ("TVP"). TVP refused the request as being 'vexatious'. The Commissioner's decision is that the request is not vexatious and he requires TVP to take the following steps to ensure compliance with the legislation:
  - disclose the requested information or issue a fresh refusal notice in compliance with section 17 of FOIA.
2. TVP 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

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3. On 6 February 2015, following other related requests, the complainant wrote to TVP and requested information in the following terms:

*"... Returning to RIPA, you'll have seen the IOCCO [Interception of Communications Commissioner's Office] has released his report into*

*RIPA investigations that shows 19 forces have used it to gain access to journalists' records.*

*The report does not name the forces but given the Government's signal that the current system has to change and there will be judicial oversight, can TVP please:*

*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*

*If it is a confirmation, is one of these cases the [name removed] case*

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

*Given the report and the Government's statements about incoming judicial oversight, will TVP voluntarily halt any new RIPA applications and/or suspend current investigations where only officer approval has been given and put each case in front of a judge*

*Given the report and the Government's statements, does TVP now accept the system it and other forces were working under was a flawed understanding of RIPA*

*What is TVP's opinion of the need for its requests under RIPA to be overseen by a Judge*

*And if some or none of these questions are able to be answered, can we have a quote explaining why."*

4. TVP responded on 6 March 2015. It stated that it found the request to be vexatious under section 14(1) of the FOIA.
5. Following an internal review TVP wrote to the complainant on 8 April 2015. It maintained its position.

## Background

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6. The request makes reference to a Report published by the IOCCO. This can be found online<sup>1</sup>.
7. The Report was accompanied with a summary which determined<sup>2</sup>:
  - *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.*
  - *608 applications were authorised to seek this communications data. This represents a very small percentage (0.1%) of the total applications that were authorised by the police in that period which demonstrates that such usage is not widespread. These figures are also artificially inflated by exceptional investigations like Operation Elveden – removing that investigation from the overall statistics provides context and would represent less than 1 application per police force per year (when averaged out over the 3 years and all UK police forces).*
  - *Police forces have not circumvented other legislation by using their powers under Chapter 2 of Part 1 of the Act to acquire communications data in these cases. Police forces are not randomly trawling communications data relating to journalists in order to identify their sources.*
  - *All of the communications data applications had been authorised by a designated person of the correct rank. The applications related to investigations where public officials were suspected of criminal conduct or where a media organisation had voluntarily disclosed information to the police.*
  - *Generally speaking the police forces did not give the question of necessity, proportionality and collateral intrusion sufficient consideration. They focused on privacy considerations (Article 8 of the European Convention on Human Rights) and did not give due consideration to freedom of speech (Article 10).*
  - *The current Home Office Code of Practice (and the recently revised draft Code said to provide protection for sensitive professions) do*

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<sup>1</sup> <http://www.iocco-uk.info/docs/IOCCO%20Communications%20Data%20Journalist%20Inquiry%20Report%204Feb15.pdf>

<sup>2</sup> <http://www.iocco-uk.info/docs/Press%20Release%20IOCCO%20Journalist%20Inquiry.pdf>

*not provide adequate safeguards to protect journalistic sources or prevent unnecessary or disproportionate intrusions.*

- *After careful consideration of all the evidence and the sensitivities and complexities of the considerations required when contemplating an interference with Article 10 of the Convention it is recommended that Judicial authorisation is obtained in cases where communications data is sought to determine the source of journalistic information.*

8. The requester is a local journalist.
9. The case makes reference to advice provided by the Association of Chief Police Officers ('ACPO') which has now been replaced by the National Police Chiefs' Council ('NPCC').

### **Scope of the case**

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10. The complainant wrote to the Commissioner on 12 April 2015 to complain about the way his request for information had been handled. He asked him to consider whether or not the request is vexatious.
11. The complainant also advised that he only wished the Commissioner to consider three parts of his request, namely:
  - *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*
12. The Commissioner put this to TVP but it did not change its position regarding the narrowed grounds of complaint. The Commissioner will consider the application of section 14(1) below.

### **Reasons for decision**

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#### **Section 14 – vexatious request**

13. Section 14(1) provides that a public authority is not obliged to comply with a request for information if the request is 'vexatious'.

14. The term 'vexatious' is not defined in the FOIA. However, the Commissioner has identified a number of 'indicators' that may be useful in identifying vexatious requests. These are set out in his published guidance on vexatious requests. In short they include:
- Abusive or aggressive language
  - Burden on the authority
  - Personal grudges
  - Unreasonable persistence
  - Unfounded accusations
  - Intransigence
  - Frequent or overlapping requests
  - Deliberate intention to cause annoyance
15. The fact that a request contains one or more of these indicators will not necessarily mean that it will be vexatious. All the circumstances of a case will need to be considered in reaching a judgement as to whether a request is vexatious.
16. The Commissioner's guidance suggests that, if a request is not patently vexatious, the key question the public authority must ask itself is whether the request is likely to cause a disproportionate or unjustified level of disruption, irritation or distress. In doing this the Commissioner considers that a public authority should weigh the impact of the request upon it and balance this against the purpose and value of the request.
17. Where relevant, public authorities also need to take into account wider factors such as the background and history of the request.
18. TVP has relied heavily on central advice issued when responding to the request. It advised the complainant that:
- "It is our view and recommended by the Association of Chief Police Officers (ACPO), to all forces, that this latest request and others on the subject matter, fully engage Section 14(1) of the Act and this should be applied".*
19. The chief reason for finding the request to be vexatious is TVP's determination that requests concerning the use of RIPA in connection with journalists represent a disproportionate burden to the police service as a whole. The arguments regarding this are summarised below.

### **Disproportionate burden**

20. In responding to the complainant TVP advised him as follows:

*"FOIA legislation is designed to provide opportunities whereby the public can shine a torch on the decision making and workings of a*

*public authority. However, this does not mean that information has to automatically be disclosed. To do so, without some thought process would be reckless and likely to breach other relevant legislation, such as the Data Protection Act (DPA), and in this case, potentially the Regulation of Investigatory Powers Act (RIPA) itself. In addition to this, disclosure of information relating to the police use of surveillance may also lead to damage to investigations, tactics, covert activity and operations. Therefore, any requests for relevant data have to be carefully thought through and the relevant exemptions and public interest factors considered.*

*This is not a simplistic task, if the data is requested under FOIA. RIPA is one of a series of toolkits available to investigators and it can be used to obtain communications data, carry out surveillance and deploy covert human intelligence sources (CHIS). Its functions require various levels of authority and its use is strictly monitored. It can only be used when there is a criminal investigation, and it must always be proportionate. Although there will always be some central records kept, as there are requirements to do so, in terms of applications the majority of the intimate detail tends to be contained within each individual investigation that it has been used for. There is no ability to simply press a button and for the data to appear when the request is focussed on a particular occupation or circumstance, in which RIPA has been used.*

*Therefore, FOI requests requiring any level of detail are often refused on cost, as the retrieval of the data would exceed the 18 hour limit. That has often been the case with these requests. But, whenever a request is received, we still have to engage with the information owners, in order to ascertain if the data can be retrieved, as we have a statutory obligation to do so. This immediately places additional workloads and distractions on policing departments whose primary function is to investigate the more complex and serious crimes that we have to deal with.*

*There is a wealth of open source data on the approach to disclosures of RIPA data under FOI and the initial responses to the early requests contained lengthy explanations of the issues, in a balanced and informative format.*

*It was also towards the end of 2014 that responses began including warnings re: continued applications for the same information. This has not prevented us from continuing to receive the requests, often duplicated word for word, or simply asking for the same information in a slightly different manner.*

*The initial requests came on the back of concerns in the world of media, post Leveson [sic], with regards to there being potential police misuse of RIPA. Whether these concerns affected the FOI decision making and what they meant in terms of disclosure, are covered later under the 'public interest and value of requests' section. However, it is relevant here as the issue caused parliament to become involved and that led to select committee recommendations:*

<http://www.publications.parliament.uk/pa/cm201415/cmselect/cmhaff/711/71103.htm>

*The recommendations were that all the data be provided to IOCCO, in order that matter could be properly reviewed. The work involved in that, although a separate burden on the relevant police business areas, nevertheless had a direct correlation to the affect [sic] on forces in terms of FOI processing as their resources became further restricted with the IOCCO work obviously taking priority”.*

21. TVP also refers more generally to the volume of requests that the police service has received from journalists concerning the use of RIPA.
22. The Commissioner accepts that considering the disclosure of detailed data from the content of RIPA applications may indeed be burdensome, and the cost limit under section 12 of the FOIA may be a relevant consideration if were it necessary to trawl through a large number of applications looking for specific details. He also accepts that detailed requests in relation to RIPA can be burdensome for the police service as a whole given the co-ordination that may be required in certain types of cases. However, he notes that the request does not require any such detail. It only seeks to ascertain whether TVP is one of the 19 forces referred to in the IOCCO Report and, if so, how many cases were involved and the type of newspaper/s that the authorisation/s specified. The majority of this information has already been gathered for the purposes of the IOCCO investigation the Commissioner does not accept that there could be any real burden in providing a response, if indeed any data is held.
23. This is further evidenced in the Report itself (see paragraph 6 above). Having considered its content, the Commissioner notes at paragraph 7.4 that:

*“... Operation Elveden accounted for 484 (80%) of the 608 applications which sought communications data. To provide context to the usage, removing this exceptional operation from the overall statistics would represent less than 1 application per police force*

*per year (when averaged out over the 3 years and all the UK police forces)".*

24. Operation Elveden is a Metropolitan Police-led enquiry. Therefore, the amount of data that could possibly be related to TVP would necessarily be very small and therefore not onerous to deal with.

### **Public interest and the value of requests**

25. In its refusal notice TVP advised the complainant that it considered the report had sufficiently satisfied the public interest and had determined that the: *"police have not been found substantially wanting in terms of the illegal use of the [RIPA] legislation"*. It added:

*"It is primarily this, coupled with unreasonable persistence on the subject that must lead us to now consider there to be little value in the continued application of FOI requests on the subject. The sensitivities on disclosure have not changed, whereas the need to inform the public has been catered for through other mediums. FOI was never designed to enable applicants to continue a campaign or determined pursuit of information when there are concerns over public authority activities, if these activities have been adjudged to be correct and appropriate"*.

26. TVP also submitted the following arguments:

*"The application of Section 14 is not subject to a public interest test. However, the examination of whether there is any real value in a request is pertinent and uniquely in this case, we feel that does relate to the public interest.*

*The use of RIPA is a contentious area; it is for that reason that the usage of the legislation is very carefully monitored and subject to independent scrutiny. Although a critical law enforcement tool, it is contrary to our expected levels of privacy and 'state' monitoring. It has to therefore be carefully managed.*

*It is not unreasonable to therefore expect focus on the subject, when there is a belief that the rules have in some way been breached. So serious are the issues, that it led to parliamentary intervention as outlined above. The importance of the public being made aware of the issues, so that proper informed debate could take place was always factored into early decision making, when responding to the subject of journalists and the police use of RIPA.*

*Journalists, as a collective group, can be caught up in RIPA activity for a myriad of reasons. This does not mean they themselves were necessarily under surveillance, but they could be victims of crime,*

*whose data is captured through police investigation, potential witnesses or innocent parties, who have been contacted by others under investigation, so captured within third party communications data, or they could be criminals themselves, who are being investigated and occupation is irrelevant. The same could be said of any other identifiable group such as teachers, taxi drivers and of course police officers.*

*There will always need to be in such circumstances a strong desire to protect police activity so that investigations are not disrupted, nor is anything placed in the public domain which renders police tactics less effective. The harm this would cause should not be underestimated. RIPA legislation also includes the deployment and usage of CHIS and we have solemn vows to protect them and their activities. The risk in some of these cases could result in extreme harm befalling individuals and the police level of trust severely eroded. This is not to say that such assets have ever been involved in investigations involving journalists, but any disclosure under FOI simply on the subject of RIPA has wide ranging repercussions. As serious as these issues are, they have to be balanced against the public right to know, and as clearly articulated non-disclosure was not a decision taken lightly, in the relevant cases.*

*Even though that was relevant in early decision making, the public interest has now changed. IOCCO have now published their report into the subject and the police have not been found substantially wanting in terms of the illegal use of the legislation. It states at 8.3 of the report; 'Police forces are not randomly trawling communications data relating to journalists in order to identify their sources'.*

*It is primarily this, coupled with unreasonable persistence on the subject that must lead us to now consider there to be little value in the continued application of FOI requests on the subject. The sensitivities on disclosure have not changed, whereas the need to inform the public has been catered for through other mediums. FOI was never designed to enable applicants to continue a campaign or determined pursuit of information when there are concerns over public authority activities, if these activities have been adjudged to be correct and appropriate".*

27. In general terms the Commissioner acknowledges that the media have pursued the issues related to police use of RIPA persistently but persistence is not necessarily an indicator of a vexatious request. The level of media interest and FOIA requests were at different stages, as more became known about the issues. The level of media interest in the issue is understandable given the interaction with fundamental issues of

freedom of expression, including Human Rights under Article 10 of the European Convention.

28. It is not necessary or appropriate for the Commissioner to comment in detail about key findings of the IOCCO report. The Commissioner recognises that the report goes some way in meeting the public interest. The report provided important context and reassurance about police use of RIPA but also made some important recommendations about safeguards. The Commissioner recognises that there was still a public interest in revealing information about the use of RIPA in relation to journalists, following the publication of the IOCCO report.

### **This request**

29. The generic content of the ACPO advice which has been relied on by TVP in respect of this request does not seem to be tailored to suit its content. The complainant seeks only to ascertain whether his local police force has ever used RIPA to obtain information about journalists; he already knows that 19 forces have done so. If the response is negative then the rest of his request falls away. If it is positive then TVP needs only to state on how many occasions it has done so and the type of newspaper involved. If this latter part of the request comes into play and requires scrutiny of many RIPA applications then this could potentially invoke section 12 of the FOIA. However, due to the small overall numbers concerned, the Commissioner considers this to be an unlikely outcome.
30. TVP has relied on advice which, the Commissioner understands, has been made available to the police service as a whole. No real consideration seems to have been made of this request in isolation. The Commissioner has seen no evidence, nor has it been suggested in the ACPO advice, that this complainant is part of any sort of organised campaign. Whilst the complainant may have been aware of other requests by media organisations the Commissioner considers that it would be inappropriate to consider the request in question as a burden in the context of a wider "media campaign".
31. The Commissioner considers that this request has not been considered on an individual basis. Rather it has been categorised as a particular type of request and refused in a blanket fashion without due regard to its specific content.

### **Previous related requests**

32. TVP has made reference to previous related requests made by this requester; there are three of these in total. One was made around the time that the IOCCO investigation was announced and was refused on

the grounds of cost. Another was made after the announcement of the investigation and was refused on the grounds of 22 (future publication), 30 (investigations & proceedings) and 31 (law enforcement). The third was made asking for any background information held to evidence how the first request was dealt with by TVP, which was largely provided. The Commissioner notes that these were not repeated requests. Each request was made after a significant change in the external context. Furthermore, although it provided the Commissioner with copies of these requests, TVP did not submit any arguments to suggest that the handling of these requests was onerous or that it had added to the burden of dealing with requests from this complainant. The Commissioner has therefore not taken these other requests into consideration.

## Conclusion

33. On the basis of the submissions made, and in consideration of the request, the Commissioner does not consider it to be vexatious. The request was not likely to cause a disproportionate or unjustified level of disruption, irritation or distress.

## Other matters

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34. The complainant raised an issue of his request not having been made under the terms of the FOIA, but rather being lodged as a media enquiry. As such he was concerned to find it had been deemed 'vexatious'. The Commissioner is unable to determine whether or not the request should have been dealt with outside the FOIA, but he notes that TVP recognised it as a written request for recorded information and therefore dealt with it under the FOIA. Whilst there may be some local agreement for dealing with press enquires the Commissioner is not aware of how this works in practice and he would not be able to make any findings regarding the handling of such matters as they would fall outside the remit of the FOIA.
35. The Commissioner would also like to use this case to remind public authorities of the importance of considering requests on the basis of their own analysis. From time to time central co-ordination bodies, such as ACPO, will provide advice on handling certain types of request. This advice can have value in enabling applicants to receive consistent responses, risks of inadvertent disclosures are avoided, and expertise on handling certain types of requests can be shared. However centrally provided advice is just that – advice – and public authorities should take responsibility for considering requests in their own circumstances. In this case the advice provided by ACPO was broad in its direction and

required further consideration by forces in the circumstances of the requests received. The Commissioner does not suggest that it was inappropriate for some form of central advice to be issued in relation to these requests but he does question the value of general advice given - that all requests on this subject matter are classed as vexatious.

36. The Commissioner is also sending a copy of this decision notice to the NPCC.

## Right of appeal

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37. 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](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

38. 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.
39. 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 .....**

**Steve Wood**  
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