

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

**Date: 26 November 2009**

**Public Authority:** UK Border Agency (a shadow agency of the Home Office)

**Address:** Central Freedom of Information Team  
5th Floor, Whitgift Centre Block C  
15 Wellesley Road  
Croydon  
Surrey CR9 3LY

### Summary

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In February 2007, the complainant requested a copy of a report by the Office of Surveillance Commissioners relating to the then UK Immigration Service (now UK Borders Agency). The public authority refused to provide this citing section 31(1)(e) as its basis for doing so. It upheld this position on internal review. The public authority provided further detail as to the application of section 31(1)(e) and also cited section 23(1) and section 40(2) in relation to certain parts of the report. Having considered these arguments the Commissioner had decided that the public authority correctly applied section 31(1)(e). He also agrees with the public authority's application of section 23(1). However, he does not agree with the public authority's application of section 40(2). The Commissioner requires the public authority to disclose the information which it has withheld under section 40(2). The Commissioner has also identified a number of procedural contraventions in the way the public authority handled this request.

### The Commissioner's Role

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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

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2. The Commissioner notes that under the Act the UK Border Agency is not a public authority itself, but is a shadow agency of the Home Office which is responsible for the UK Border Agency. The public authority in this case is therefore the Home Office and not the UK Border Agency. However, for the sake of clarity, this Decision Notice refers to the UK Border Agency as if it were the public authority.
3. The complainant made the following request for information on 24 February 2007 to the public authority:  
  
*"I understand that the Office of Surveillance Commissioners inspected the UK Immigration Service in 2005-6. I am writing to request:*
  1. *A copy of the report's executive summary and/or introduction;*
  3. *A copy of the report's conclusions;*
  4. *A copy of the report's recommendations;*
  5. *If possible, a copy of the full report.*
  6. *A copy of your official response to its findings and recommendations."*
4. The public authority responded on 27 March 2007. It refused to disclose the information requested on the basis of the exemption at section 31(1)(e).
5. The complainant requested an internal review on 29 March 2007 and the public authority advised him of the outcome of its internal review in a letter dated 10 July 2007. This review upheld its original position.

## The Investigation

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### Scope of the case

6. On 15 July 2007 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the following points:
  - the public authority had failed to apply section 31 correctly;
  - the public authority failed to comply with section 16 when it did not provide him with a telephone number for contact.
7. During the course of the Commissioner's investigation part of the report was disclosed to the complainant. This Notice will focus solely on the non-disclosure of that information which remains withheld from the complainant. At the end of this Notice, the Commissioner will set out any procedural shortcomings that he has identified in the way the

public authority handled this request and will address the complainant's assertion that the public authority failed to comply with its obligations under section 16 to provide advice and assistance.

## Chronology

8. On 25 July 2007 the Commissioner wrote to the Home Office to advise receipt of this application. It was not clear at this stage whether this matter would be dealt with by the Home Office or by one of its agencies which dealt with immigration matters.
9. On 2 September 2008 the Commissioner wrote to the public authority asking for a copy of the withheld information and for its full and complete arguments as to the application of section 31(1)(e) with specific and direct reference to the information. It set a deadline for response of 30 September 2008.
10. There followed a series of correspondence in which the public authority explained that it was reviewing its original position with regard to the request. Towards the end of November 2008, the public authority had completed its review and had made a further disclosure to the complainant.
11. The Commissioner wrote to the complainant on 24 November 2008 to ask whether the further disclosure now satisfied his request. The complainant explained that it did not and challenged the public authority's continued reliance on section 31. He also queried the non-disclosure of the sixth item described in his request.
12. There followed a series of further correspondence in which the Commissioner sought the public authority's full and final arguments as to the application of exemptions and for its comments regarding the sixth item described in the request. This correspondence culminated in the issuing of an Information Notice on 18 February 2009 which formally required the public authority to provide the aforementioned information within a specified time period.
13. The public authority responded in full within the time period in a letter dated 20 March 2009. This letter also sought to introduce section 23(1) and section 40(2) as a basis for withholding some of the report. The remainder of this Notice will now analyse the public authority's arguments as to the application of exemptions in relation to that information within the scope of the complainant's request which remains withheld from disclosure.

## Findings of fact

14. 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]”.*

15. Covert surveillance activities are summarised and explained on the OSC's website 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.*

*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.”<sup>1</sup>*

16. The requested information in this case is a report made by the OCS following its annual visit to the public authority during which it reviewed the public authority’s use of covert surveillance.
17. According to its website, the public authority’s role is to be “*responsible for securing the United Kingdom borders and controlling migration in the United Kingdom. We manage border control for the United Kingdom, enforcing immigration and customs regulations. We also consider applications for permission to enter or stay in the United Kingdom, citizenship and asylum.*”<sup>2</sup>
18. It should be noted that at the time of the request, the public authority was called the Immigration and Nationality Directorate. Shortly after the date of this complaint that Directorate was renamed ‘the Border and Immigration Agency’. However, in April 2008 the Border and Immigration Agency was brought together with other agencies to form the UK Border Agency, the public authority named in this Decision Notice. On its website it describes this event as follows: “*The [UK Border] Agency brings together the work previously carried out by the Border and Immigration Agency, customs detection work at the border from Her Majesty’s Revenue & Customs, and UK Visa Services from the Foreign & Commonwealth Office*”.

## Analysis

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### Exemptions

19. The public authority sought to apply three exemptions as a basis for withholding information within this report, namely section 31(1)(e), section 23(1) and section 40(2).

#### *Section 23 – Information provided by or related to certain listed security bodies*

20. In summary, this exemption applies where the information in question is supplied directly or indirectly by any of the security bodies listed at section 23(3) (the “listed bodies”) or where it relates to those bodies. Section 23 is set out in full in a Legal Annex to this Notice. It is a class-based absolute exemption. This means that where information falls within the class described in the exemption it is absolutely exempt

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<sup>1</sup> [http://www.surveillancecommissioners.gov.uk/about\\_covert.html](http://www.surveillancecommissioners.gov.uk/about_covert.html)

<sup>2</sup> <http://www.bia.homeoffice.gov.uk/>

from disclosure under the Act. This exemption is not qualified by a public interest test.

21. In its letter of 20 March 2009, the public authority introduced reliance on section 23(1) for the first time in relation to a portion of the withheld information. It argued that the information is related to one of the listed bodies.
22. The Commissioner is prepared to accept the late application of this exemption in the circumstances of this case. However, he would observe that the public authority's failure to indicate its reliance on section 23(1) in relation to part of the withheld information in its refusal notice and its failure to rectify this at internal review constitutes a contravention of its procedural obligations under the Act. More comment on this point is provided later in this Notice.
23. The Commissioner is satisfied that this information is self-evidently related to one of the listed bodies and that this information is therefore exempt from disclosure under section 23(1). The Commissioner also noted that another element of the withheld information is also exempt from disclosure under section 23(1) because it clearly relates to one of the listed bodies. The information that the public authority identified as being exempt under section 23(1) and the information that the Commissioner identified as being exempt under section 23(1) is listed in a Confidential Appendix to this Notice.
24. This Notice will now analyse the public authority's application of section 31(1)(e). It applied this exemption to the majority of the withheld information.

*Section 31(1)(e) – Prejudice to the operation of immigration controls*

25. The public authority cited section 31(1)(e) as the basis of withholding the remainder of the report. This exemption is engaged where disclosure "*would, or would be likely to, prejudice the operation of immigration controls*".
26. When considering the application of a prejudice-based exemption, 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).

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

*Step 1 – relevant applicable interests*

28. In the case of the exemption under section 31(1)(e), the relevant applicable interest is the operation of immigration controls.

*Step 2 – nature of the prejudice*

29. 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.”*

30. 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 more than insignificant or trivial.
31. 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 that could arise is not insignificant and is not trivial, the Commissioner will then consider the question of likelihood. In doing so, he will consider the information itself and the arguments put forward by the public authority in this regard.

*Step 3 – standard of proof*

32. In his letter of 19 January 2009, the Commissioner drew the public authority's attention to the distinction between “*would prejudice*” and “*would be likely to prejudice*” and asked it to specify which it sought to rely on.
33. 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.

34. In its letter of 20 March 2009, the public authority confirmed that it believed the prejudicial outcome described in the exemption “*would*” arise as a result of disclosure.

*Evidence of likely prejudice*

35. In the Hogan/Oxford CC case as noted above, the Tribunal referred to the evidential burden that rested 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”.*

36. 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.
37. The Commissioner has assessed the weight of the public authority’s arguments based on the three-step test outlined above.
38. In its submissions of 20 March 2009, the public authority identified certain information, the disclosure of which would give rise to a prejudicial outcome. This can broadly be described as operational information related to covert surveillance activities carried out for the purpose of maintaining immigration controls. This information provides varying degrees of detail as to specific operations and administrative processes. As noted above, it also includes personal data which sets out named individuals’ involvement in the investigation and is inextricably linked with other information in the report to which section 31(1)(e) has been applied.
39. The public authority set out three prejudicial outcomes that would arise as a result of disclosure:



- damage to its ability to gather and manage intelligence information effectively;
  - the revelation of methods and tactics employed by the public authority's officials;
  - allowing individuals to infiltrate, pervert and exploit the public authority's intelligence activity.
40. The Commissioner accepts that covert surveillance is a useful tool in the operation of immigration controls. As noted in Findings of Fact above, covert surveillance covers a range of activities. The nature of covert surveillance in this context depends upon law enforcement officers achieving and maintaining a tactical advantage over those who intend to undermine the operation of immigration controls. 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 operation of immigration controls.
41. Applying the model of the three-step process outlined above, the Commissioner has focussed his attention on matters which relate to the interest applicable in the exemption. He has concluded that there is a causal relationship, in theory, between the disclosure of detailed operational and administrative information which relate to the carrying out of covert surveillance activities by the public authority and the risk of undermining the effective operation of immigration controls.
42. Having identified the applicable interest and having accepted that disclosure of detailed operational and administrative 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 result in this outcome.
43. The Commissioner considered the withheld information and has also considered the submissions of the public authority. The Commissioner would agree that the disclosure of the withheld information would give rise to the prejudicial outcomes set out by the public authority. It provides significant operational detail about how the public authority conducts covert surveillance activities and includes, for example, detailed information about resources and strategies. This information self-evidently reveals methods and tactics employed by the public authority as well as significant operational detail. He believes that disclosure of this information would undermine the tactical advantage that the public authority legitimately maintains in its use of covert surveillance in order to maintain immigration controls. The information in question is itemised in a Confidential Appendix to this Notice.
44. The Commissioner has therefore concluded that the public authority has correctly engaged section 31(1)(e). The application of section 31(1)(e) is qualified by a public interest test by virtue of section 2(2) of

the Act. Having concluded that the majority of the information in the report attracts the exemption at section 31(1)(e) the Commissioner went on to consider whether the public interest in maintaining this exemption outweighed the public interest in disclosure of this information.

*Public interest arguments in favour of disclosing the requested information*

45. The public authority identified the following arguments in favour of disclosing the requested information.
- The public would be able to see how intelligence information is managed.
  - Disclosure would promote transparency and openness in the public authority's methodology.
  - Disclosure would reassure the public that the public authority has the capacity and capability to effectively counter and locate immigration offenders and that the public purse is being used effectively.
46. The complainant set out the following arguments in favour of disclosure:
- There is an overwhelming public interest in ensuring that Government Departments are acting within the law, particularly in such a sensitive area as this.
  - Information cannot be withheld simply because it is felt its release would embarrass public authorities or officials.
  - The information it contains is now largely historical and so is highly unlikely to give rise to significant prejudice.
47. The complainant also quoted from the Commissioner's published guidance on the application of section 31 which cited a request to the public authority in this case as an example:

*"The exemption covers the operation of immigration controls and there will be many disclosures of information which would prejudice the work of the IND and would help people evade immigration controls. In this case, the public interest test would involve weighing the interest of the state (and the public) in being able to prevent illegal immigration, illegal working and overstaying a permission to enter the country, against the public interest in making sure that the system is operated fairly and within budget, and that applications for asylum status are handled properly. Although it is easy to see that there will be many instances where the disclosure of operational or tactical information would help those trying to evade immigration controls, there will be other cases where disclosing the information will be necessary to demonstrate*

*fairness and to promote public confidence in the system”<sup>3</sup>.*

48. This guidance was published on 13 October 2006 before there had been a significant number of relevant Decision Notices and Information Tribunal judgments. The Commissioner’s guidance on section 31 has since been updated to include relevant Decision Notices and judgments of the Information Tribunal<sup>4</sup>. However, while the example given in the earlier guidance has been removed, the Commissioner believes the observations in that guidance remain valid.

*Public interest arguments in favour of maintaining the exemption*

49. The public authority identified the following as arguments for maintaining the exemption.
- The use of accurate and detailed intelligence is crucial to the maintaining of immigration control and any action that would lead to a loss or reduction in that intelligence material would not be in the public interest.
  - The public interest is best served by allowing the public authority to operate and allocate surveillance techniques and equipment in an environment that is not open to the general public, which would include those seeking to evade immigration control and detection.
  - The use of surveillance is closely regulated by RIPA and as such the public can be assured that any surveillance undertaken by the public authority is done so in line with agreed policy and procedures and as such the public’s interest is satisfied.
  - Disclosure of this information would provide individuals bent on committing illegal activity within the UK with the sort of information that would not only aid them in doing so but would also inhibit the public authority’s ability to detect and apprehend them. This is clearly not in the public’s interest.

*Balance of the public interest arguments*

50. The Commissioner acknowledges that both the public authority and the complainant have provided compelling arguments for disclosure. He gives particular weight to the complainant’s observation that there is a public interest in ensuring that Government Departments are acting within the law, particularly in such a sensitive area as immigration controls. He recognises that full disclosure of the OSC report requested here would serve that interest.

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[http://www.ico.gov.uk/upload/documents/library/freedom\\_of\\_information/detailed\\_specialist\\_guides/section\\_31\\_law\\_enforcement\\_13\\_oct\\_06\\_v2.pdf](http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/section_31_law_enforcement_13_oct_06_v2.pdf)

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[http://www.ico.gov.uk/upload/documents/library/freedom\\_of\\_information/detailed\\_specialist\\_guides/s31\\_exemption\\_for\\_law\\_enforcement\\_v3.pdf](http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/s31_exemption_for_law_enforcement_v3.pdf)

51. However, the Commissioner has weighed this against the public interest in ensuring that those who seek to evade immigration control and detection are not given greater opportunity to do so through disclosure of information under the Act. He believes that there is a more compelling public interest in protecting the tactical advantage that the public authority holds in the use of covert surveillance to ensure the effective operation of immigration controls. He accepts that the public authority is entitled to withhold that information which reveals operational and procedural detail.

*Section 31(1)(e) - Conclusion*

52. The Commissioner has concluded the information within the report is exempt under section 31(1)(e).
53. He has further concluded that the public interest in maintaining the exemption in relation to this information outweighs the public interest in disclosure. In reaching this conclusion he gave particular weight to the public interest in ensuring that the public authority maintains the tactical advantage it holds in the operation of covert surveillance for the effective operation of immigration control.

*Section 40(2) – Unfair disclosure of personal data*

54. The public authority holds the view that certain information that it has redacted from the report is, in fact, outside the scope of the request. This information is the name of OSC officials and its own officials. It argued that the request was very clear and “*did not specifically identify the names of those involved in the report as information that was required [by the complainant]*”. It has also argued that where it is wrong on this point, the information in question is exempt from disclosure under section 40(2).

*Are the names of officials within the scope of the request?*

55. The Commissioner acknowledges that the request was relatively clear but does not agree with the public authority that it is entitled to exclude officials’ names on the basis that such names were not specifically mentioned in the request. The fourth bullet point of the request specifies “*If possible, a copy of the full report*”. Given the format and structure of the report, the Commissioner fails to see how the names of officials could be considered as being outside the scope of the request.
56. Having concluded that the names of officials contained in the report are within the scope of the request, the Commissioner went on to consider whether these names were exempt from disclosure under section 40(2).
57. 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. Section 40 is set out in full in a Legal Annex to this Notice.

58. Section 40(3) states that section 40(2) applies where disclosure would contravene one of the data protection principles of the Data Protection Act 1998 (DPA). The Commissioner considers that section 40(3) is the more relevant of the two conditions referred to in section 40(2) in this case.
59. The data protection principle of the DPA which is most likely to apply in this case is the first principle. This principle 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.
60. 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 and lawful?
  - If so, can one of the DPA Schedule 2 conditions for processing be met?

*Is the information personal data as defined in DPA?*

61. 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”.*
62. When considering whether the information is personal data, the Commissioner had regard to his own published guidance: “Determining what is personal data”<sup>5</sup>.
63. 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

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[http://www.ico.gov.uk/upload/documents/library/data\\_protection/detailed\\_specialist\\_guides/personal\\_data\\_flowchart\\_v1\\_with\\_preface001.pdf](http://www.ico.gov.uk/upload/documents/library/data_protection/detailed_specialist_guides/personal_data_flowchart_v1_with_preface001.pdf)

individual's involvement was biographically significant such that a record of their involvement constitutes their personal data.

64. The Commissioner is therefore satisfied that the names of the individuals concerned constitute each individual's personal data. The Commissioner would also comment that the withheld information contains other information relating to named individuals which, in his view, constitutes personal data.

*Would disclosure of the individuals' personal data be fair?*

65. The individuals in question can be divided into two categories. The first category is that of OSC officials. The second category is that of officials of the public authority. These include the recipient of the report and other individuals named in the main body of the report.

66. In its letter to the Commissioner dated 20 March 2009, the public authority argued that the disclosure of individuals' names "*involved in any way with the report*" would breach the first data protection principle of the Data Protection Act 1998 (DPA) where such names were considered to be within the scope of the request. As indicated above, the public authority maintains the view that the names of individuals where they appear in the report are outside the scope of the complainant's request. However, for reasons which are also outlined above, the Commissioner disagrees with this view. It also made this argument to the complainant in its letter of 21 November 2008 where it made a further disclosure to him. It said:

*"Staff names (where they appear) have also been removed from the report as they are 'out of scope' i.e. they are not relevant to the content of the report. Even if they were considered to be in scope they would likely be subject to another exemption in the Freedom of Information Act i.e. section 40(2) as disclosure of that information would breach the Data Protection Act".*

67. However, its detailed arguments as to the application of section 40(2) in its letter of 20 March 2009 relate solely to OSC officials and one of its named officials who is identified as being the recipient of the report and whose contact details are provided. It did not make detailed arguments as to the application of section 40(2) in relation to any other personal data relating to its officials which is also contained in the withheld information. However, the public authority cited section 31(1)(e) in relation to the withheld information which contains this personal data.
68. The Commissioner will now consider whether any of the personal data contained in the withheld information are exempt under section 40(2). Where he finds that the personal data is not exempt under section 40(2), he will consider whether it is exempt under section 31(1)(e) where that exemption has been applied.

69. When considering whether disclosure would be fair, the Commissioner has had regard to his own published guidance<sup>6</sup>. This guidance identifies 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.

70. 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. The guidance suggests that:

*'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.'*

71. 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.

72. 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.

73. The public authority acknowledged that personal data which related to an individual's actions in a professional capacity does not "warrant the same degree of protection as that relating to a private individual carrying out a personal activity" but added that "in carrying out an official function the individual concerned should expect a degree of protection". However, it argued that "those involved in drafting the report would not have put their names to that report with the knowledge that this information would be made available to the wider public". The

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[http://www.ico.gov.uk/upload/documents/library/freedom\\_of\\_information/detailed\\_specialist\\_guides/awareness\\_guidance\\_1\\_-\\_personal\\_information.pdf](http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/awareness_guidance_1_-_personal_information.pdf)

Commissioner presumes the public authority is making an argument here for withholding the names of OSC officials.

74. The public authority also argued “*the receiving officer would not have been informed or notified of the possibility that their role in receiving this report would be made public*”. The Commissioner presumes that the public authority is making an argument here for withholding the name and contact details of one of its officials where they are identified as the recipient of the report. As noted above, it made no argument as to fairness in relation to the disclosure of any other personal data found in the report.

#### *Fairness - OSC officials*

75. The Commissioner notes that at the time of the request the OSC published the names of all Surveillance Commissioners, Assistant Surveillance Commissioners and Surveillance Inspectors in its Annual Report which was most recent at that time (namely its Annual Report for 2005-6). It also published the names of its officials within its Secretariat. This Annual Report identifies four full-time and two part-time Surveillance Inspectors by name. It also identifies three Assistant Surveillance Commissioners by name. At the time of drafting this Decision Notice, it continued to make this information available in its annual reports.<sup>7</sup>
76. While the Commissioner notes that the OSC's Annual Report does not link these officials with specific inspections, he fails to see how the disclosure of this link would be unfair in this case. He also finds it difficult to follow the public authority's arguments as to fairness in relation to these individuals as set out above. The public authority seems to suggest that the individuals might have carried out their duties as public officials in a different way had they known their names were to be disclosed in this way. The Commissioner is not certain as to how this point relates to their privacy.
77. Anyone accessing the published version of this requested report and the OSC's 2005-6 Annual Report could reasonably deduce that the Assistant Surveillance Commissioner whose name was withheld from disclosure here was one of three named individuals and the name of the Surveillance Inspector whose name was withheld from disclosure here was one of six named individuals.
78. The Commissioner also notes that requests for OSC reports have been made to other public authorities by this complainant and others. The Commissioner understands that many of those authorities have not withheld the names of Surveillance Inspectors or Assistant Surveillance Commissioners that may be included in the OSC reports.

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<sup>7</sup> [http://www.surveillancecommissioners.gov.uk/about\\_annual.html](http://www.surveillancecommissioners.gov.uk/about_annual.html)



79. The Commissioner also notes that the OSC continues to publish the names of its staff including some who appear to have relatively junior roles. It also publishes the names of staff who have left the OSC in the reporting period.
80. Had the Commissioner identified any other obvious detriment to the privacy of the individuals concerned arising from disclosure he would have taken this into consideration when assessing fairness in this case even if the public authority had not done so itself. He did not identify any other obvious detriment in this case. He therefore concluded that disclosure of the OSC officials' names would be fair.

*Fairness – public authority's officials*

81. As noted above, the public authority's arguments as to fairness in relation to the disclosure of the names of its officials focussed solely on the name of the individual who received this report and their contact details at the public authority. It argued that the individual would not have been notified that their role in receiving this report would be made public. While this may well be the case, the Commissioner would observe that the public authority had been subject to the requirements of the Act for over two years as at the date of the request. As such, any employee of the public authority, particularly one in a relatively senior role such as the individual in this case, would reasonably expect that personal data about them may fall within the scope of a request under the Act. The fairness or otherwise of a disclosure under the Act of their personal data will depend on the circumstances of each case and the nature of the personal data requested. While the individual in question may well not have received notification that their personal data fell within the scope of this particular request, that does not, in the Commissioner's view, mean that they were unaware that their personal data might fall within the scope of a request under the Act at some point.
82. In the Commissioner's view, disclosure would inform the reader that this individual, operating at a senior level within the public authority, received this report in the course of their duties. The Commissioner fails to see how such a disclosure would give rise to any detriment to this individual's privacy. As such the Commissioner finds that disclosure of this individual's name and contact details would be fair.
83. As noted above, the public authority did not make any further arguments as to why the disclosure of other personal data relating to its officials would be unfair. The Commissioner has considered the personal data in question. It sets out named individuals' involvement in matters covered by the report relating to the use of covert surveillance at a senior, more general level rather than specific cases. The Commissioner does not consider that the disclosure of their involvement would be unfair. The individuals are senior members of staff and the Commissioner believes that no detriment to their privacy would arise as a result of disclosing their involvement in general terms.

However, he believes that the matters covered in the section of the report which contains this personal data are sensitive for reasons other than personal privacy. This point will be addressed later in this Notice.

84. The first component of the first data protection principle also requires processing to be lawful. Having concluded that disclosure of all the personal data contained in the report would be fair, the Commissioner went on to consider whether disclosure would be lawful. Disclosure under the Act is unlawful where, for example, a statutory prohibition applies such as the statutory prohibition on making public the name of a person who has alleged that a sexual offence has been committed against them. The Commissioner has not identified any statutory prohibition that would apply in this case nor has any been drawn to his attention. The Commissioner has therefore concluded that disclosure of all the personal data in the report would be both fair and lawful in this case.

*Can a Schedule 2 condition for processing be satisfied?*

85. In order for disclosure to be 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”.*

86. 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.

87. 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.
88. He does not identify any specific harm in releasing the information in this case, and he considers that the release of the personal data in question 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 were involved in the OSC investigation. The Commissioner 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.
89. The Commissioner is therefore not persuaded by the public authority’s arguments that the personal data contained in this report is exempt under section 40(2).

### **Procedural Requirements**

90. In failing to provide the information which is listed in the Confidential Appendix to this Notice as not being exempt under section 31(1)(e) within 20 working days of the complainant’s request, the Commissioner finds that the public authority contravened the requirements of section 1(1)(b) and section 10(1) of the Act. These provisions are set out in a Legal Annex to this Notice.
91. The complainant raised concerns about the public authority’s apparent refusal to provide him with a telephone number for contact purposes. He argued that this contravened the public authority’s duty to provide advice and assistance under section 16 of the Act.
92. Section 16(1) of the Act places a duty on public authorities to provide advice and assistance “*so far as it would be reasonable to expect the authority to do so, to persons who propose to make, or have made, requests for information to it*”. Section 16(2) states that a public authority will have complied with that duty where it has conformed with the code of practice described in section 45 of the Act.
93. Part II of the Code of Practice issued by the Secretary of State under section 45<sup>8</sup> sets out the requirements for public authorities in the provision of advice and assistance to applicants.
94. In relation to helping those submitting requests, paragraph 5 of the code recommends that public authorities should publish details of their

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<sup>8</sup> <http://www.dca.gov.uk/foi/reference/impref/codepafunc.htm>

request handling procedures and that these should include postal, email and telephone contact points. The Commissioner notes that the public authority's current website only provides email and fax contact details<sup>9</sup>.

95. In the Commissioner's view, the emphasis in the section 45 Code is upon establishing a dialogue with a requester rather than being prescriptive about the medium through which this is conducted. Telephone contact is preferable but not obligatory. Email contact can, for example, ensure an auditable trail of advice and assistance and may be more suitable in some circumstances. In this particular case, the public authority received the request by email and could therefore reasonably assume that the complainant had ready access to this method of communication. The Commissioner does not consider that the public authority breaches its obligations to provide advice and assistance where it only provides email or fax contact details. That said, the public authority should take the circumstances of the requester into account when considering its obligations to provide advice and assistance and where the requester does not have ready access to email, it should consider offering telephone contact details in the alternative.

#### *Failure to cite exemption in refusal notice*

96. The public authority failed to apply section 23(1) to some of the information until the Commissioner had started his investigation. This constitutes a breach of section 17(1)(b) and (c). These provisions of section 17 are set out in a Legal Annex to this Notice.

## **The Decision**

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97. 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 was correct to rely on section 31(1)(e) and section 23(1) to withhold certain information.

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

- It incorrectly relied upon section 40(2) in relation to other information which is listed in a Confidential Appendix to this Notice. In failing to provide this information within twenty working days of the date of the complainant's request, it contravened the requirements of sections 1(1)(b) and 10(1) of the Act.

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<sup>9</sup> <http://www.ukba.homeoffice.gov.uk/navigation/foi>

- The public authority failed to cite section 23(1) as a basis for refusal until the Commissioner had started his investigation. In failing to cite this exemption in its refusal notice it contravened section 17(1)(b) and (c).

## Steps Required

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98. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act.
  - Disclose to the complainant that information which is identified in the Confidential Appendix to this Notice as *not* being exempt under Section 40(2).
99. The public authority must take the steps required by this notice within 35 calendar days of the date of this Notice.

## Failure to comply

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100. Failure to comply with the steps described above 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.

## Other matters

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101. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern.

### *Section 45 code of practice – internal reviews*

102. 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. The Commissioner is concerned that in this

case, it took over 60 working days for an internal review to be completed, despite the publication of his guidance on the matter.

*Engagement with the Commissioner's investigation*

103. During the course of his investigation, the Commissioner has encountered considerable delay on account of the public authority's reluctance to meet the timescales for response set out in his letters. Furthermore, the Commissioner has been met with resistance in his attempts to understand the public authority's reasons for handling the request as it did and for invoking particular exemptions. The delays were such that the Commissioner issued an Information Notice in order to obtain details relevant to his investigation.
104. Accordingly the Commissioner does not consider the authority's approach to this case to be particularly co-operative, or within the spirit of the Act. As such he will be monitoring the authority's future engagement with the ICO and would expect to see improvements in this regard.

## Right of Appeal

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105. 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](mailto:informationtribunal@tribunals.gsi.gov.uk).  
Website: [www.informationtribunal.gov.uk](http://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 26<sup>th</sup> 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.2 Effect of Exemptions**

**Section 2(2)** provides that –

*'In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that –*

*(a) the information is exempt information by virtue of a provision conferring absolute exemption, or*

*(b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information'*

...

### **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.16 Duty to provide Advice and Assistance**

**Section 16(1)** provides that -

*'It shall be the duty of a public authority to provide advice and assistance, so far as it would be reasonable to expect the authority to*



*do so, to persons who propose to make, or have made, requests for information to it'.*

**Section 16(2)** provides that -

*'Any public authority which, in relation to the provision of advice or assistance in any case, conforms with the code of practice under section 45 is to be taken to comply with the duty imposed by subsection (1) in relation to that case.'*

### **S.17 Refusal of Request**

**Section 17(1)** provides that -

*'A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which -*

- (a) states that fact,*
- (b) specifies the exemption in question, and*
- (c) states (if that would not otherwise be apparent) why the exemption applies.'*

...

### **S.23 Information supplied by, or relating to, bodies dealing with security matters**

**Section 23(1)** provides that –

*'Information held by a public authority is exempt information if it was directly or indirectly supplied to the public authority by, or relates to, any of the bodies specified in subsection (3).'*

**Section 23(2)** provides that –

*'A certificate signed by a Minister of the Crown certifying that the information to which it applies was directly or indirectly supplied by, or relates to, any of the bodies specified in subsection (3) shall, subject to section 60, be conclusive evidence of that fact.'*

**Section 23(3)** provides that –

*'The bodies referred to in subsections (1) and (2) are-*

- (a) the Security Service,*

- (b) *the Secret Intelligence Service,*
- (c) *the Government Communications Headquarters,*
- (d) *the special forces,*
- (e) *the Tribunal established under section 65 of the Regulation of Investigatory Powers Act 2000,*
- (f) *the Tribunal established under section 7 of the Interception of Communications Act 1985,*
- (g) *the Tribunal established under section 5 of the Security Service Act 1989,*
- (h) *the Tribunal established under section 9 of the Intelligence Services Act 1994,*
- (i) *the Security Vetting Appeals Panel,*
- (j) *the Security Commission,*
- (k) *the National Criminal Intelligence Service, and*
- (l) *the Service Authority for the National Criminal Intelligence Service.'*

...

### **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-*

...

- (e) *the operation of the immigration controls,*

...

### **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 40(4)** provides that –

*'The second condition is that by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(c) of that Act (data subject's right of access to personal data).'*

....