Investigatory Powers Tribunal
P.O.Box 33220
London
SW1H 9ZQ

NOTICE OF DECISION

Issued pursuant to Section 68(4) and 68(4A) of the Regulation of Investigatory Powers Act 2000 (as amended) and Rule 15(3) of the Investigatory Powers Tribunal Rules 2018

CHRISTOPHER [redacted] BURY - v – HEREFORDSHIRE COUNCIL

IPT/23/2[redacted]

1. This Notice of Decision is issued to the complainant and the respondent in accordance with Rule 15(1) of the Investigatory Powers Tribunal Rules 2018 ("the Rules").

2. The Tribunal has considered the proceedings brought under section 7 of the Human Rights Act 1998 ('HRA') in a claim (Form T1).

3. In accordance with section 68(4)(b) of the Regulation of Investigatory Powers Act 2000 ("RIPA") the Tribunal has decided to make no determination in the complainant's favour.

4. In accordance with Rule 15(3) of the Rules the Tribunal has considered whether it is necessary in the interests of justice to provide a summary of the determination. That duty is subject to the Tribunal's duty under Rule 7(1) of the Rules which provides:

   "The Tribunal must carry out their functions in such a way as to secure that information is not disclosed to an extent, or in a manner, that it is contrary to the public interest or prejudicial to national security, the prevention or detection of serious crime, the economic well-being of the United Kingdom or the continued discharge of the functions of any of the intelligence services".

5. Having considered these provisions and the circumstances of the claim, the Tribunal provides the following summary of its determination.

6. Mr Bury ('the complainant') lodged a complaint (Form T1) against Herefordshire Council ('the respondent') dated 10 August 2023. The complainant alleges that the respondent has been conducting covert monitoring and surveillance of his web presence (website, social media and news articles) between 2017 and 2023. He filed extensive submissions in a letter in support of the claim. He also provided submissions in various documents in November 2023 (in reply to the respondent's response which was communicated to him on 2 November 2023). It is apparent from earlier correspondence dated 5 September 2023 that the respondent has invoked its 'unreasonable behaviour' policy in respect of the complainant who is said to have

contacted its councillors 145 times by email. The complainant provided further documents to the Tribunal in March 2024. It is apparent from the recent correspondence dated 15 March 2024 that the respondent has determined that his complaints against it are vexatious.

Claim is outside the Tribunal's jurisdiction

7. The complainant's human rights claim, made pursuant to section 7 of the Human Rights Act 1998 ('HRA'), alleges that the respondent has breached his rights under articles 3, 8 and 10 of the European Convention on Human Rights ('ECHR') and seeks remedies therefor.

8. The Tribunal's first determination is that the claim falls outside its jurisdiction under section 65 RIPA. Any s.7 HRA proceedings alleging unlawful surveillance by the respondent local authority are not within the Tribunal's jurisdiction for the following reasons.

9. The claim falls to be considered within the Tribunal's jurisdiction to hear s. 7 HRA proceedings under s.65(2)(a) and (3)(d) of the Regulation of Investigatory Powers Act 2000 ('RIPA'). The Tribunal may only consider claims under s.65(2)(a) and(3)(d) RIPA if they are proceedings relating to the taking place in any challengeable circumstances of any conduct falling within 65(5).

10. Section 65(5) lists the covert and intrusive powers which might be challenged. S.65(5)(d) includes conduct under Part II of RIPA (which includes directed or intrusive surveillance under section 26 RIPA).

11. The respondent is a public authority which may be entitled to exercise surveillance powers under Part II of RIPA – see Part 1 of Schedule 1 thereto. However, by virtue of section 65(6), surveillance (conduct under Part II of RIPA and s65(5)(d) RIPA) carried out by a council or local authority would not be conducted by one of the eight public authorities listed in 65(6) so is excluded from section 65(5).

12. Therefore, the proceedings do not relate to any conduct falling within s.65(5) and the jurisdiction of the Tribunal as provided by section 65 (2)(a) and (3) RIPA. Thus, the complainant's claim is outside the Tribunal's jurisdiction on the basis that it constitutes proceedings under section 7 HRA which do not fall within section 65(2), (3)(d) and (5) of RIPA.

Merits of the claim

13. Further and in any event, the Tribunal has investigated the claim and is satisfied that no unlawful action or activity that falls within the Tribunal's jurisdiction has been undertaken by the respondent with respect to the complainant.

14. The Tribunal is not satisfied that there has been any unlawful directed surveillance under RIPA conducted against the complainant for the reasons that the respondent has provided.

15. Claire Porter of Herefordshire Council provided a response to the complainant's claim in the form of a response to a search direction dated 18 October 2023 which included the following:

'Mr Bury claims that Herefordshire Council has been monitoring his internet activity since 2017. As part of the investigation into this claim and in order to answer these directions Herefordshire Council's ICT provider, Hoople Ltd have run an audit in order to establish if anyone using a Council computer has visited Mr Bury's website, as alleged. To be able to do this they were required to visit the website in question.

The audit was run from 20 November 2022, as the earliest date possible. It showed (not including the views that were required in order to run the audit), that there were 5 hits in total to Mr Bury's website between 20 November 2022 and 12 September 2023 by 4 separate officers of the council. One of the officers has since left the council and one is unnamed. The other two officers do not recall visiting the website or why they would have done so. Both officers have also confirmed that they did not capture any evidence from the website. The officers were not performing surveillance or monitoring Mr Bury's internet activity, as alleged or at all. It is not within the role requirements of the individuals to undertake monitoring of internet presence of any party.

Please note that neither the Council nor Hoople can provide information prior to 20 November 2022. Further the translation raised by Mr Bury that a specific IP address refers to the Council's users is not accurate. The IP address relates to that of a commonly used proxy server provider (Forcepoint Proxy Service). This is not evidence that the Council has accessed his website as the same IP address can be used by any of the service providers other customers.

With regard to the Schedule above:
a) **Details of any conduct that has taken place under the authority, or purported authority, of a warrant, authorisation, notice or permission as set out in s65(5) of RIPA as amended by the Investigatory Powers Act 2016.** None

b) **Details of any conduct where such authority should have been sought, or consideration given to whether it should have been sought, whether or not this was actually done.** None, the conduct outlined above was not covert surveillance carried out whilst investigating a criminal offence and as such a RIPA authorisation was not required or considered.

c) **Details of any conduct carried out, or alleged to have been carried out, by or on behalf of the intelligence services, regardless of whether that conduct is specifically mentioned in RIPA or other relevant legislation.** None

d) **Information relating to *any other organisation* with s65(5) powers which may hold information relevant to this complaint. Please identify any such organisation in your response and indicate the nature of the information which you believe such organisation may hold and why you think that organisation may be able to assist the Tribunal.** None.'

16. The complainant made submissions in reply to this response:

The council's focus on visits directly to the website is overly narrow and does not account for the possibility that council officers may have found the website through internet searches or external links.

• The council's refusal to provide data for audit prior to November 20, 2022 is suspicious and suggests that they may be trying to hide evidence of their internet monitoring activities.

• The fact that two of the four known Council officers who accessed the website do not recall doing so raises concerns about the council's oversight of its internet monitoring activities.

• The council's explanation about the IP address being associated with a commonly used proxy server is ambiguous and raises concerns about whether the council can accurately track internet monitoring activities.

• The council's reliance on internal private network data alone may be limiting and could be used to conceal activity.

• The council should consider external data sources, such as logs from internet service providers and Forcepoint, to provide a more comprehensive picture of the internet monitoring activities.

• The council should include interviews and statements from all officers involved in the internet monitoring activities to ensure transparency.

17. We accept the respondent's submissions and reject those of the complainant for the following reasons.

18. None of the conduct of the respondent identified by it was covert let alone directed surveillance for the purposes of RIPA and as such a RIPA authorisation was not required or considered.

19. Section 26(1), (2), (3) & (9) of RIPA defines directed, intrusive and covert surveillance relevantly as follows:

26 Conduct to which Part II applies.

(1)This Part applies to the following conduct—

(a)directed surveillance;

(b)intrusive surveillance;

…

(2)… 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.

(3)Subject to subsections (4) to (6), surveillance is intrusive for the purposes of this Part if, and only if, it is covert surveillance that—

(a)is carried out in relation to anything taking place on any residential premises or in any private vehicle…

…

(9)For the purposes of this section—

(a)surveillance is covert if, and only if, it is carried out in a manner that is calculated to ensure that persons who are subject to the surveillance are unaware that it is or may be taking place…

20. 48 of RIPA provides further definitions of 'surveillance' as follows:

48 Interpretation of Part II.

(1)In this Part—

…

• "directed" and "intrusive", in relation to surveillance, shall be construed in accordance with section 26(2) to (6);

…

• "surveillance" shall be construed in accordance with subsections (2) to (4);

…

(2) Subject to subsection (3), in this Part "surveillance" includes—

(a) monitoring, observing or listening to persons, their movements, their conversations or their other activities or communications;

(b) recording anything monitored, observed or listened to in the course of surveillance; and

(c) surveillance by or with the assistance of a surveillance device.

…

21. In this case Mr Bury has not established there has been any specific investigation into him conducted by the respondent for the purposes of section 26(2)(a) of RIPA. Further, it is likely that anyone would have access to the information posted by Mr Bury. The information that has been provided by Mr Bury to support the claim does not evidence any covert or directed investigation (or consistent and persistent surveillance) but simply rehearses his assertion of Herefordshire Council's covert monitoring and surveillance of his web presence (website, social media and news articles).

22. The complainant states he has submitted a Subject Access Request ('SAR') and raised a concern with the Information Commissioner's Office in the belief it was that organisation who dealt with such data collection and matters, and they accepted the case for investigation. He complains that they provided an inconclusive decision on the 9th of March 2023 without allowing him to provide further evidence. However, this is irrelevant in relation to the present claim in respect of the use of RIPA powers.

23. The Tribunal has not been directed to any policy held by the respondent in respect of its one off, or repeated viewing or monitoring of social media/websites. Nonetheless, for the reasons stated above the Tribunal does not consider that the actions taken by

the council in relation to Mr Bury fall within directed surveillance under s.26 and 48 of the Regulation of Investigatory Powers Act 2000.

24. The Tribunal has also considered paragraphs 3.10 to 3.17 of the Home Office 'Covert Surveillance and Property Interference Revised Code of Practice' (Aug. 2018) on 'Online Covert Activity.' The Tribunal is not satisfied that any visits to the social media /websites of the complainant by Herefordshire Council would be such as to constitute directed surveillance for the purposes of s.26(2)(a) and s. 48 RIPA. This is for the reasons submitted by Herefordshire Council as set out above: occasional and specific viewing of publicly available social media posts (and in the absence of any recording, retention and retrieval) would not constitute directed surveillance of the complainant's online activity because it was not for the purposes of a specific investigation nor operation (see s. 26(2)(a) RIPA).

25. There has been no directed surveillance in operation by the respondent in relation to the complainant. The Tribunal accepts the respondent's denial that any of its officers is or has been conducting an investigation into him. The council is required to respond to SARs and has done so. The council is not/has not initiated investigations or disseminated information about Mr Bury. In the circumstances there has been no need therefore for RIPA authorisation to be considered.

Conclusion

26. The Tribunal has therefore decided:
    a) that the claim is outside the Tribunal's jurisdiction under s.65 RIPA on the basis that it constitutes proceedings under section 7 HRA in relation to conduct under Part II of RIPA by a local authority;
    and in any event,
    b) to make no determination in the complainant's favour because there has been no unlawful directed surveillance conducted by the respondent which required authorisation under RIPA.

27. Pursuant to section 67A of RIPA there is a right to apply for leave to appeal this decision. The Tribunal hereby specifies, in accordance with s.67A(2) of RIPA that, in the event of an appeal, the relevant appellate court in this case is the Court of Appeal of England and Wales.

28. An appeal is possible only in respect of a point of law that raises an important point of principle or practice (or for other compelling reasons) and is not a decision on a procedural matter. An appeal requires permission so an application must first be made to the Tribunal for leave to appeal. A form applying for leave to appeal is attached and full details of the provisions relating to appeal may be found on the Tribunal's website: https://www.ipt-uk.com/

29. The Rules contain detailed provisions in relation to making an application for leave to appeal which are contained in Rule 16 of the Rules. The Rules are available from the Tribunal's website https://www.ipt-uk.com/

SIGNED



Tribunal Secretary
on behalf of the Tribunal

12 April 2024

Complainant:
Mr C Bury

Respondent:
Herefordshire Council
Plough Lane
Hereford
HR4 0LE