Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 26 November 2009

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

Summary

In May 2006, the complainant requested a copy of the previous year's report of the Office of Surveillance Commissioners relating to HM Prison Service (England and Wales). The public authority refused to provide this citing provisions of section 31 (Law enforcement exemption) and section 38 (Health and safety exemption) as its basis for doing so. After an internal review, it provided him with an extract from the report but upheld its position in relation to the remainder. It also cited section 40 (unfair disclosure of personal data) as a basis for withholding individuals' names which were found in the report. The Commissioner found that the majority of the withheld information was correctly withheld under section 31 of the Act. However, the Commissioner was not persuaded by the public authority's arguments as to application of section 40. The Commissioner requires the public authority to disclose certain personal data within the report which, in his view, is not exempt under section 40.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

The Request

2. On 12 May 2006, the complainant emailed the National Offender Management Service, an executive agency of the public authority and requested the following information:

"*I would like a copy of the report produced by the Office of Surveillance Commissioner* [sic] *on the handling of police and prison informants. I understand it was forwarded by the OSC to the Prison Service sometime last summer. The report was the subject of an article in the Sunday Mail on May 7* [2006] *(attached). I understand from the OSC that parts of the article were inaccurate but I spoke to a Home Office press officer yesterday who confirmed that the report existed (though he refused to provide its title)*".

3. On 18 May 2006, the public authority acknowledged the request and aimed to respond by 13 June 2006. It issued a refusal notice on 13 June 2006 citing sections 31(1)(a), 31(1)(f) and 38(1)(a) and (b) but advised that it would need further time to consider the balance of the public interest in relation to these exemptions. It gave an estimated response time of 11 July 2006. On 30 June 2006, it wrote again to advise that there would be a further delay in providing details of its arguments as to the balance of the public interest and it gave a new deadline of 7 August 2006. It finally provided its arguments as to the balance of the public interest in relation to sections 31(1)(a), 31(1)(f) and 38(1)(a) and (b) on 31 July 2006.

4. It should be noted, at this point, that the public authority failed to provide an accurate citation of the provisions in section 38 that it sought to rely on in any of its correspondence with the complainant or the Commissioner. It neglected to include subsection (1) in its citation. This minor oversight on the public authority's part is addressed later in this Notice. It is clear from all correspondence that the public authority intended to cite section 38(1)(a) and section 38(1)(b) and all further reference to these exemptions in this Notice will follow the correct citation.

5. The complainant requested an internal review on 30 June 2006.

6. On 12 December 2006 the public authority provided part of the report with some redactions made by virtue of section 40(2) but reiterated its position in relation to sections 31 and 38.

The Investigation

Scope of the case

7. On 15 December 2006 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The Commissioner acknowledged receipt of this complaint on 16 January 2007. The complainant specifically asked the Commissioner to consider the following points:

- the public authority's reliance on section 40(2) was incorrect;
- the public authority's reliance on section 31 and section 38 is flawed and unsupported by evidence as to likelihood.

Chronology

8. The Commissioner wrote to the public authority on 2 September 2008 to ask for a copy of the withheld information and for its arguments as to the application of exemptions. He asked that these arguments should be made with specific reference to the withheld information.

9. When no reply was received, the Commissioner telephoned the public authority on 1 October 2008. It transpired that the Commissioner had used an out-of-date room number when addressing the initial letter and that, in such cases, mail is not transferred internally to the named recipient at the public authority. The Commissioner re-sent the letter by email and set a revised deadline for response of 29 October 2008.

10. The public authority called the Commissioner on 29 October 2008 to advise that the requested response would be sent within the next couple of days.

11. On 3 November 2008, a response was sent in part by email and in part by recorded delivery.

Findings of fact

12. The Office of Surveillance Commissioners (OSC) is not, of itself, a public authority and is therefore not subject to this Act. According to its website:

"*The OSC's aim is to provide effective and efficient oversight of the conduct of covert surveillance and covert human intelligence sources by public authorities in accordance with:*

- *Part III of the 1997 Act* [this is the Police Act 1997]
- *Parts II and III of RIPA* [this is the Regulation of Investigatory Powers Act 2000]".

13. Covert surveillance activities are summarised and explained on the OSC's website[1] as follows:

"***Covert activities***

Part II of the RIPA and RIP(S)A put covert surveillance on a statutory basis enabling the public authorities identified in the legislation, to carry out such operations without breaching human rights.

[1] http://www.surveillancecommissioners.gov.uk/about_covert.html

They identify three categories of covert activity:

1 Intrusive surveillance
This is covert and carried out in relation to anything taking place on any residential premises or in any private vehicle. It involves a person on the premises or in the vehicle, or is carried out by a surveillance device. Except in cases of urgency, it requires a Commissioner's approval to be notified to the authorising officer before it can take effect. The power is available to the same law enforcement agencies as under the 1997 Act.

2 Directed surveillance
This is covert but not intrusive (and not an immediate response to events) but undertaken for a specific investigation or operation in a way likely to obtain private information about a person. It must be necessary and proportionate to what it seeks to achieve and may be used by the wide range of authorities identified in the legislation.

3 Covert Human Intelligence Sources (CHIS)
The use or conduct of someone who establishes or maintains a personal or other relationship with a person for the covert purpose of obtaining information. The authorising officer must be satisfied that the authorisation is necessary, that the conduct authorised is proportionate to what is sought to be achieved and that arrangements for the overall management and control of the individual are in force. CHIS may be used by the wide range of authorities identified in the legislation.

Authorisations for directed surveillance and CHIS do not have to be notified to Commissioners but must be available for review when Commissioners, Assistant Commissioners and Inspectors visit the various authorities."

Analysis

Exemptions

Section 31 – Law Enforcement

14. The public authority cited two provisions of section 31 as its basis for refusing to provide the withheld information, section 31(1)(a) and section 31(1)(f). The first applies where disclosure "*would, or would be likely to, prejudice the prevention or detection of crime*". The second applies where disclosure "*would, or would be likely to, prejudice the maintenance of security and good order in prisons or in the other institutions where persons are lawfully detained*".

15. The Commissioner has concluded that the most practical way to assess this case is to focus first on section 31(1)(a). Where he finds

that section 31(1)(a) is not applicable, he will consider the other exemptions cited by the public authority.

16. When considering the application of a prejudice-based exemption, such as those in section 31 which have been cited in this case, the Commissioner adopts the three step process laid out in the Information Tribunal case of *Hogan v the ICO and Oxford City Council* (EA/2005/0026, EA/2005/0030) (the "Hogan/Oxford CC case"):

'The application of the 'prejudice' test should be considered as involving a numbers of steps. First, there is a need to identify the applicable interest(s) within the relevant exemption……..Second, the nature of 'prejudice' being claimed must be considered ……..A third step for the decision-maker concerns the likelihood of occurrence of prejudice' (paragraphs 28 to 34).

17. This Notice will now set out the Commissioner's approach in relation to section 31(1)(a) in this case when following the three steps described above.

Step 1 – relevant applicable interests

18. In the case of the exemption under section 31(1)(a), the relevant applicable interest is the prevention or detection of crime.

Step 2 – nature of the prejudice

19. When considering the nature of the prejudice, the Commissioner has considered the Tribunal's further comments in the Hogan/Oxford CC case (paragraph 30):

'An evidential burden rests with the decision maker to be able to show that some causal relationship exists between the potential disclosure and the prejudice and that the prejudice is, as Lord Falconer of Thoronton has stated, "real, actual or of substance" (Hansard HL, Vol. 162, April 20, 2000, col. 827). If the public authority is unable to discharge this burden satisfactorily, reliance on 'prejudice' should be rejected. There is therefore effectively a de minimis threshold which must be met.'

20. Therefore, the Commissioner takes the view that, for the exemption to be engaged, the disclosure of the information must have a causal effect on the applicable interest, this effect must be detrimental or damaging in some way, and the detriment must be significant and not trivial.

21. If he concludes that there is a causal relationship between potential disclosure and the prejudice outlined in the exemption *and* he concludes that the prejudice that could arise is significant and not trivial, the Commissioner will then consider the question of likelihood. In

doing so, he will consider the information itself and the limited arguments put forward by the public authority in this regard.

Step 3 – standard of proof

22. It is not clear from the public authority's submissions whether it is arguing that prejudice would arise or whether it is arguing that it would be likely to arise. It set out both options in its refusal notice and in its internal review. In its letter of 3 November 2008, it commented that it was "*satisfied that release of this information would prejudice the prevention and detection of crime and the maintenance of good order and security in prisons"*. However, later in the same letter it was more equivocal and stated that disclosure "*could make the use of covert human intelligence sources far less effective*" or that it "*might jeopardize"* such operations.

23. Where the public authority has claimed that disclosure is only *likely* to give rise to the relevant prejudice then, in accordance with the Tribunal's decision in the case of *John Connor Press Associates Limited v The Information Commissioner* (EA/2005/0005), *'the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk'*. Where the public authority has claimed that disclosure *would* give rise to the relevant prejudice then the Tribunal has ruled, in the Hogan/Oxford CC case, that there is a much stronger evidential burden on the public authority, and the prejudice must be at least more probable than not.

24. Where the level of prejudice has not been specified by the public authority then the Commissioner will consider the lower threshold unless there is clear evidence that the higher level should apply. In *McIntyre v The Information Commissioner and the Ministry of Defence* (EA/2007/0068), which involved the application of the section 36 exemption, the Tribunal specified which standard of proof should apply when the level of prejudice was not designated by the public authority's qualified person:

'Parliament still intended that the reasonableness of the opinion should be assessed by the Commissioner but in the absence of designation as to level of prejudice that the lower threshold of prejudice applies, unless there is other clear evidence that it should be at the higher level.'

25. Having considered the lack of clarity on the public authority's part, the Commissioner has decided that he will consider whether the lower threshold "*would be likely to*" applies.

Evidence of likely prejudice

26. In the Hogan/Oxford CC case, the Tribunal stated that the "*evidential burden rests with the decision maker to be able to show that some causal relationship exists between the potential disclosure and the*

prejudice". However, in *England v ICO and London Borough of Bexley* (EA/2006/0060 & 0066) the Tribunal stated that it was impossible to provide:

"*evidence of the causal link between the disclosure of the list* [of empty properties] *and the prevention of crime*. *That is a speculative task, and as all parties have accepted there is no evidence of exactly what would happen on disclosure, it is necessary to extrapolate from the evidence available to come to the conclusion about what is likely*".

27. Taking into account the Hogan/Oxford case and other adjudications of the Tribunal, the Commissioner takes the view that although unsupported speculation or opinion will not be taken as evidence of the nature or likelihood of prejudice, neither can it be expected that public authorities must prove that something definitely will happen if the information in question is disclosed. Whilst there will always be some extrapolation from the evidence available, the Commissioner expects the public authority to be able to provide some evidence (not just unsupported opinion) to extrapolate from.

28. The Commissioner then assessed the weight of the public authority's arguments based on the three-step test outlined above.

The public authority's submissions

29. In its submissions of 3 November 2008, the public authority commented that "*the report contains details of how Covert Human Intelligence Sources are used in prisons*". It added that:

"*these sources are clearly a useful tool in preventing or detecting crime in prisons and in maintaining order and security*. *Release of this information could make Covert Human Intelligence Sources (CHIS) far less effective if others were able to exploit the tactics identified in the OSC report to circumvent the covert investigatory system in prisons"*.

30. In its internal review letter of 12 December 2006, it commented that "*this information would alert prisoners to security operations and would therefore frustrate intelligence gathering. It would not serve the public interest to disclosure details of a surveillance operation which may compromise a specific operation and result in disorder in the prison*".

31. In its submission of 3 November 2008 it identified one particular category of information which might give rise to the prejudicial outcomes described above. This was information which identified geographical locations. It explained that where covert surveillance activities could be linked to a geographic location, this "*might jeopardize the running of covert operations in those establishments*".

32. The public authority did not pinpoint any other information in the report which might have a similar effect. In the absence of further comment from the public authority, the Commissioner concludes that the public

authority is of the view that all the information in the report that has not already been disclosed is information which provides "*details of how Covert Human Intelligence Sources are used in prisons*".

33. The Commissioner accepts that covert surveillance is a useful tool in the prevention or detection of crime. As noted in "Findings of Fact" above, covert surveillance covers a range of activities. The nature of covert surveillance depends upon law enforcement officers or prison officers achieving and maintaining a tactical advantage over those who intend to carry out criminal activity. Any action, including disclosure of information, which puts at risk this tactical advantage, could, in the Commissioner's view, give rise to a variety of significant and non-trivial outcomes, adversely affecting the public authority's ability to prevent or detect crime.

34. Applying the model of the three-step process outlined above, the Commissioner focussed his attention on matters which relate to the interest applicable in the exemption, namely the prevention or detection of crime. He has concluded that there is a causal link, in theory, between the disclosure of information related to covert surveillance activities in prisons and the prevention or detection of crime..

35. Having identified the applicable interest and having accepted that disclosure of tactical and operation information about surveillance activities could, theoretically, give rise to a prejudicial effect on this interest, the Commissioner went on to consider whether disclosure of the withheld information would be likely to result in this outcome.

The withheld information

36. The Commissioner examined the information in question to identify "*details of how Covert Human Intelligence Sources are used in prisons*" (the public authority's letter of 3 November 2008 refers). He also examined the information to identify "*details of a surveillance operation which may compromise a specific operation and result in disorder in the prison*" (the public authority's letter of 12 December 2006 refers). He considered whether and to what extent the information provided details about how CHIS were used. He also considered whether disclosure of the locations which were identified in the report would adversely affect the public authority's ability to prevent or detect criminal activity at the named location or elsewhere.

37. Having reviewed the document, the Commissioner accepts that disclosure of most of the withheld information would be likely to give rise to prejudice to the prevention and detection of crime.

38. The report contains information such as

- detail about covert operations which provide information about the extent to which these are undertaken in HM Prison Service;

- information about current strengths and weaknesses of covert surveillance policies and procedures;
- tactical or operational detail; and
- case specific information.

39. In the Commissioner's view, this information is extremely sensitive and disclosure of it would be likely to undermine the tactical advantage and ability of law enforcement agencies to use covert surveillance operations.

Location information

40. The public authority made specific reference to the sensitivity of information about particular locations that is contained in the report. The Commissioner will now consider the public authority's arguments in this regard.

41. The public authority argued that it "*did not want to disclose any information that directly linked* [location detail] *to possibly undertaking covert surveillance as it might jeopardize the running of covert operations* [at the location]".

42. The Commissioner believes that any person who works at or is detained in a prison facility or similar institution would reasonably assume that covert surveillance could be undertaken at that facility. As such, he is not persuaded that passing reference to a location in the context of high-level and generic comments about the use of covert surveillance would, of itself, be likely to give rise to the prejudicial outcome described in section 31(1)(a).

43. When considering the strength of the public authority's arguments as to the sensitivity of location information, the Commissioner had regard to the level of detail provided about covert surveillance activities at any named location. In parts of the report, the references to the named location are supported by little substantive detail. On first reading, such references appear relatively innocuous. However, elsewhere in the same report, the references to the same locations are expanded upon and include more detail. In the Commissioner's view, this information draws attention to covert surveillance activities in particular locations in a manner which would be likely to give rise to prejudice to the prejudicial outcome described in section 31(1)(a) were the information to be disclosed. For example, the Commissioner recognises that where suspicion is raised within a particular prison community that one of their number is providing or has provided intelligence information to authorities, this is likely to undermine efforts within that location to prevent or detect crime. The Commissioner accepts that rumours of this nature (true or otherwise) are likely to gain particular currency within the confines of a prison community.

44. In the circumstances of this case and having regard to the specific detail in the report, the Commissioner has concluded that all the information in the report which makes reference to a location has been properly withheld under section 31(1)(a). If the report only contained passing references to locations in the context of high-level and generic comments about the use of covert surveillance he would have reached a different view as to the likelihood of prejudice. However, the Commissioner notes that the commentary about covert surveillance which makes reference to particular locations runs as a thread throughout the report. He considers that it would not be possible to disclose a passing reference to a named location in one part of the report without exposing a link to more detailed commentary in another part of the report which is location-specific.

Names of officials

45. As noted above, the public authority released part of the initial sections of the report. Some of the information it redacted from the initial sections of the report are names of officials of the public authority. The public authority sought to argue that this information was exempt under section 40(2) of the Act. The Commissioner will address the application of section 40(2) later in this Notice. However, he would note that at this stage, one of the named individuals is publicly linked with a particular location within the public authority's area of responsibility. The Commissioner finds that this name forms part of the thread of information which links to specific detail about covert surveillance activity at that particular location. He therefore finds that this name is attracts the exemption at section 31(1)(a).

46. In light of the above, the Commissioner accepts the exemption at section 31(1)(a) is engaged.

Balance of public interest

47. Section 31(1)(a) can only be maintained as a basis for withholding requested information where the public interest in doing so outweighs the public interest in disclosure.

Public interest arguments in favour of disclosing the requested information

48. In its letter to the Commissioner of 3 November 2008, the public authority put forward conflated section 31 arguments in favour of disclosing the requested report. It accepted that there was a public interest in ensuring that "*HMPS* [Her Majesty's Prison Service] *is accountable*" and in increasing "*public confidence that covert investigations conducted by HMPS are lawfully conducted and compliant with* [RIPA]". It accepted that disclosure would serve this interest.

49. In its correspondence with the complainant, the public authority identified the following additional arguments in favour of disclosing the requested information:

Section 31(1)(a)

- maintaining public confidence in law enforcement and the criminal justice system; and
- demonstrating how prison inspection recommendations are implemented by HMPS to improve service to the community.

50. In his complaint to the Commissioner, the complainant accepted that information about individual informants and the techniques used in relation to them would be sensitive.

51. However, he drew the Commissioner's attention to the article referred to in his original request. This article referred to the outcome of a recent inquest into the death of a prisoner, Paul Day, who had apparently been an informant and who had committed suicide. The Commissioner identified coverage of this subject on the BBC news website for 2 March 2005[2].

52. The article referred to in the complainant's request appears to link the outcome of this inquest with the report that the complainant has requested. The complainant seems to be suggesting that the review to which the report relates was undertaken as a consequence of the events described in the article and that this would add weight to the public interest in its disclosure. However, it is clear from the published version of the report which has already been disclosed to the complainant that it covers "*the fourth annual inspection of the Prison Service*" and was dated 8 July 2005. In other words, while it was the report forwarded to the public authority "*sometime last summer* [2005]" (see paragraph 2) it was not specifically commissioned as a result of Mr Day's tragic death. The Commissioner is not persuaded, therefore, that he can give particular weight to Mr Day's case when considering the particular information in the report. The Commissioner does however accept that Mr Day's case does give an indication of public concerns about the state of surveillance in Prisons at the time of the request. The Commissioner has therefore afforded this more general factor some weight.

53. The complainant also made the following general comments as to the public interest in disclosure:

"*There is a considerable public interest in ensuring that police and prison informants are handled properly. The public has few opportunities to judge whether actions carried out in its name to prevent and detect crime using informants are being carried out*

[2] http://news.bbc.co.uk/1/hi/england/4313035.stm

properly – but this report presents one such opportunity".

Public interest arguments in favour of maintaining the exemption

54. The public authority identified a number of public interest factors in favour of maintaining the exemption as follows:

- it would not serve the public interest to disclose tactical information which could be used to circumvent ongoing and future covert investigations;

- it would not serve the public interest to compromise a specific surveillance operation.

55. It also argued that the public interest in providing assurance to the public about the use of covert surveillance techniques is served by the Chief Surveillance Commissioner's annual report to the Prime Minister on general compliance issues which is also laid before Parliament.

Balance of the public interest arguments

56. The Commissioner has considered whether the public interest in maintaining section 31(1)(a) in relation to this set of information outweighs the public interest in disclosing it. In considering the balance of public interest, the Commissioner has focussed on the level of harm that would be likely to arise through disclosure.

57. The Commissioner believes there is a compelling public interest in ensuring that relevant public authorities retain a tactical advantage over those who are, or could become, the subject of covert surveillance in prisons. He also believes there is a compelling public interest in ensuring that specific operations are not compromised because this could give rise to disorder within prisons.

58. The Commissioner notes that there is a widely reported rise in prison population numbers year on year and recognises that, inevitably, finite public resources are available to support the maintenance of good order and security in prisons. The Commissioner believes that this adds weight to the argument in favour of maintaining the exemption in this case.

59. He acknowledges that there is a competing public interest in increasing the public's understanding of the operation of covert surveillance. There are widespread concerns about such activities being conducted in a lawful and proportionate manner. He notes that there are also widespread concerns about the management of individuals who become Covert Human Intelligence Resources. However, he believes that the public interest in disclosing this particular set of information is outweighed by the compelling public interest in maintaining the exemption at section 31(1)(a).

60. The Commissioner is satisfied, therefore that the information in the Confidential Appendix which is identified as being exempt under section 31(1)(a) has been properly withheld by the public authority. He is satisfied that the public interest in maintaining this exemption outweighs the public interest in disclosure. In reaching this decision he has given particular weight to the level of harm to covert surveillance activities in prisons that would be likely to result from disclosure. He has also given particular weight to the level of prejudice that would be likely to arise to prevention or detection of crime.

61. Having concluded that the public authority had correctly applied section 31(1)(a), the Commissioner did not go on to consider the application of sections 38(1)(a) and (b) which had been applied to the same information.

62. The public authority has applied section 40(2) to the names of its officials which had been redacted from the initial paragraphs of the report. These redactions are identified in a Confidential Annex to this Notice. The Commissioner has already found that one of the names is already exempt under section 31(1)(a). He has therefore not included this name in his analysis of section 40(2).

Section 40(2)

63. Section 40(2) provides an exemption for information which is the personal data of an individual other than the applicant, and where one of the conditions listed in section 40(3) or section 40(4) is satisfied. One of the conditions listed in section 40(3)(b) is where the disclosure of the information to any member of the public of manual data would contravene any of the principles of the Data Protection Act 1998 (DPA). Section 40 is set out in full in a Legal Annex to this Notice.

64. The first principle of the DPA requires that the processing of personal data is fair and lawful, *and*,

- at least one of the conditions in DPA schedule 2 is met, and
- in the case of sensitive personal data, at least one of the conditions in DPA schedule 3 is met.

65. When analysing the application of this exemption in this case the Commissioner followed the following process:

- is it personal data as defined in DPA?
- if so, would disclosure of the personal data be fair?
- if so, can one of the DPA Schedule 2 conditions for processing be met?

Is the information personal data as defined in DPA?

66. Section 1 of the DPA defines personal data as being "*data which relate to a living individual who can be identified from those data or those and other information in the possession of or which is likely to come into the possession of the data controller and includes expressions of opinions about the individual and indications of the intentions of any other person in respect of that individual".*

67. When considering whether the information is personal data, the Commissioner had regard to his own published guidance: "Determining what is personal data"[3].

68. In the Commissioner's view, each individual's name is, of itself, their personal data. The name relates to an identifiable living individual and, in this context, it tells the reader that this individual was actively involved in the matters covered in the report. The Commissioner recognises that this involvement was in a professional capacity. However, he is satisfied that, in this context, the record of each individual's involvement was biographically significant such that a record of their involvement constitutes their personal data.

69. The Commissioner is therefore satisfied that the names of the individuals concerned constitute each individual's personal data.

Would disclosure of the personal data be fair?

70. The individuals in question can be divided into two categories. The first category is that of Surveillance Inspector (an official of the Office of Surveillance Commissioners). The second category is that of other individuals involved in the inspection in a professional capacity. In its letter of 3 November 2008, the public authority withdrew its arguments for withholding the names of Surveillance Inspectors under the Act. The Commissioner will therefore order specifically that this information should be released in the 'Steps Required' section of this Notice. The remainder of the Commissioner's analysis as to the application of section 40 will focus on the names of other individuals involved in the inspection in a professional capacity.

71. The public authority argued that the disclosure of individuals' names found in the report would breach the first data protection principle of the Data Protection Act 1998 (DPA). It explained that it would be "*unfair and unlawful*" to do so.

72. It said that disclosure under the Act would be outside the individuals' reasonable expectations and described them as "*junior officials, i.e., anyone below the grade of senior civil servant*". It described the individuals in question as "*not public facing and* [they] *would not expect their names to be released in relation to their public role*".

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3 http://www.ico.gov.uk/upload/documents/library/data_protection/detailed_specialist_guides/personal_data_flowchart_v1_with_preface001.pdf

73. When considering whether disclosure would be fair, the Commissioner has had regard to his own published guidance[4].

74. This guidance suggests a number of issues that should be considered when assessing whether disclosure of information would be fair, namely:

- the individual's reasonable expectations of what would happen to their personal data;
- the seniority of any staff;
- whether the individuals specifically refused to consent to the disclosure of their personal data;
- whether disclosure would cause any unnecessary or unjustified distress and damage to the individuals;
- the legitimate interests in the public knowing the requested information weighed against the effects of disclosure on the individuals

75. Furthermore, the Commissioner's guidance suggests that when assessing fairness, it is also relevant to consider whether the information relates to the public or private lives of the third party. In the Commissioner's view information which is about the home or family life of an individual, his or her personal finances, or consists of personal references, is likely to deserve protection. By contrast, information which is about someone acting in an official or work capacity should normally be provided on request unless there is some risk to the individual concerned.

76. When considering whether disclosure would, in this case, be fair, the Commissioner has considered the expectations of the persons and the degree to which the release of the information would infringe on their privacy.

77. When assessing the expectations of the individuals concerned the Commissioner considers it appropriate to take into account the type of information that is already in the public domain about the parties. He has also considered the level of detriment to the privacy of the persons if the requested information were to be released.

78. The Commissioner identified a series of occasions when all but one of the individuals' names was available on another public authority's website as fulfilling the role which has already been disclosed by the public authority. The one individual whose name is not on this website is not a junior official and holds a public-facing role.

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4 http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/personal_information.pdf

79. The Commissioner acknowledges that the individuals in question have not been publicly linked with the review described in this report and that disclosure, in this case, would make that link. However, the Commissioner is satisfied that there would be no detriment to the privacy of the individuals concerned if their names were specifically connected to involvement in meetings with the Surveillance Commissioners during the course of their inspections. He is therefore satisfied that disclosure of these names under the Act would be fair.

80. The public authority advanced no arguments as to why disclosure of these names would be unlawful and the Commissioner has been unable to identify any arguments to that effect. The Commissioner is therefore satisfied that disclosure of these names under the Act would be lawful.

Can a Schedule 2 condition for processing be satisfied?

81. In order for disclosure to in accordance with the first data protection principle, one of the conditions in schedule 2 of the DPA must also be satisfied. While the Commissioner has concluded that disclosure would be fair and lawful, he must satisfy himself that a schedule 2 condition for processing can be satisfied. If none can be satisfied then disclosure would contravene the requirements of the first data protection principle and the information in question would be exempt from disclosure under section 40(2). In this case, the Commissioner considers that the most relevant condition is the sixth condition. This states that:

"*the processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject*".

82. In deciding whether the sixth condition would be met in this case the Commissioner has considered the decision of the Information Tribunal in *House of Commons v ICO & Leapman, Brooke, Thomas* (EA/2007/0060 etc). In that case the Tribunal established the following three-part test that must be satisfied before the sixth condition will be met:

- there must be legitimate interests in disclosing the information;
- the disclosure must be necessary for a legitimate interest of the public;
- even where disclosure is necessary it nevertheless must not cause unwarranted interference or prejudice to the rights, freedoms and legitimate interests of the data subject.

83. It further clarified, at paragraph 55, that "*The public interest in disclosure of official information is an interest which is relevant for the*

purposes of condition 6". The Commissioner will therefore go on to consider these tests.

84. He does not identify any specific harm in releasing the information in this case, and he considers that the release of the names would be fair. The Commissioner considers that – given the benefits of transparency and accountability - a legitimate interest arises from the disclosure on request of information by public bodies. More specifically, there is legitimate interest in the public knowing which senior officials the Surveillance Commissioners met when carrying out their investigation. The Commissioner further finds that disclosure is necessary for the public to be able to establish the accountability of senior staff involved. He also finds, in this case, that there would be no unwarranted interference or prejudice to the rights, freedoms and legitimate interests of the senior-level individuals concerned.

85. The Commissioner therefore finds that individuals' names redacted from the first five sections of the requested report are not exempt under section 40(2). As outlined above, he has found that one of the names is exempt under section 31(1)(a) and that the public interest in maintaining that exemption outweighs the public in disclosure.

Procedural Requirements

86. The public authority incorrectly relied on section 40(2) in relation to individuals names redacted from the first five sections of the report. In failing to provide that information within 20 working days of the complainant's request and in failing to rectify this on internal review, the public authority contravened the requirements of section 1(1)(b) and section 10(1) of the Act. These provisions of the Act are set out in a Legal Annex to this Notice.

The Decision

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87. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:

- it correctly applied section 31(1)(a) to the withheld information.

However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:

- The public authority incorrectly relied on section 40(2) in relation to individuals names redacted from the first five sections of the report. In failing to provide that information within 20 working days of the complainant's request and in failing to rectify this on

internal review, the public authority contravened the requirements of section 1(1)(b) and section 10(1) of the Act.

Steps Required

88. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act.

- Disclose the names of individuals who are listed in the Confidential Appendix to this Notice..

89. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

90. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Other matters

Public interest test extension

91. On 22 February 2007, the Commissioner issued guidance on the time limits for considering the public interest test. This recommended that public authorities should aim to respond fully to all requests in 20 working days. Although it suggested that it may be reasonable to take longer where the public interest considerations are exceptionally complex, the guidance stated that in no case should the total time exceed 40 working days. Whilst he recognises that the consideration of the public interest test in this case took place before the publication of his guidance on the matter, the Commissioner remains concerned that it took over 50 working days for the authority to communicate the outcome to the complainant.

Time for Internal Review

92. Part VI of the section 45 Code of Practice makes it desirable practice that a public authority should have a procedure in place for dealing with complaints about its handling of requests for information, and that the procedure should encourage a prompt determination of the complaint. As he has made clear in his *'Good Practice Guidance No 5'*, published

in February 2007, the Commissioner considers that these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by the Act, the Commissioner has decided that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may be reasonable to take longer but in no case should the time taken exceed 40 working days. Whilst he recognises that in this case, the delay occurred before the publication of his guidance on the matter, the Commissioner remains concerned that it took over 100 working days for an internal review to be completed.

Right of Appeal

93. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@tribunals.gsi.gov.uk.
Website: www.informationtribunal.gov.uk

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.

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

Dated the 26th day of November 2009

Signed ……

Steve Wood
Assistant Commissioner

Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

Legal Annex

S.1 General right of access

Section 1(1) provides that -

'Any person making a request for information to a public authority is entitled –

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him.'

…

S.10 Time for Compliance

Section 10(1) provides that –

'Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.'

…

S.31 Law enforcement

Section 31(1) provides 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,

…

S.38 Health and safety

Section 38(1) provides that –

'Information is exempt information if its disclosure under this Act would, or would be likely to-

(a) endanger the physical or mental health of any individual, or

(b) endanger the safety of any individual.'

…

S.40 Personal information

Section 40(1) provides that –

'Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.'

Section 40(2) provides that –

'Any information to which a request for information relates is also exempt information if-

(a) it constitutes personal data which do not fall within subsection (1), and
(b) either the first or the second condition below is satisfied.'

Section 40(3) provides that –

'The first condition is-

(a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of 'data' in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene-

(i) any of the data protection principles, or

(ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and

(b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.'

…

Section 70 - Exemptions applicable to certain manual data held by public authorities

Section 70(1) provides that –

> "*After section 33 of the [1998 c. 29.] Data Protection Act 1998 there is inserted—*
>
> '33A Manual data held by public authorities
> (1) Personal data falling within paragraph (e) of the definition of "data" in section 1(1) are exempt from—
>
> (a) the first, second, third, fifth, seventh and eighth data protection principles,
>
> (b) the sixth data protection principle except so far as it relates to the rights conferred on data subjects by sections 7 and 14,
>
> (c) sections 10 to 12,
>
> (d) section 13, except so far as it relates to damage caused by a contravention of section 7 or of the fourth data protection principle and to any distress which is also suffered by reason of that contravention,
>
> (e) Part III, and
>
> (f) section 55'."

….