

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 11 February 2016

Public Authority: Chief Constable of Durham Constabulary
Address: Police Headquarters
Aykley Heads
Durham
DH1 5TT

Decision (including any steps ordered)

1. The complainant has requested copies of information which Durham Constabulary (the 'Constabulary') submitted to the Interception of Communications Commissioner's Office ('IOCCO') to assist with an inquiry being undertaken. Having initially found the request to be vexatious under section 14(1) of the FOIA, the Constabulary revised its position and instead found the information to be exempt from disclosure under section 31(1)(a)(b) and (g) (law enforcement). The Commissioner is satisfied that it was entitled to rely on section 31(1)(a) & (b) and that the balance of the public interest favours maintaining these exemptions. No steps are required.

Background

2. The request concerns an inquiry undertaken by the IOCCO. The final published report can be found online¹.

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

3. Page 41 of that report outlines the information that police forces were required to submit in response to the inquiry. Forces were asked to respond using a form which contained two tables each of which contained a number of questions, along with the provision of supporting documentation if 'positive' information was held. Essentially this was as follows:

"Number of investigations which involve determining if a member of police force or other party have been in contact with a journalist or employee of a newspaper or television company related to news / documentaries in past 3 years.

For each investigation above provide:

- 1. A brief outline of the investigation specifying the role of the journalist / employee.*
- 2. Details of the crime / offences under investigation.*
- 3. Details of any communications data that was acquired on the journalist / employee or the person suspected to be in contact with them. Please list the communications data acquired (type of data, date parameters, person data related to, and, purpose of acquiring the data).*
- 4. Submit copies of any such communications data applications including the Designated Persons (DPs) considerations.*
- 5. Submit copies of any legal advice that was sought / provided in relation to journalistic privilege / protecting journalistic sources.*

Number of investigations in past 3 years where a PACE order has been applied for to require disclosure of journalistic material / the identity of a journalistic source.

For each investigation above provide:

- 1. A brief outline of the investigation specifying the role of the journalist / employee.*
- 2. Details of the crime / offences under investigation.*
- 3. Details of the material sought.*
- 4. Details as to whether the Judge granted / refused the order and the reasoning.*

It is appreciated that it might not be a straightforward task to identify such investigations / communications data applications. Liaison with your Head of Crime Investigations, Professional Standards Department / Anti Corruption Unit and Senior Investigating Officers (SIOs) combined with targeted searches across force systems / communications data workflow systems might assist".

4. Regarding its findings the Report states:

"Statistical Information

7.1 In the 3 year period covered by the inquiry 19 police forces reported undertaking 34 investigations which sought communications data in relation to suspected illicit relationships between public officials (sources) and journalists. The 34 investigations concerned relationships between 105 journalists and 242 sources.

7.2 608 applications under Chapter 2 of Part 1 of the Act were authorised to seek this communications data. This represents an extremely small percentage (0.1%) of the total applications that were authorised by the police in that 3 year period.

7.3 Commonly the investigations were internal Police Professional Standards enquiries concerned with the disclosure of information to journalists by police officers and police staff which was considered sensitive and therefore deemed to be a criminal act - typically misconduct in public office, a breach of data protection or an offence under the computer misuse act. Exceptionally they related to contempt of court and the offence of conspiracy to pervert the course of justice".

5. The Report further adds, at paragraph 7.8, 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".

6. The Commissioner has previously issued two decision notices finding that requests on this subject matter were not vexatious^{2,3}. He has also issued a further notice on the same subject matter⁴.

² https://ico.org.uk/media/action-weve-taken/decision-notices/2015/1432033/fs_50578306.pdf

³ https://ico.org.uk/media/action-weve-taken/decision-notices/2015/1432034/fs_50582792.pdf

⁴ https://ico.org.uk/media/action-weve-taken/decision-notices/2015/1560415/fs_50592915.pdf

7. The Commissioner has viewed the Constabulary's response to the IOCCO.

Request and response

8. On 11 February 2015, the complainant wrote to the Constabulary and requested information in the following terms:

"On 6th October 2014, the Rt Hon. Sir Paul Kennedy, Interception of Communications Commissioner, stated:

Today I have written to all Chief Constables and directed them under Section 58(1) of RIPA to provide me with full details of all investigations that have used Part 1 Chapter 2 RIPA powers to acquire communications data to identify journalistic sources.

Please provide the following:

- 1. A copy of all the information provided by your police force to the IOCCO in response to the Interception of Communications Commissioner's request".*

9. The Constabulary responded on 12 March 2015. It stated that it considered the request to be vexatious under section 14(1) of the FOIA.
10. Following an internal review the Constabulary wrote to the complainant on 21 April 2015 maintaining its position.

Scope of the case

11. The complainant originally contacted the Commissioner on 26 May 2015 to complain about the way her request for information had been handled. At this stage the Constabulary was relying on section 14(1) to refuse to comply with her request.
12. During the course of the Commissioner's investigation the Constabulary revised its position. On 21 August 2015, it advised that it no longer wished to rely on section 14(1) of the FOIA and instead cited section 31(1). The Commissioner will consider the application of section 31 below.

Reasons for decision

Section 31 – law enforcement

13. The Constabulary is relying on sections 31(1)(a)(b) and (g). These state 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,*
- (b) the apprehension or prosecution of offenders,*
- (g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2)...*

14. Section 31 is a prejudice based exemption and is subject to the public interest test. This means that not only does the information have to prejudice one of the purposes listed but, before the information can be withheld, the public interest in preventing that prejudice must outweigh the public interest in disclosure.

15. In order to be engaged, the following criteria must be met:

- the actual harm which the public authority alleges would, or would be likely to, occur if the withheld information was disclosed has to relate to the applicable interests within the relevant exemption;
- the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance; and
- it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – ie disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice.

16. The Commissioner will firstly consider the citing of 31(1)(a) and (b).

Section 31(1)(a) and (b)

17. The relevant applicable interests cited in this exemption are the prevention or detection of crime and the apprehension or prosecution of offenders.

18. In engaging this exemption the Constabulary stated:

"If detailed information law enforcement information [sic] was released into the public domain, substantial harm would be caused to the law enforcement function of Durham Constabulary by prejudicing on-going/future investigations and identifying individuals. In addition, those with criminal intent could use information to avoid detection or identify other individuals. Any such disclosure is therefore likely to affect policing capabilities and thereby cause an increased risk to members of the public and the local communities".

19. In further correspondence with the Commissioner it added:

"What is a matter of public record is that only 19 Forces had carried out investigations which fitted the criteria as outlined by IOCCO. This is a matter of public record, within their final report. Who these Forces were [sic], apart from the Metropolitan police, was and is sensitive information, as disclosure would map, by Force area where journalistic source investigations, as described by IOCCO, have been taking place. These investigations, bar some localised disclosures through media, are not in the public domain. This application, especially when linked with others made to all UK forces by various applicants would through disclosure identify those forces. The prejudice would occur by default if only those 19 maintained the Section 31 FOIA exemption".

20. The Commissioner accepts that the Constabulary has argued above that the harm envisaged relates to the applicable interests in this exemption.

21. When considering the second point, the Commissioner must be satisfied that the nature of the prejudice is 'real, actual or of substance' and not trivial or insignificant. He must also be satisfied that some causal relationship exists between the potential disclosure and the stated prejudice.

22. In the complainant's view the envisaged harm is not reasonable. She is of the view that:

"... given that the time-frame covered came to an end almost a year ago, I expect many of these investigations will now be closed. If investigations are ongoing at Durham, any compromising information could be redacted, as could all personal information relating to witnesses and victims".

23. Whilst the Commissioner understands this rationale, he 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. Furthermore, one of the main arguments at stake here is whether or not this force is one of the 19 forces to have undertaken one of the 34 RIPA investigations concerned. It is the Constabulary's view that disclosing its submission would in itself cause the harm by showing whether or not it is actually one of those forces.

24. In correspondence with the Commissioner the Constabulary advised:

"Disclosure of who we are, or are not investigating, by occupation and time period is harmful to all of our attempts to keep certain investigations from the public gaze".

...

"... the focus should be on protecting the Forces who are one of the 19 ... disclosure now would lead to extreme harm to ongoing investigations in the future.

Such investigations, especially sources are rare, many Forces may not have any. The ability to confirm these investigations could alert suspects or indeed reassure them that they remain undetected. It is matter of fact that Judges nearly always hear such cases in this area, ex-parte, without media".

25. The Constabulary has stated that the prejudice 'would' occur, which is the higher limb of likelihood considerations. The Commissioner accepts that disclosure of the withheld information would identify whether or not the Constabulary was one of the 19 forces which had made RIPA requests. It would also reveal how many investigations had been undertaken and reveal details of those investigations. In so doing he is also satisfied that this would in effect 'tip off' any parties who have acted as a journalistic source in that force area as to whether or not they may be under any sort of suspicion. This could mean that they 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 the Constabulary has demonstrated that a causal relationship exists between the potential disclosure and the applicable interests stated.

26. As the Commissioner accepts that the outcome of disclosure predicted by the public authority would occur he is therefore satisfied that the exemptions provided by sections 31(1)(a) and (b) are engaged.

The public interest test

27. Having concluded that sections 31(1)(a) and (b) are engaged, the Commissioner has gone on to consider the balance of the public interest.

Public interest arguments in favour of disclosure

28. The complainant has argued:

"The public need assurances that forces are using powers under RIPA legitimately and proportionately. Police use of RIPA to identify journalistic sources is a serious, controversial and high-profile issue, which has long attracted significant debate and criticism. The concerns reported in the media were routinely dismissed by police and public figures. However, the IOCCO's February 2015 report revealed that there was legitimate cause for concern. The Commissioner found that generally police did not give due consideration to questions of necessity, proportionality and freedom of speech when seeking communications data in this area, and that the safeguards then in place to protect sources were inadequate.

The fact that extensive FOI requests made thereafter on the subject (including this one) were automatically met with the vexatious exemption by all police forces - regardless of requester - further exacerbated concerns. It is understandable that the blanket stonewalling of journalists on the subject raised suspicions, which have yet to be resolved".

29. The Commissioner notes the complainant's concerns; however, he does not agree that the IOCCO Report is inadequate in addressing the matters she has raised. Indeed, the Report required procedures to change so any shortfalls in the processes being adopted by the police service as a whole have been considered. He also accepts the complainant's arguments regarding the citing of section 14 (vexatious) by police forces, although he is unable to take this argument into account now as this exception is no longer being relied on.

30. The complainant has further argued that:

"Anxieties heightened again in July this year when the IOCCO reported that two police forces had acquired communications data to identify the interactions between journalists and their sources without obtaining judicial approval. The Office did not name these forces. These incidents illustrate that, despite the IOCCO's inspections and recommendations, there is a continuing cause for serious concern. The overall public interest in accountability and transparency is far greater than the harm that could be caused to members of the public in disclosure".

31. The incidents referred to above postdate this request so have not been taken into account, although the Commissioner notes that the issue obviously did come to the forefront as the IOCCO has reported on the

matter. In any event, this therefore demonstrates that methods and actions are clearly being questioned and acted upon.

32. The complainant added:

“Durham Constabulary argues that the IOCCO is ‘best placed’ to inform the public about this controversial area and that the February 2015 report ‘concluded’ the debate. Yet as the ongoing controversies highlight, it is clear that the debate has not been concluded and the public need assurances that the IOCCO is doing an adequate and autonomous job. While the Office is an independent oversight body and regulator, the public should not be expected to accept their conclusions blindly.

I believe the refusal of the IOCCO to reveal any regional data on the subject, in the February 2015 report and beyond, leaves the public ill-informed. The February 2015 report provides only a national summary and there is likely to be widespread variation in how forces have used RIPA to identify journalistic sources. Communities have a right to know whether their local police force has been behaving appropriately. As the IOCCO report concluded, improper use of these powers is not pervasive and therefore disclosing regional variations will in many cases serve to create greater trust between communities and local forces”.

33. The Commissioner is not able to comment on the integrity of the IOCCO or its independence. If the complainant does not accept that it is able to function properly then this is a matter she will need to raise elsewhere (the Commissioner understands that the IOCCO Commissioner reports directly to the Prime Minister). Regarding the rights of local communities to know whether or not their forces are behaving appropriately, the Commissioner notes that the IOCCO identified that there were very few applications made for this type of data. Furthermore, in the press release which it issued to accompany the Report⁵ it stated:

“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.

⁵ <http://iocco-uk.info/docs/Press%20Release%20IOCCO%20Journalist%20Inquiry.pdf>

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”.

34. The Commissioner is satisfied that communities can therefore have confidence that their forces have acted appropriately and that when they have used RIPA they have done so in an effort to investigate ‘leaks’ – something which is also very much in the public interest as such leaks have the ability to compromise the prevention or detection of crime and the apprehension or prosecution of offenders.

Public arguments in favour of maintaining the exemption

35. The Commissioner considers that appropriate weight must be afforded here to the public interest inherent in the exemption; that is, the public interest in avoiding likely prejudice to the prevention or detection of crime and the apprehension or prosecution of offenders by the Constabulary. The Commissioner considers it clear that there is a very substantial public interest in avoiding that outcome and that this is a public interest factor in favour of maintenance of the exemption of considerable weight.
36. In its public interest arguments the Constabulary advised the complainant that:

“The law enforcement function of the Police Service may be undermined, compromised or disrupted by release of this information. While it may be assumed that members of the public will be aware that Durham Constabulary uses its legitimate powers under RIPA, the Force maintains a tactical advantage in so far that limited details of its use are in the public domain. In addition, there is a public need that these actions which are taken by the police remain effective and that they can operate in a confidential environment”.

And:

“The protection of either unknown and/or ongoing police investigations, which may be taking place now or in the future. 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”.

37. The complainant argued that these were not 'real and serious' arguments and that: *"It is also unlikely that disclosure would reveal police tactics because the powers given under RIPA to identify sources are well-known"*. Whilst the Commissioner generally agrees with the complainant and finds that these arguments are generic in nature rather than being specific to the requested information, he does accept there is some argument to be made regarding the protection of either unknown and/or ongoing police investigations. Premature disclosure about its investigations under RIPA (or not) would obviously be detrimental to the Constabulary. Unlike the complainant, the Commissioner accepts that some enquiries can continue for a considerable length of time and the time frame here remains realistic as evidenced above.

38. The Constabulary also argued that:

"The Police Service and Durham Constabulary have both Common Law and statutory responsibilities to enforce the law to prevent crime. There is also the essential need to instil public confidence, so that people can enjoy a general sense of safety and security and be safeguarded and protected from crime. Members of the public who require police assistance, in any circumstances, must be assured that the police response to any given situation is adequate and effective".

39. The Commissioner accepts these comments and the important duties carried out by the police service. However, he does not accept that these arguments relate directly to the withheld information in this case so he affords them little weight on this occasion.

40. Additionally, the Constabulary has argued:

"Clearly there is a public need that IOCCO's 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 be a mutual expectation of confidentiality. It is a matter of fact that Durham Constabulary has always fully cooperated with all IOCCO's requests for information and has always given full and unrestricted access to all inspection information and material required by IOCCO".

41. Again the Commissioner accepts the comments but does not consider they are relevant to the engaging of this exemption on this occasion. The information being requested is sourced from the Constabulary itself rather than the IOCCO so there is no question of 'mutual confidentiality' being overridden as IOCCO is not being asked to make the disclosure; the Commissioner can see no harm to the IOCCO were the Constabulary

to be required to comply with the request. Furthermore the Commissioner would expect the Constabulary to fully cooperate with the IOCCO in respect of its powers to oversee the proper use of RIPA.

42. The Constabulary further submitted:

"... in this case, IOCCO has subsequently published a report of their investigation, based on the information returned from Police Forces. This publication was done by them to satisfy the public interest. This did not include the individual submissions... An adverse decision notice here, would have to be on the basis that there is still a public interest in disclosing even more information than IOCCO did.

Would that then be the ICO judgement that they did not satisfy the public interest in what they did finally produce? We would maintain that the public interest, which we all know means there must be some benefit to the wider community, is not met by disclosure of our information here. In our view, the public are already in possession of everything IOCCO considered to be in their interest ... To take into account the different needs of just one small group, in this case just journalists, or even just the applicant, we would submit is not part of the public interest test, as established by the Information Tribunal".

43. The Commissioner accepts that the IOCCO Report gives a balanced and informative view of the issues which it was required to consider. He accepts that this is of interest to the public and that it addresses the concerns which were raised. He also recognises here that the IOCCO disclosed what it thought was necessary to answer the concerns which it was given and that it has done so in a way which it believes to be proportionate and without any risk to ongoing investigations. Had it thought it appropriate to name all the forces and give further details about the investigations concerned then it would have been able to do so. As it stands, it chose only to provide some details regarding the Metropolitan Police Service, which was the most likely of the 19 forces being both the largest force and the 'home force' to the largest national newspapers.

Balance of the public interest test

44. The Commissioner has weighed the public interest in avoiding prejudice to the prevention or detection of crime and the apprehension or prosecution of offenders against the public interest in the openness and transparency of the Constabulary; he has also taken into account the arguments advanced by the complainant. His conclusion is that the public interest in avoiding the prejudice is the more weighty factor and

so his finding here is that the public interest in the maintenance of the exemption outweighs the public interest in disclosure.

45. As he has found that this exemption is engaged and that the public interest favours maintaining it, the Commissioner has not gone on to consider the applicability of section 31(1)(g).

Right of appeal

46. 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

47. 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.
48. 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

Carolyn Howes
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