

C v The Police : Latest Investigatory Powers Tribunal Decision

Part 2 of the Regulation of Investigatory Powers Act 2000 (“RIPA”) governs the carrying out of directed surveillance by local authorities. A recent decision by the Investigatory Powers Tribunal (“the Tribunal”) has implications for the surveillance of employees.

Directed surveillance is defined by section 26 of RIPA:

“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 manner as is likely to result in the obtaining of private information about a person (whether or not specifically identified for the purposes of the investigation or operation); and (c) otherwise than by way of 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.”

The RIPA regime aims to ensure that directed surveillance is carried out in a manner which is human rights compliant. This is achieved through a system of self authorisation by senior officers who have to be satisfied that the surveillance is necessary on one of the grounds set out in section 28(3) and proportionate.

The grounds are:

- (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.

Local authorities can only authorise directed surveillance for the purpose of preventing or detecting crime or of preventing disorder.

Section 27 of the Act means that where an authorisation is given and properly complied with, the authority's surveillance becomes lawful for all purposes and there is no civil liability for any incidental conduct engaged in. So whilst essentially a voluntary scheme (see section 80), RIPA provides valuable insurance against legal challenges especially under section 6 of the Human Rights Act 1998 for a violation of individuals' human rights.

The wide definition of directed surveillance was previously thought to cover most covert surveillance activities including surveillance of employees. However a recent decision by the Tribunal seems to suggest that RIPA is not applicable in such situations. The Tribunal is where directed surveillance targets, who think that their rights have been infringed, can complain.

In *C v The Police and the Secretary of State for the Home Department* (14th November 2006, No: IPT/03/32/H), a former policeman wanted the Tribunal to rule against the police for failing to get a RIPA authorisation to do directed surveillance on him.

C, having made a claim for a back injury he sustained after tripping in a police station, was awarded damages and an enhanced pension. He said that the injuries would affect his ability to earn income as a driver. In August 2002 the police instructed a firm of private detectives to observe C. They videoed him mowing the lawn and in his car. The case turned on the interpretation of the first

limb of the definition of directed surveillance i.e. was the surveillance “for the purposes of a specific investigation or a specific operation?”

The Tribunal ruled that this was not the type of surveillance that RIPA was meant to regulate. It made the distinction between the ordinary functions and the core functions of a public authority:

“The specific core functions and the regulatory powers which go with them are identifiable as distinct from the ordinary functions of public authorities shared by all authorities, such as the employment of staff and the making of contracts.

There is no real reason why the performance of the ordinary functions of a public authority should fall within the RIPA regime, which is concerned with the regulation of certain investigatory powers, not with the regulation of employees or of suppliers and service providers.”

The Tribunal also stated that it would not be right to apply RIPA to such employee surveillance for two reasons:

- 1) RIPA does not cover all public authorities, and there was no sense in police employee surveillance being conducted on a different legal footing than, for example, the Treasury, which does not have the same surveillance rights under RIPA.
- 2) The Tribunal has very restrictive rules about evidence, openness and rights of appeal. The effect of these would lead to unfairness for employees of RIPA authorities when challenging their employers’ surveillance as compared to those who were employed by non RIPA authorities.

So what are the lessons for local authorities? Firstly, even before this case was decided, it has always been important to check the reason for which the surveillance is being done. Local authorities can only do directed surveillance under section 28(3) (b) i.e. crime prevention, detection and preventing disorder. Not all employees being watched will have committed a crime e.g. running

errands whilst on official business will only be disciplinary offences. In such cases no RIPA authorisations can be sought.

Secondly, even where surveillance is being carried out for crime prevention or detection purposes, the question has to be; is it for a core function linked to one of the authority's regulatory functions? In the local authority context this would include, amongst others, trading standards and benefit fraud. However sometimes benefit fraud staff, due to their expertise, will be asked to advise on employee surveillance. If it is not being done for one of these purposes it will not be directed surveillance. For example, surveillance of a local authority employee falsifying his/her timesheet will be for a crime detection purpose but will not be for a regulatory function of the authority.

Thirdly even where the employee surveillance is not directed, it does not mean that it can be done with impunity. Not being able to seek an authorisation means that there is a greater risk of a human rights challenge. This risk can be reduced by ensuring compliance with the Data Protection Act 1998 (DPA). Part 3 of the DPA Employment Practices Code of Practice covers employee surveillance and provides guidance on the procedures to be followed. Compliance with the code will go a long way towards showing that such surveillance is human rights compliant.

This Tribunal decision clarifies an area of law where interpretation has greatly differed. The Tribunal described RIPA as "a complex and difficult piece of legislation." It is therefore essential that clear written guidance and refresher training is made available to RIPA investigators and authorisers.

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