



Does RIPA (Regulation of Investigatory Powers Act 2000) apply to disciplinary investigations by public bodies?

'Core Functions' and 'Ordinary Functions'

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Introduction

One instinctively thinks as 'surveillance' as being an activity confined to the Police and other investigative agencies. However, the term 'surveillance' is defined by The Regulation of Investigatory Powers Act 2000 (RIPA) in such a way that many non investigatory bodies may be conducting 'surveillance' whether they know it or not.

One of the functions of any employer is to make sure that employees act properly. From time to time this may well involve investigating employees who are suspected of committing disciplinary, but not criminal, offences. Employers who seek to check on malingering employees for disciplinary related matters may be surprised to find out that arguably, they have been conducting 'directed surveillance.' An employee who is kept under such surveillance could argue that that the surveillance infringed his Article 8 Right to Privacy. The European Convention on Human Rights governs the actions of all public bodies, whether the body is acting in a private capacity as an employer or in a public capacity. RIPA regulates all public bodies. Do the provisions of RIPA apply to public authority employers investigating disciplinary transgressions? Should Public Authority employers consider the provisions RIPA before checking on a malingering employee?

In July last year the Investigatory Powers Tribunal had to consider these and other related issues in the case of *C v Police and Secretary Of State* IPT/03/32/H 14th November 2006. The issues were considered to be of such public importance that the Tribunal took the unprecedented step of sitting in public, The Secretary of State intervened in the proceedings and the ruling has been reported into the public domain. The issues that the Tribunal was asked rule upon had the potential to impact on all public bodies. This article considers the issues raised in the case and examines how far the ruling has gone to providing a remedy.

C was a police officer who had retired on ill health grounds. He was in dispute with his

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Constabulary about the level of his disability. This in turn affected the amount of his ill health pension. In furtherance of the dispute the Constabulary engaged private investigators to film C's movements. C was filmed walking along a public street and mowing his lawn, an activity visible from the public street. The Constabulary considered RIPA had no application and did not apply for a directed surveillance authority. C complained about the lack of the authority and the fact that his Article 8 Right had been infringed.

At the hearing, the ultimate question for the Tribunal was whether the provisions of Part II of RIPA regulating surveillance applied at all. If they did not, the IPT had no jurisdiction. However, in considering the ultimate question the Tribunal had to grapple with a number of related questions. They included:

- Do provisions of Part II of RIPA apply to disciplinary investigations?
- In particular, is it necessary for public bodies to get an authority for directed surveillance for covert observations if the investigation is into disciplinary transgressions rather than criminal offences?
- If it is necessary, what grounds are to be used to justify the application? Does that depend on the public authority in question ?
- Should the answer be different depending upon which public authority is the investigating body ?
- What if the authorising criteria are satisfied by one public authority but not others?
- What if the criteria are not met ? Can covert surveillance still be carried out ?

It is axiomatic that RIPA applies to the actions of all public authorities. Any argument suggesting that a public authority acting in a private capacity as an employer and thus outside the scope of the Convention and RIPA is unlikely to succeed. A public authority is considered public for all purposes *Halford v UK* (1997) 24 EHRR 523. Observing an individual who is unaware he is being watched would constitute surveillance which is covert for the purpose of the RIPA¹.

Against this undisputed background of trite law, C argued that the surveillance constituted 'directed surveillance' under section 26 of the Act. To follow the arguments it is necessary to look at the wording of that section.

Section 26 states that:

Conduct to which Part II applies.

26.(1) This Part applies to the following conduct-

¹ See sections 26 (9) and 48 (2) of RIPA 2000

- (a) directed surveillance;
 - (b) intrusive surveillance; and
 - (c) the conduct and use of covert human intelligence sources.
- (2) Subject to subsection (6), surveillance is directed for the purposes of this Part if it is covert but not intrusive and is undertaken –
- (a) for the purposes of a specific investigation or a specific operation;
 - (b) in such a manner as is likely to result in the obtaining of private information about a person (whether or not one specifically identified for the purposes of the investigation or operation); and
 - (c) otherwise than by way of an immediate response to events or circumstances the nature of which is such that it would not be reasonably practicable for an authorisation under this Part to be sought for the carrying out of the surveillance.

C's argument was based on a plain reading of the Act. He argued that the Constabulary was a public body, it kept him under surveillance, the surveillance was for the purpose of a 'specific investigation,' it was planned and it was conducted in a manner likely to result in the obtaining of private information. It was therefore, 'directed surveillance.' The 'specific investigation' was into the state of his health and 'health,' following the House of Lords decision in *Campbell v MGN Limited* [2004] 2 AC 457, is one of the areas that the court considers is 'inherently private.' The actions of the Constabulary therefore fell within the definition of 'directed surveillance' and the lack of any authority resulted in an infringement of his Article 8 right to privacy.

Whatever the merits of any arguments based on 'private information' the case ultimately turned on the construction of section 26 (2)(a). Was the surveillance in question for the purpose of a 'specific investigation' or 'specific operation'? The respondent argued that it was not and that RIPA could not and should not be interpreted so as to include this employee related surveillance. To do so would lead to absurd and unworkable results.

The Constabulary and the Secretary of State sought to argue that S 26(2)(a) should be interpreted so as to exclude surveillance conducted by a public authority acting in a capacity as an employer rather as in its public capacity pursuing a public function. It is only whilst pursuing the public or 'core functions' that surveillance should be described as being in pursuit of a 'specific operation' The Claimant responded by arguing that there was nothing in S 26 that allowed for the distinction between ordinary and public or core functions. Such an interpretation did violence to the clear wording of the section.

The two arguments focused on different aspects. The arguments advanced on C's behalf focused on a plain reading of the provisions of the Act. The respondent's arguments focused on the consequences of such an approach. The arguments advanced on the claimant's behalf had the attraction of simplicity. On a plain reading of the wording of the Act those arguments were compelling. However, the problem lay not with the argument, but with the consequences of it. RIPA is drafted in such a way that the dispute was impossible to resolve without doing real violence to

the wording of the Act. The tribunal was faced with task of selecting an argument that did least violence and provided the most workable solution to a problem that ultimately stems from the drafting of the Act itself.

The consequences of the literal approach led to practical difficulties and to difficulties of construction. On a practical level, bringing employer-employee disputes of this nature into the realms of RIPA would have meant that where an individual complains that there has been improper surveillance, the only Court or Tribunal with jurisdiction over the complaint would be the Investigatory Powers Tribunal². The IPT is not set up to deal with such disputes. There is no disclosure and the proceedings are normally conducted in private.

Another practical difficulty with the black-letter approach is the scale of bureaucratic consequences that would follow. If the literal interpretation were accepted, then public authorities checking on the state of an employee's health, in a covert manner, however informally, would fall within the remit of RIPA. Is it to be suggested that every time a line manager wanted to investigate whether an employee was malingering, however informally, he should apply for directed surveillance authority?

Imagine an employee who is suspected of having a drink problem. If he popped out to the changing room every day after lunch and returned smelling of drink, is the line manager to apply for a directed surveillance authority before following him to the changing room? The drinking employee would argue his health is a very personal area. The act of following him after lunch was not in immediate response to events. On the literal approach contended by C, RIPA would apply and the activities of the line manager would fall within the definition of covert surveillance. If RIPA did apply, on what ground would the application for the authority be sought? It is this last point which caused particular difficulties of construction.

The grounds upon which a public authority can grant a directed surveillance authority appear in section 28 of the Act.

Authorisation of directed surveillance

28. (1) Subject to the following provisions of this Part, the persons designated for the purposes of this section shall each have power to grant authorisations for the carrying out of directed surveillance.
- (2) A person shall not grant an authorisation for the carrying out of directed surveillance unless he believes-
- (a) that the authorisation is necessary on grounds falling within subsection (3); and
 - (b) that the authorised surveillance is proportionate to what is sought to be achieved by carrying it out.
- (3) An authorisation is necessary on grounds falling within this subsection if it is necessary-

² Section 65, RIPA

- (a) in the interests of national security;
- (b) for the purpose of preventing or detecting crime or of preventing disorder;
- (c) in the interests of the economic well-being of the United Kingdom;
- (d) in the interests of public safety;
- (e) for the purpose of protecting public health;
- (f) for the purpose of assessing or collecting any tax, duty, levy or other imposition, contribution or charge payable to a government department; or
- (g) for any purpose (not falling within paragraphs (a) to (f)) which is specified for the purposes of this subsection by an order made by the Secretary of State.

However, not all public authorities are permitted to grant authorisations on each of the grounds appearing in section 28. In order to find out which authority may rely on which ground(s), it is necessary to read section 28 in conjunction with the Regulation of Investigatory Powers (Directed Surveillance and Covert Human Intelligence Sources) Order 2003.

A reading of the Order reveals that SOCA for example, can only authorise directed surveillance if it is necessary to prevent or detect crime, the same for the SFO and parts of the MOD. The Chief executive of the Driving Standards Agency can only authorise directed surveillance in the interests of public safety. The police by contrast can authorise under most of the grounds appearing in section 28. As employers the issues facing each of these agencies in terms of the regulation of staff are the same. Parliament could not have intended that some public authorities be able to authorise surveillance of the malingering employee but not others.

The Ruling: 'Core functions' and 'Ordinary functions'

The Tribunal ruled that the actions of the Constabulary in filming C were not 'directed surveillance.' The reasoning is of crucial significance in the context of disciplinary investigations into the conduct of employees. Surveillance by a public authority is likely to fall within the ambit of part II of RIPA if the authority is acting pursuant to one of its 'core functions,' but not if it is operating in pursuit of its 'ordinary functions'. The regulation of employees is a factor common to all public authorities and was considered to be an 'ordinary function.' It is only when engaged in directed surveillance as part an authority's core function that RIPA would apply.

The Tribunal was of the view that a public authority's core functions could be determined by its responsibilities. Public authorities have responsibility to discharge specific public functions and normally have investigatory powers to perform those functions. Those functions are its 'core' or 'public' functions. By contrast an 'ordinary function' is a function common to all public authorities. One such example being the employment of staff.

In determining a core function, assistance can be drawn from section 28(3) of the Act and from the Regulation of Investigatory Powers (Directed Surveillance and Covert Human Intelligence Sources) Order 2003. Taken together they indicate the grounds upon which a public authority can authorise surveillance. The grounds are indicative of the public or core functions of each particular authority.

Does RIPA apply to disciplinary investigations by public bodies ?

Whether directed surveillance conducted by public authority falls within RIPA depends upon whether the authority is acting in pursuit of its *ordinary functions* or in pursuit of its *core functions* when it conducts the surveillance. Surveillance conducted in pursuit of its ordinary functions falls outside the provisions of part II of RIPA.

However, the real issue for a public authority is the avoidance of liability arising from infringing an employee's Article 8 Right to Privacy. Public authorities are, at present, not as free as their private employer counterparts to engage in the surveillance of employees to check for disciplinary infringements. The European Convention on Human Rights governs the actions of public authorities. A public-authority employer is unlikely to be able to argue that it was acting in a private capacity in the field of employer and employee relations and thus the provisions of Article 8 should not apply. A public authority engaging in surveillance should ensure that its actions are convention compliant. In this context, the most likely breach will be of the Article 8 Right to Privacy. No breach will occur where either, there is no intrusion into the private sphere or there is an intrusion, but the intrusion is justified in accordance with 8(2) of the ECHR as being necessary and 'in accordance with the law.'

RIPA was drafted to ensure that the UK was compliant with the Convention following *Khan v UK* (2001) 31 EHRR 45 and *Halford v UK* (1997) 24 EHRR 523. In both cases the UK could not show that the intrusions that took place were 'in accordance with the law' because the UK was lacking law regulating surveillance. The introduction of RIPA provided a statutory framework that was intended to provide such regulation. In the context of surveillance, the Act permits public authorities to self-authorise directed surveillance in certain circumstances. Surveillance conducted in accordance with an authority is deemed by the Act to be lawful for all purposes³. A valid authority provides a shield to an allegation of unlawfulness. The Act does not make it mandatory to consider obtaining an authority nor does it make it illegal to conduct surveillance without one⁴. Conducting surveillance without an authority means that there is an absence of the shield which an authorisation provides and a very real risk that the surveillance was not conducted 'in accordance with the law'.

The ruling of the Investigatory Powers Tribunal avoids the impractical consequences of the black-letter approach, but was very much the lesser of two evils. There remains the real risk that surveillance conducted by public authorities in pursuit of their 'ordinary functions' and thus outside the provisions of RIPA, will not be conducted 'in accordance with the law.'

In effect, authorities conducting surveillance in pursuit of their ordinary functions as employers may find themselves in a *Khan* or *Halford* situation. What is urgently required is the introduction of a set of business related surveillance regulations analogous those regulating business intercepts⁵. Such regulations would provide a legal framework regulating the monitoring of members of staff to ensure compliance with professional standards.

3 Section 27 RIPA

4 Section 80 RIPA

5 SI 2000 no 2699 The Telecommunications (Lawful Business Practice) (Interception of Communications) Regulations 2000.