

BEFORE THE INFORMATION COMMISSIONER

BETWEEN

PRIVACY INTERNATIONAL

Applicant

- and -

AVON AND SOMERSET POLICE AND CRIME COMMISSIONER

Respondent

GROUNDS OF APPEAL

I. Introduction and Summary

1. The Applicant is Privacy International, a registered UK charity, campaigning for the right to privacy.
2. On 1 November 2016, Privacy International wrote to the Avon and Somerset Police and Crime Commissioner (“PCC”), Home Office, National Police Chiefs Council, National Crime Agency, Metropolitan Police, South Yorkshire Police, Kent PCC, Staffordshire PCC, Warwickshire PCC, West Mercia PCC and West Midlands PCC, requesting information about the purchase and use of mobile phone surveillance equipment by the police forces and the regulatory and oversight regime governing the use of such equipment. This equipment can be referred to using a range of terms, including “Covert Communications Data Capture” (“CCDC”) equipment, “IMSI Catchers”, “IMSI Grabbers”, “Cell site simulators” and “Stingrays”. In these grounds, this equipment is hereafter referred to as “IMSI Catchers”. Privacy International’s initial request to Avon and Somerset PCC is annexed to these grounds as Exhibit A.
3. On 29 November 2016, Avon and Somerset PCC responded to the initial request. In the response, the PCC noted that two of the questions were directed at Avon and Somerset Police, that it had made that body aware of our request, and that Avon and Somerset Police would respond to Privacy International directly. As to the remaining questions, Avon and Somerset PCC submitted that it could neither confirm nor deny (“NCND”) whether it held the information requested pursuant to sections 23(5), 24(2), 30(3) and 31(3) of the Freedom of Information Act (“FOIA”) 2000. This response is annexed to these grounds as Exhibit B.
4. On 30 January 2017, Privacy International made a request for internal review of Avon

and Somerset PCC's decision. This request is annexed to these grounds as Exhibit C.

5. On 13 February 2017, Avon and Somerset PCC upheld its initial decision. This decision is annexed to these grounds as Exhibit D.
6. Avon and Somerset Police and Crime Commissioner's 13 February 2017 decision was wrong and/or unlawful in that it erred in concluding that:
 - a. Sections 23(5) and 30(3) FOIA were engaged by the request;
 - b. Its NCND position was "required for the purpose of safeguarding national security" pursuant to section 24(2) FOIA;
 - c. Confirming or denying the existence of the requested information would or would be likely to prejudice law enforcement pursuant to section 31(3) FOIA;
 - d. In all the circumstances of the case, the public interest in neither confirming nor denying whether it held the information requested outweighs the public interest in disclosing the information pursuant to sections 24(2), 30(3) and 31(3) FOIA.

II. The Facts

A. Privacy International

7. Privacy International is a UK-registered charity. It was founded in 1990 as the first organisation to campaign at an international level on privacy issues. Its mission is to defend the right to privacy across the world, by investigating and challenging unlawful surveillance and other intrusions into private life by governments and corporations. Recent cases brought by Privacy International include a challenge to the lawfulness of the bulk interception of internet traffic by the UK security and intelligence services (*10 Human Rights Organisations v United Kingdom*, European Court of Human Rights, App. No. 24960/15) and a challenge to the blanket exemption of the Government Communications Headquarters under FOIA (*Privacy International v United Kingdom*, European Court of Human Rights, App. No. 60646/14).
8. Privacy International has played a long-standing role in campaigning on privacy and surveillance issues and has a particular interest in the purchase and use of mobile surveillance equipment by the police forces throughout the UK and in the regulatory and oversight regime that governs the use of such equipment.

B. IMSI Catchers

9. IMSI Catchers are surveillance devices used to collect mobile phone data and track individuals' locations. IMSI stands for "International Mobile Subscriber Identity", a

number unique to Subscriber Identification Module (“SIM”) cards.¹ Mobile phones communicate with a network of base stations, which enable the network provider to route calls, text messages and internet data to and from the mobile phone. IMSI Catchers function by impersonating a base station, tricking mobile phones into connecting to them. Once connected to an IMSI Catcher, mobile phones identify themselves by revealing their IMSI. This identification process also allows IMSI Catchers to determine the location of mobile phones. Some IMSI Catchers also have the capability to intercept data, including calls, text messages, and internet data, as well as block service, either to all mobile phones within their range or to select devices.

10. IMSI Catchers can interfere with the right to privacy in several ways. Where they intercept the data transmitted from mobile phones, such as calls, text messages, and internet data, they pose the same privacy concerns as traditional methods of communications surveillance.
11. The interception of IMSI/IMEI data can also raise several privacy concerns. A mobile phone is “*very intimately linked to a specific individual*”, meaning IMSI/IMEI data can also be tied to specific individuals.² By linking IMSI/IMEI data to other information, the government can not only determine the identity of individuals, but also track and profile those individuals. For example, by tracking IMSI/IMEI data across a number of locations, the government can create a profile of an individual’s activities and contacts.
12. The use of IMSI Catchers also raises particular concerns because of the indiscriminate nature by which they collect data. IMSI Catchers trick all mobile phones within a given range to identify themselves and reveal their location. Their use can therefore interfere with the privacy rights of many persons, including those who are not the intended targets of surveillance.
13. The indiscriminate nature by which IMSI Catchers collect data means that their use can also interfere with the rights to freedom of expression and to freedom of assembly and association. The police forces can use IMSI Catchers at gatherings of individuals, such as a protest, to identify those attending such gatherings.
14. Finally, the use of IMSI Catchers has a number of implications for the ability of individuals to maintain their anonymity, including when attending a gathering. There are inextricable linkages between anonymity, privacy, and freedom of expression.³

¹ IMSI Catchers typically also collect the “International Mobile Station Equipment Identifier” (“IMEI”) of mobile phones. The IMEI is unique to each mobile phone whereas the IMSI is unique to each SIM card.

² Article 29 Data Protection Working Party, Opinion 13/2011 on Geolocation Services on Smart Mobile Devices, 881/11/EN, 16 May 2011, available at http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2011/wp185_en.pdf.

³ See Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, U.N. Doc. A/HRC/29/32, 22 May 2015, available at http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/29/32; see also Written Submissions on Behalf of

15. There has been disquiet about the use of IMSI Catchers and speculation as to whether they are operational in the UK. IMSI Catchers have been reported in other countries in Europe, including Germany, where their use is regulated by federal law and subject to a series of safeguards. Those safeguards include requiring prior judicial authorisation for law enforcement agencies' use of IMSI Catchers and only where there are grounds indicating that an individual has committed or is going to commit a specific serious crime and only to the extent necessary to determine that individual's mobile IMSI/IMEI or whereabouts.⁴ IMSI Catchers are also reported in use in the United States, where at the federal level, the Department of Justice has announced a policy requiring that all agencies obtain a search warrant supported by probable cause prior to using an IMSI Catcher.⁵

16. In 2014, the use of IMSI Catchers was described in a response in Hansard:

*“Investigative activity involving interference with property or wireless telegraphy, such as International Mobile Subscriber Identity (IMSI) grabbers, is regulated by the Police Act 1997 and the Intelligence Services Act 1994 which set out the high level of authorisation required before the police or Security and intelligence agencies can undertake such activity. Use of these powers is overseen by the Intelligence Services Commissioner and the Office of Surveillance Commissioners. In any case involving the interception of the content of a communication, a warrant authorised by the Secretary of State under the Regulation of Investigatory Powers Act 2000 is required.”*⁶

17. On 10 October 2016, an article appeared in *The Bristol Cable* entitled: “Revealed: Bristol’s police and mass mobile phone surveillance.”⁷ The article made reference to the purchase of items related to “IMSI Covert Communications”, also referred to as “CCDC”, from the company CellXion by Avon and Somerset Police for £169,575. The article links to a download of the original document disclosing the purchase.⁸ The article also explains that the acronym “CCDC equipment” appears to refer to “covert communications data capture” as spelled out in the minutes of an Alliance Governance Group meeting in May 2016 between Warwickshire and West Mercia Police.⁹

18. On the same day, *The Guardian* published the article “Controversial snooping

Privacy International and Article 19, *Breyer v Germany*, European Court of Human Rights, App. No. 50001/12, 5 Sept. 2016.

⁴ Section 100i of the *Criminal Procedure Code (Strafprozessordnung, StPO)* (Germany), available at https://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html.

⁵ 2015 U.S. Department of Justice Policy, available at <https://www.justice.gov/opa/file/767321/download>.

⁶ Electronic Surveillance: Written question – HL2602, 3 Nov. 2014, available at <http://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Lords/2014-11-03/HL2602>.

⁷ Alon Aviram, “Revealed: Bristol’s police and mass mobile phone surveillance,” *The Bristol Cable*, 10 Oct. 2016, <https://thebristolcable.org/2016/10/imsi/>.

⁸ <https://thebristolcable.org/wp-content/uploads/2016/10/09-imsi-5.ods>

⁹ <https://thebristolcable.org/wp-content/uploads/2016/10/09-imsi-4.pdf>

technology ‘used by at least seven police forces’”.¹⁰ The article reported that “*surveillance technology that indiscriminately harvests information from mobile phones*”, also “*known as an IMSI catcher*” is being “*used by at least seven police forces across the country...according to police documents.*”

19. The Investigatory Powers Act 2016 does not explicitly address the use of IMSI Catchers.

III. Procedural History

A. Request for Information

20. On 1 November 2016, Privacy International requested the following information from South Yorkshire Police:

1. *Purchase orders, invoices, contracts, loan agreements, solicitation letters, correspondence with companies and other similar records regarding Avon and Somerset Police’s acquisition of CCDC equipment held by the Police and Crime Commissioner. Please include records of all purchase orders, invoices, contracts, agreements, and communications with CellXion.*
2. *Marketing or promotional materials received by Avon and Somerset Police relating to CCDC equipment.*
3. *All requests by CellXion or any other corporation, or any government agencies, to Avon and Somerset Police to keep confidential any aspect of Avon and Somerset’s possession and use of CCDC equipment, including any non-disclosure agreements between Avon and Somerset Police and CellXion or any other corporations, or government agency, regarding Avon and Somerset Police’s possession and use of CCDC equipment.*
4. *Legislation, codes of practice, policy statements, guides, manuals, memoranda, presentations, training materials or other records governing the possession and use of CCDC equipment by Avon and Somerset Police, including restrictions on when, where, how and against whom it may be used, limitations on retention and use of collected data, guidance on when a warrant or other legal process must be obtained, and rules governing when the existence and use of CCDC equipment may be revealed to the public, criminal defendants, or judges.*

¹⁰ David Pegg & Rob Evans, “Controversial snooping technology ‘used by at least seven police forces,’” The Guardian, 10 Oct. 2016, <https://www.theguardian.com/world/2016/oct/10/controversial-phone-snooping-technology-imsi-catcher-seven-police-forces>.

B. The Refusal

21. On 29 November 2016, a Freedom of Information Officer for Avon and Somerset PCC indicated that questions 2 and 4 were directed at Avon and Somerset Police and informed Privacy International that the Police were aware of the request and would respond directly. With respect to questions 1 and 3, the Freedom of Information Officer refused the request on grounds that Avon and Somerset PCC could NCND whether it held the information sought pursuant to sections 23(5), 24(2), 30(3), and 31(3) FOIA.
22. The reasons given for the overall harm identified for NCND can be summarised as follows:
 - a. That confirming or denying that Avon and Somerset PCC holds information regarding these techniques would in itself disclose exempt information. Stating information is held would confirm usage and the opposite if there is no such information;
 - b. Any disclosure under FOIA is a disclosure to the world at large, and confirming or denying the use of specialist techniques which may or may not exist, and which (should they exist) the police service may or may not deploy in specific circumstances would prejudice law enforcement. If the requested information was held by the PCC, confirmation of this fact would reveal that the PCC or Police have access to sophisticated communications analysis techniques. This would be damaging as it would:
 - i. Limit operational capabilities as criminals/terrorists would gain a greater understanding of the police's methods and techniques, enabling them to take steps to counter them; and
 - ii. Provide an indication to any individual who may be undertaking criminal/terrorist activities that the police may be aware of their presence and taking counter terrorist measures.
 - c. Conversely, if information was not held by the PCC, and a denial was issued, this would reveal to those same individuals that their activities are unlikely to have been detected by the police. It may also suggest (whether correctly or not) the limitations of police capabilities in this area, which may further encourage criminal/terrorist activity by exposing a potential vulnerability.
 - d. Disclosure of the information could confirm to those involved in criminality or terrorism that they are or have been the subject of such activity, allowing them to gauge the frequency of its use and to take measures to circumvent its use. Any compromise of, or reduction in technical capacity by forces would substantially prejudice their ability to police their areas which would lead to a greater risk to the

public.

- e. The information could be useful to those committing crimes of drugs and terrorist activity who would be able to 'map' where the use of certain tactics are or are not deployed. This information could enable individuals to become aware of location-specific operations and could lead to them moving their operations, destroying evidence, or avoiding those areas, ultimately compromising police tactics, operations and future prosecutions.
- f. Any information identifying the focus of policing activity could be used to the advantage of terrorists or criminal organisations and information undermining the operational integrity of these operations will adversely affect public safety and have a negative impact on both national security and law enforcement.

23. With respect to the public interest test, Avon and Somerset PCC identified as factors in favour of and against confirming or denying for sections 24(2), 23(5), 30(3) and 31(3) FOIA as follow:

“Factors favouring confirming or denying whether information is held for Section 24

The public is entitled to know where its public funds are being spent and a better informed public can take steps to protect themselves.

Factors against confirming or denying whether information is held for Section 24

By confirming or denying the use of specialist techniques could render security measures less effective. This could lead to the compromise of ongoing or future operations to protect the security or infra-structure of the UK and increase the risk of harm to the public

Factors favouring confirming or denying whether information is held for Section 30

The public are entitled to know what their public funds are spent on. Investigations may be closed and any proceedings may have been completed, and the investigations may have been high profile and had national implications.

Factors against confirming or denying whether information is held for Section 30

By confirming or denying the use of specialist techniques, the force's future law enforcement capabilities would be affected and this would hinder the prevention and detection of crime.

Factors favouring confirming or denying whether information is held for Section 31

Better awareness may reduce crime or lead to more information from the public, and the public would be able to take steps to protect themselves. Some

information is already in the public domain.

Factors against confirming or denying whether information is held for Section 31
By confirming or denying whether such techniques were used would compromise law enforcement tactics and undermine the partnership approach which would hinder the prevention or detection of crime. This would impact on police resources, more crime would then be committed and individuals placed at risk.”

24. Avon and Somerset PCC acknowledged that while “*there is a public interest in the transparency of policing operations and in this case providing assurance that the police service is appropriately and effectively engaging with the threat posed by the criminal fraternity, there is a very strong public interest in safeguarding both national security and the integrity of police investigations and operations in this area.*” Moreover, the PCC submitted that “[*a*]s much as there is public interest in knowing that policing activity is appropriate and balanced in matters of national security this will only be overridden in exceptional circumstances” and that there is “*no requirement to satisfy any public concern over the legality of police operations and the tactics we may or may not use.*”

25. Avon and Somerset PCC concluded that “*the balancing test for confirming or denying whether any information is held regarding these techniques is not made out.*”

C. Request for Internal Review

26. On 30 January 2017, Privacy International challenged the refusal on five grounds.

27. First, Privacy International submitted that the Avon and Somerset PCC’s response was predicated on a series of *non-sequiturs*:

- a. It simply does not follow that merely confirming or denying that a police force uses IMSI catchers would reveal operationally sensitive information about the scope of police activities and operations. This reasoning is not understood. It appears that the Avon and Somerset PCC has confused consideration of NCND with consideration of the provision of information itself;
- b. Equally, it does not follow that making similar requests to multiple police forces could identify how individuals could map or be aware of how operationally sensitive information is obtained by the various police forces. Different police forces could obtain information in multiple ways. Confirming or denying that a police force holds the requested information does not automatically reveal how tactics are deployed or what technical operations each force has;
- c. It is not understood why revealing that a police force has sophisticated capabilities to analyse data would limit operational capabilities. The reasoning set out in this respect is nonsensical.

28. Second, Privacy International submitted that the refusal failed to have regard to obviously material considerations, including, but not limited to:
- a. The fact that the Avon and Somerset Police’s purchase of IMSI Catchers is already in the public domain, as set out in Privacy International’s original request;
 - b. The significant public interest in the topic of IMSI catchers and the regulation of related communications surveillance technologies.
29. Third, Privacy International submitted that when considered forensically, the exemptions relied upon do not apply:
- a. Under Section 23(5) FOIA, there has to be a realistic possibility that a security body would be involved in the issue the request relates to in order for the exemption to apply. No such possibility has been set out. Any possibility that is particularised would be too remote to justify the application of this exemption;
 - b. Section 24(2) FOIA provides an exemption from the duty to confirm information is held, where the exemption is required for the purposes of safeguarding national security. Section 31(3) also provides an exemption where it is necessary for the prevention or detection of crime. No real reasons have been set out as to why either exemption applies;
 - c. Section 30(3) FOIA provides that the duty to confirm or deny does not arise in relation to information which is exempt information by virtue of sections 30(1) or (2). Section 30(1) can only be claimed by public authorities that have a duty to investigate whether someone should be charged with an offence, or the power to conduct such investigations and/or institute criminal proceedings. Section 30(2) protects the identity of confidential sources, primarily to ensure informants are not deterred from supplying law enforcement agencies with valuable intelligence. ICO guidance makes clear that the section 30 exemptions “*exist to ensure the effective investigation and prosecution of offences and the protection of confidential sources. They recognise the need to prevent disclosures that would prejudice either a particular investigation or set of proceedings, or the investigatory and prosecution processes generally, including any prejudice to future investigations and proceedings.*”¹¹ None of these matters have been addressed in the response to the request. There is no risk of prejudice to a specific investigation, there is no risk to informants, and there is no risk to confidential sources.

¹¹ See Information Commissioner’s Office, Investigations and proceedings (section 30), Freedom of Information Act, §53, available at <https://ico.org.uk/media/for-organisations/documents/1205/investigations-and-proceedings-foi-section-30.pdf>.

30. Fourth, Privacy International submitted that as regards the qualified exemptions (*i.e.* sections 24(3), 30(3) and 31(3) FOIA) relied upon, the public interest balancing exercise fell squarely in favour of disclosure:
- a. No meaningful reasons have been provided as to why there is a public interest in neither confirming nor denying the matters requested in this request;
 - b. There is currently no evidence at all to suggest that the public interest will be harmed to any material extent by disclosure of the information sought;
 - c. The public interest in disclosure is real, it is important that the public are reassured that the measures used to safeguard national security are proportionate and effective;
 - d. Inadequate regard at all has been had to the public interest in the disclosure of the information requested. There is currently a wide-ranging public debate taking place on the ambit of privacy rights in the context of surveillance and technology. There has also been widespread coverage of the purchase and use of IMSI catchers by police forces across the country. The refusal fails to take into account material consideration.
31. Finally, Privacy International submitted that when relying upon the NCND position pursuant to one of the exemptions, it is necessary to have regard to the language and purpose of FOIA, which require exemptions to be narrowly construed:
- a. The word “*required*” in section 1(1)(a) FOIA “...*means reasonably necessary. It is not sufficient for the information sought simply to relate to national security; there must be a clear basis for arguing that disclosure would have an adverse effect on national security before the exemption is engaged*”;¹²
 - b. It is therefore clear that a decision to NCND requires a clear justification and merits close scrutiny. This is because it flies in the face of the “*default setting*” in FOIA, which is in favour of disclosure.¹³ It also flies in the face of the Article 10 right to receive information, as recently confirmed by the European Court of Human Rights,¹⁴
 - c. This submission reflects the approach taken to NCND in parallel contexts. An NCND decision “...*requires justification similar to the position in relation to*

¹² *Philip Kalman v Information Commissioner and the Department of Transport* (EA/2009/111 8 July 2010).

¹³ *Galloway v Information Commissioner v The Central and North West London NHS Foundation Trust* (2009) 108 BMLR 50, at §70.

¹⁴ *Magyar Helsinki Bizottság v Hungary*, European Court of Human Rights, App. No. 18030/11, 8 Nov. 2016.

public interest immunity...It is not simply a matter of a governmental party to litigation hoisting the NCND flag and the court automatically saluting it.¹⁵

D. Decision in Response to Request for Internal Review

32. On 13 February 2017, the Chief Executive Officer with the Avon and Somerset PCC responded by upholding its original decision. The Officer stated that having “[h]aving considered the arguments in the original response..., your appeal arguments... – and considering that utilizing the ‘neither confirm nor deny’ approach requires a broad/non-case specific public interest test – and reviewing all the circumstances, I conclude that this approach has been satisfactorily applied in this case.”

IV. The Appeal

A. The Purpose of FOIA

33. The purpose of FOIA as part of the modern constitutional fabric of the law means that exemptions must be construed narrowly. To hold otherwise would fly in the face of FOIA, which is in favour of disclosure, and the right to receive information under Article 10 of the European Convention on Human Rights.

34. There is a high degree of consensus under international law that access to information is part of the right to freedom of expression. In particular, the Commissioner should have regard to the Grand Chamber decision in *Magyar Helsinki Bizottság v Hungary*.¹⁶ That case concerned the rejection by the police of an access to information request submitted by the applicant, an NGO. The Court affirmed a right to access to information and emphasised the importance of this aspect of freedom of expression, which operates to provide transparency on the conduct of public affairs and on matters of society as a whole.¹⁷

35. The Court also emphasised the important role of watchdogs in a democracy in providing information of value to political debate and discourse. It explained the concept of a public watchdog as follows:

“167. The manner in which public watchdogs carry out their activities may have

¹⁵ *Mohamed and Another v Secretary of State for the Home Department* [2014] 1 WLR 4240, per Maurice Kay LJ, at §40.

¹⁶ *Magyar Helsinki Bizottság v Hungary*, European Court of Human Rights, App. No. 18030/11, 8 Nov. 2016.

¹⁷ The right to access to information is also recognised by numerous other international human rights instruments and mechanisms. *See, e.g.*, Article 19, International Covenant on Civil and Political Rights; U.N. Human Rights Committee, General Comment No. 34, U.N. Doc. No. CCPR/C/GC/34, 12 Sept. 2011; U.N. Special Rapporteur on Freedom of Opinion and Expression, OSCE Representative on Freedom of the Media, OAS Special Rapporteur on Freedom of Expression, ACHPR on Freedom of Expression, Joint Declaration, 20 Dec. 2006; U.N. Special Rapporteur on Freedom of Opinion and Expression, OSCE Representative on Freedom of the Media, OAS Special Rapporteur on Freedom of Expression, Joint Declaration, 6 Dec. 2004.

a significant impact on the proper functioning of a democratic society. It is in the interests of democratic society to enable the press to exercise its vital role of 'public watchdog' in imparting information on matters of public concern (see Bladet Tromsø and Stensaas, cited above, § 59), just as it is to enable NGOs scrutinising the State to do the same thing. Given that accurate information is a tool of their trade, it will often be necessary for persons and organisations exercising watchdog functions to gain access to information in order to perform their role of reporting on matters of public interest. Obstacles created in order to hinder access to information may result in those working in the media or related fields no longer being able to assume their 'watchdog' role effectively, and their ability to provide accurate and reliable information may be adversely affected (see Társaság, cited above, § 38).

168. Thus, the Court considers that an important consideration is whether the person seeking access to the information in question does so with a view to informing the public in the capacity of a public 'watchdog'."

36. As a human rights organisation, Privacy International plays the role of a watchdog, similar to that played by the press.¹⁸ Indeed, in litigation before the European Court of Human Rights, the UK Government has accepted that “NGOs engaged in the legitimate gathering of information of public interest in order to contribute to public debate may properly claim the same Art. 10 protections as the press.”¹⁹ Privacy International seeks to advance the right to privacy around the world, including in the UK. It carries out this work, in part, by conducting research on a variety of issues related to privacy and surveillance and publishing that research in multiple formats, including research reports, policy papers and blog posts. It seeks information about IMSI Catchers in order to educate the public about the government’s use of this surveillance technology and its human rights implications, including for the right to privacy.
37. It may also be useful in this respect to consider a comparative perspective. In the United States, a range of requests pursuant to federal and state freedom of information laws relating to law enforcement use and regulation of IMSI Catchers have successfully disclosed relevant records, including purchase records, product descriptions, non-disclosure agreements and policy guidance. These records were disclosed notwithstanding exemptions under the relevant laws protecting certain categories of information, including information classified to protect national security and information related to law enforcement techniques and procedures. A summary of these requests and the subsequent disclosure of records are annexed to these grounds as Exhibit E.

¹⁸ See *Társaság a Szabadságjogokért v Hungary*, App. No. 37374/05, 14 April 2009.

¹⁹ The United Kingdom’s Observations on the Merits, *10 Human Rights Organisations v United Kingdom*, App. No. 24960/15, 14 April 2016, §6.1.

B. Section 23(5) FOIA

38. By virtue of section 23(5) FOIA the duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would involve the disclosure of any information, which was directly or indirectly supplied to the public authority by, or which relates to, any of the bodies specified in section 23(3).
39. In a recent decision relating to IMSI Catchers, the Commissioner held that in assessing the engagement of section 23(5), “*the balance of probabilities is the correct test to apply*”, meaning that “*the evidence must suggest to a sufficient degree of likelihood (rather than certainty) that any information falling within the scope of the request would relate to, or have been supplied by, a body specified in section 23(3)*”. The Commissioner proceeded to apply this test to “*the subject matter of the request – data capture from mobile phones*” and found it to be “*within the area of the work of bodies specified in section 23(3)*.” The Commissioner continued that “[*t*]his view is strengthened by the citation [*from Hansard*] which states that any use of IMSI technology would be regulated by the Police Act 1997 and the Intelligence Services Act 1994.” The Commissioner further accepted that it was likely that “*if the information described in the request does exist, this would be a field of work which is likely to have been conducted in conjunction with, and with the knowledge, of other parties within the policing field, and that this type of work is likely to include security bodies*.” The Commissioner submitted that if “*the information requested is within what could be described as the ambit of security bodies’ operations, section 23(5) is likely to apply*” and that “[*f*]actors indicating whether a request is of this nature will include the functions of the public authority receiving the request, the subject area to which the request relates and the actual wording of the request.” Finally, the Commissioner noted that “*there is clearly a close relationship between the police service and the security bodies*” and therefore, “*on the balance of probabilities, any information about its potential use of IMSI technology, if held, could be related to one of more bodies identified in section 23(3) of the FOIA.*”²⁰
40. Privacy International respectfully submits that this decision should be distinguished and revisited on the following basis. Just because IMSI Catchers may also be used by the bodies specified in section 23(3) is not enough for section 23(5) to be engaged. There are many techniques – ranging from the simple to the sophisticated – that both the police forces and the section 23(3) bodies may deploy. For that reason, the reliance on the argument that both the Police Act 1997 and the Intelligence Services Act 1994 cover a technique is meaningless. For example, both pieces of legislation authorise the power to interfere with property, which may include entry onto a property. A logical extension of this argument would engage section 23(5) for any technique covered by both statutes. Similarly, reliance on the argument that there is a close relationship between the police

²⁰ ICO, Decision Notice, Ref. FS50665716, 13 June 2017, paras. 18-19, 21, 23-24, available at <https://ico.org.uk/media/action-weve-taken/decision-notice/2017/2014285/fs50665716.pdf>; see also ICO Decision Notice, Ref. FS50660527, 8 June 2017, paras. 16-19, 24-25 available at <https://ico.org.uk/media/action-weve-taken/decision-notice/2017/2014349/fs50660527.pdf>.

forces and security bodies is dangerously vague. Indeed, a logical extension of that argument would engage section 23(5) for any technique deployed by the police forces. The Avon and Somerset PCC have made no attempt to indicate the circumstances in which police forces use IMSI Catchers, which could include ordinary law enforcement activities such as tracking a suspect for a variety of offences, and how those circumstances in any way relate to the section 23 bodies.

C. Section 24(2) FOIA

41. By virtue of section 24(2) FOIA, the duty to confirm or deny does not arise if, or to the extent that, exemption from section 1(1)(a) is required for the purpose of safeguarding national security.
42. With regards to section 24(2), the Commissioner has recently held in a decision on IMSI Catchers that consideration of this exemption is a “two-stage process”: first, the exemption must be engaged “*due to the requirement of national security*” and second, the exemption is “*qualified by the public interest, which means that the confirmation or denial must be provided if the public interest in the maintenance of the exemption does not outweigh the public interest in disclosure.*”²¹
43. The Commissioner has also previously held that “*this exemption should be interpreted so that it is only necessary for a public authority to show that either a confirmation or a denial of whether requested information is held would be likely to harm national security. The Commissioner interprets the phrase ‘required’ in the context of this exemption as ‘reasonably necessary’. In effect this means that there has to be a risk of harm to national security for the exemption to be relied upon, but there is no need for a public authority to prove that there is a specific, direct or imminent threat.*”²²
44. In the recent decision on IMSI catchers, the Commissioner found that there was some valid public interest in confirmation or denial and that this would increase public knowledge regarding the extent, or otherwise, of the use of IMSI catchers, by Nottinghamshire Police, which may give an indication regarding their use by the police service as a whole. However, the Commissioner determined that this interest was outweighed by that in safeguarding national security.²³

i. Safeguarding National Security

45. In the recent decision on IMSI Catchers, the Commissioner discussed the first prong of

²¹ ICO, Decision Notice, Ref. FS50665716, 13 June 2017, para. 26; *see also* ICO Decision Notice, Ref. FS50660527, 8 June 2017, para 27.

²² ICO, Decision Notice, Ref. FS50622468, 13 June 2016, para. 22, available at https://ico.org.uk/media/action-weve-taken/decision-notices/2016/1624502/fs_50622468.pdf.

²³ ICO, Decision Notice, Ref. FS50665716, 13 June 2017, paras. 29-30; *see also* ICO Decision Notice, Ref. FS50660527, 8 June 2017, paras. 30-31.

the section 24(2) FOIA exemption and relied heavily on the justification that because the Commissioner had already found section 23(5) to be engaged, section 24(2) would also be engaged, since “*a disclosure that touches on the work of the security bodies would consequentially undermine national security.*”²⁴

46. The Avon and Somerset PCC bases arguments around national security on skeletal assertions that national security would be impacted by (1) at a general level, confirming or denying the use of “*specialist techniques*” and (2) at a specific level, indicating that a technique is used one area but not in another area. Both arguments are baseless. As to the first argument, the Avon and Somerset PCC does not define a “specialist technique” and why IMSI Catchers constitute a specialist technique. Furthermore, it does not follow that merely confirming or denying that a police force uses IMSI Catchers reveals operationally sensitive information that would negatively impact national security. In fact, the government has willingly admitted and subjected to either public regulation or FOIA requests the use of a variety of what might also be considered “specialist techniques” – from hacking²⁵ to the use of equipment to physically extract mobile phone data.²⁶ There is therefore no reason that the information related to the use of IMSI Catchers by police forces should be afforded special protection. As to the second argument, it does not follow that determining which police forces use this equipment could permit individuals to map or be aware of how operationally sensitive information is obtained, thereby negatively impacting national security. Different police forces will obtain information in many different ways.

ii. Public Interest Test

47. The original decision identified as the factor against confirming or denying the existence of the requested information that “*confirming or denying the use of specialist techniques could render security measures less effective*” and that “[t]his could lead to the *compromise of ongoing or future operations to protect the security or infra-structure of the UK and increase the risk of harm to the public.*” The ICO should not accept these bare assertions. As discussed above, the Avon and Somerset PCC has not clarified what constitutes a “specialist technique” or why confirming or denying the mere existence of such techniques generally or IMSI Catchers specifically could render security measures less effective. This position runs contrary to the government’s admission and public disclosure of information relating to the regulation of other operational capabilities of the police forces. Furthermore, the Avon and Somerset PCC has presented no evidence of risk to support its position.

²⁴ ICO, Decision Notice, Ref. FS50665716, 13 June 2017, para. 27; *see also* ICO Decision Notice, Ref. FS50660527, 8 June 2017, para. 29.

²⁵ *See* Part 5, Investigatory Powers Act; *see also* Equipment Interference: Draft Code of Practice.

²⁶ *See* Disclosure by the Metropolitan Police, https://www.met.police.uk/globalassets/foi-media/disclosure_2017/april_2017/information-rights-unit--mobile-phone-data-extraction-carried-out-at-local-police-station-and-hubs.

48. The original decision only identified as a factor in favour of confirming or denying the existence of the requested information that “[t]he public is entitled to know where its public funds are spent and a better informed public can take steps to protect themselves”. The Avon and Somerset PCC failed to consider that there is public interest in citizens being informed about methods of surveillance that could have a profound impact on their fundamental rights, including the rights to privacy, freedom of expression and freedom of assembly and association. In particular, there is significant public interest in the topic of IMSI Catchers and the regulation of related communication surveillance technologies. Indeed, because IMSI Catchers can indiscriminately collect data (by tricking all mobile phones within a given range to identify themselves and reveal their location), their use can interfere with the rights of many persons, including those who are not the intended targets of surveillance.
49. It is also worth considering that the European Court of Human Rights has placed particular emphasis on the public interest in the disclosure of matters of public concern. The Grand Chamber in *Magyar Helsinki Bizottság v Hungary* set out a number of relevant factors in its consideration of access to information under Article 10. These include:
- a. The purpose of the information being sought;
 - b. The nature of information sought (i.e. the public interest);
 - c. The role of the applicant;
 - d. The availability of the information.
50. With respect to the public interest, the Court stated that “*the public interest relates to matters which affect the public to such an extent that it may legitimately take an interest in them, which attract its attention or which concern it to a significant degree, especially in that they affect the well-being of citizens of the life of the community*”.²⁷ As discussed above, IMSI Catchers engage the public interest because their use implicates the fundamental rights of many citizens, Privacy International seeks this information in its role as a public watchdog, and it intends to use the information requested to educate the public about the use of IMSI Catchers and their human rights implications.
51. The *Magyar Helsinki Bizottság* decision’s reasoning on public interest effectively affirmed a prior decision in *Youth Initiative for Human Rights v Serbia*, which concerned an NGO that was monitoring the implementation of transitional laws in Serbia with a view to ensuring respect for human rights.²⁸ The applicant NGO requested the intelligence agency of Serbia to provide it with factual information concerning the use of electronic surveillance measures by that agency. The Court held that the NGO was involved in the legitimate gathering of information of public interest with the intention of

²⁷ *Magyar Helsinki Bizottság v Hungary*, European Court of Human Rights, App. No. 18030/11, 8 Nov. 2016, para. 162.

²⁸ *Youth Initiative for Human Rights v Serbia*, European Court of Human Rights, App. No. 48135/06, 25 June 2013.

imparting that information to the public and thereby contributing to the public debate.

52. As set out previously to the Avon and Somerset PCC and as explained above, the public interest balancing exercise falls squarely in favour of disclosure.
- a. No meaningful reasons have been provided as to why there is a public interest in neither confirming nor denying the information sought in this request;
 - b. There is currently no evidence at all to suggest that the public interest will be harmed to any material extent by disclosure of the information sought;
 - c. The public interest in disclosure is real, it is important that the public are reassured that the measures used to safeguard national security are necessary and proportionate as well as effective. Access to the information would allow for a fact-based public debate on surveillance measures. This has been hindered by the decision of the Avon and Somerset PCC to NCND the information in question.
 - d. The applicant plays an important watchdog role and has requested the information as part of this function. Given the public interest nature of the issue on which Privacy International seeks to obtain information, its activities as a public watchdog warrant a high level of protection, and its role as a watchdog should be taken into account when evaluating the public interest in this matter.
 - e. The fact that IMSI Catchers have been purchased by UK police forces is already in the public domain. Avon and Somerset Police have specifically been named in this regard.

D. Section 30(3) FOIA

53. Pursuant to section 30(3) FOIA, the duty to confirm or deny does not arise if the information would be exempt by virtue of sections 30(1) or 30(2), which relate to information held for the purposes of investigations and proceedings or obtained from confidential sources.
54. The Commissioner has held that consideration of section 30(3) FOIA “*involves two stages; first, the information described in the request must fall within the classes described in sections 30(1) or 30(2). Secondly, the exemption is qualified by the public interest. This means that if the public interest in the maintenance of the exemption does not outweigh the public interest in confirming or denying whether information is held,*

then confirmation or denial must be provided.”²⁹

i. Investigations, Proceedings and Confidential Sources

55. The Avon and Somerset PCC has provided no explanation as to how the information requested falls within the categories of information described in sections 30(1) or 30(2) FOIA. As a point of comparison, the Commissioner has found a request to fall into such a category where it contained a “*specific reference to a crime reference number which . . . related to the incident he was asking about.*”³⁰ By contrast, Privacy International’s request contains no references to nor relates to any investigations or proceedings (nor, for that matter, to information obtained from confidential sources). Rather, the requested information relates to the purchase of IMSI Catchers and the regulatory and oversight regime governing their use.

ii. Public Interest Test

56. The original decision identified as the factor against confirming or denying the existence of the requested information that “*confirming or denying the use of specialist techniques*” would affect “*the force’s future law enforcement capabilities . . . and . . . would hinder the prevention and detection of crime*”. Notably, this factor says nothing about the effect of confirming or denying the existence of the requested information on investigations, proceedings or confidential informants, strengthening Privacy International’s argument above that the Avon and Somerset PCC has failed to explain how the request falls within the section 30(1) or 30(2) FOIA categories of information.

57. Nevertheless, as with the factors against confirming or denying the existence of the requested information under section 24(2), the Commissioner should not accept such bare assertions. Again, the Avon and Somerset PCC has not clarified what constitutes a “specialist technique” or why confirming or denying the mere existence of such techniques generally or IMSI Catchers specifically in any way impact investigations or proceedings. This position runs contrary to the government’s explicit regulation of other operational capabilities of the police forces or FOIA disclosures relating to such capabilities. Furthermore, the Avon and Somerset PCC has presented no evidence of risk to support its position.

58. The original decision identified as factors in favour of confirming or denying the existence of the requested information that “[*t*]he public are entitled to know what their public funds are spent on” and that “[*i*]nvestigations may be closed and any proceedings may have been completed, and the investigations may have been high profile and had national implications.” As discussed above, the Avon and Somerset PCC has failed to

²⁹ ICO, Decision Notice, Ref. FS50689520, 18 Dec. 2017, para. 17, available at <https://ico.org.uk/media/action-weve-taken/decision-notices/2017/2172938/fs50689520.pdf>.

³⁰ *Id.* at para. 20.

consider that there is a public interest in citizens being informed about methods of surveillance that could have a profound impact on their fundamental rights, including the rights to privacy, freedom of expression and freedom of assembly and association.

59. Finally, as discussed above, it is also worth considering the European Court of Human Right's recent jurisprudence on access to information under Article 10, which emphasises the public interest in disclosing matters of public concern, especially where they affect the rights of citizens.
60. Thus, as set out previously to the Avon and Somerset PCC and as explained above, the public interest balancing exercise falls squarely in favour of disclosure.
 - a. No meaningful reasons have been provided as to why there is a public interest in neither confirming nor denying the information sought in this request;
 - b. There is currently no evidence at all to suggest that the public interest will be harmed to any material extent by confirming or denying the existence of the information sought;
 - c. The public interest in disclosure is real, it is important that the public are reassured that the measures used to safeguard national security are necessary and proportionate as well as effective. Access to the information would allow for a fact-based public debate on surveillance measures. This has been hindered by the decision of the Avon and Somerset PCC to NCND the information in question.
 - d. The applicant plays an important watchdog role and has requested the information as part of this function. Given the public interest nature of the issue on which Privacy International seeks to obtain information, its activities as a public watchdog warrant a high level of protection, and its role as a watchdog should be taken into account when evaluating the public interest in this matter.
 - e. The fact that IMSI Catchers have been purchased by UK police forces is already in the public domain. The Avon and Somerset Police have specifically been named in this regard.

E. Section 31(3) FOIA

61. Pursuant to section 31(3) FOIA, the duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice a range of matters related to law enforcement, including, *inter alia*, the prevention or detection of crime or the apprehension or prosecution of offenders.

62. The Commissioner has identified section 31(3) to be a “prejudice-based exemption” and that for this section to be engaged, “*three criteria must be met*:

- *Firstly, the actual harm which the public authority alleges would, or would be likely, to occur if the withheld information was disclosed – or in this case confirmation as to whether or not the requested information is held – has to relate to the applicable interests within the relevant exemption;*
- *Secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld – or the confirmation as to whether or not the requested information is held – and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance; and*
- *Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – ie, confirming or denying whether information is held disclosure ‘would be likely’ to result in prejudice or confirming or denying whether information is held ‘would’ result in prejudice. In relation to the lower threshold the Commissioner considers that the chance of prejudice occurring must be more than a hypothetical possibility; rather there must be a real and significant risk. With regard to the higher threshold, in the Commissioner’s view this places a stronger evidential burden on the public authority to discharge.’³¹*

i. Prejudice to Law Enforcement Matters

63. As with its arguments around the section 24(2) and 30(3) FOIA exemptions, the Avon and Somerset PCC also bases arguments around the 31(3) exemption on skeletal assertions that matters related to law enforcement would be prejudiced by (1) at a general level, confirming or denying the use of “specialist techniques” and (2) at a specific level, indicating that a technique is used in one area but not in another area. For the reasons discussed above, these arguments fail to demonstrate any causal link between confirming or denying the existence of the requested information and the prejudice to law enforcement matters claimed. Furthermore, these arguments fail to demonstrate how the prejudice claimed is real, actual or of substance, let alone the likelihood that the claimed prejudice will be met.

ii. Public Interest Test

64. The original decision identified as the factor against confirming or denying the existence of the requested information that “*confirming or denying whether such techniques were*

³¹ ICO, Decision Notice, Ref. FS50688200, 21 Nov. 2017, para. 21, available at <https://ico.org.uk/media/action-weve-taken/decision-notices/2017/2172802/fs50688200.pdf>.

used would compromise law enforcement tactics and undermine the partnership approach which would hinder the prevention or detection of crime” and that this “would impact on police resources, more crime would then be committed and individuals placed at risk”. Again, the Commissioner should not accept such bare assertions. The MPS have not indicated why confirming or denying the mere existence of “*such techniques*” in general or IMSI Catchers specifically could render law enforcement less effective. This position runs contrary to the government’s explicit regulation of other operational capabilities of the police forces or FOIA disclosures relating to such capabilities. The Avon and Somerset PCC has further failed to clarify what it means by reference to the “partnership approach” and how such an approach would be undermined by confirming or denying the existence of the requested information. Finally, the Avon and Somerset PCC has presented no evidence of risk to support its position.

65. The original decision identified as factors in favour of confirming or denying the existence of the requested information that “*[b]etter awareness may reduce crime or lead to more information from the public, and the public would be able to take steps to protect themselves*” and that “*[s]ome information is already in the public domain.*” As discussed above, the Avon and Somerset PCC has failed to consider that there is a public interest in citizens being informed about methods of surveillance that could have a profound impact on their fundamental rights, including the rights to privacy, freedom of expression and freedom of assembly and association.
66. Finally, as discussed above, it is also worth considering the European Court of Human Right’s recent jurisprudence on access to information under Article 10, which emphasises the public interest in disclosing matters of public concern, especially where they affect the rights of citizens.
67. Thus, as set out previously to the Avon and Somerset PCC and as explained above, the public interest balancing exercise falls squarely in favour of disclosure.
 - a. No meaningful reasons have been provided as to why there is a public interest in neither confirming nor denying the information sought in this request;
 - b. There is currently no evidence at all to suggest that the public interest will be harmed to any material extent by confirming or denying the existence of the information sought;
 - c. The public interest in disclosure is real, it is important that the public are reassured that the measures used to safeguard national security are necessary and proportionate as well as effective. Access to the information would allow for a fact-based public debate on surveillance measures. This has been hindered by the decision of the Avon and Somerset PCC to NCND the information in question.

- d. The applicant plays an important watchdog role and has requested the information as part of this function. Given the public interest nature of the issue on which Privacy International seeks to obtain information, its activities as a public watchdog warrant a high level of protection, and its role as a watchdog should be taken into account when evaluating the public interest in this matter.
- e. The fact that IMSI catchers have been purchased by UK police forces is already in the public domain. Avon and Police have specifically been named in this regard.

F. Conclusion

68. For the reasons set out above, the ICO is respectfully invited to allow this appeal and to issue a decision notice requesting Avon and Somerset PCC to comply with its obligations under section 1(1) FOIA and inform Privacy International whether it holds information of the description specified in the request and communicate that information.

9 February 2018

Ailidh Callander
Scarlet Kim

Privacy International

EXHIBIT A

Avon and Somerset Police and Crime Commissioner
Police Headquarters
Valley Road
Portishead
BS20 8JJ

1 November 2016

Dear Freedom of Information Officer:

I am writing on behalf of Privacy International to seek records, pursuant to the Freedom of Information Act 2000, relating to the purchase and use of mobile phone surveillance equipment by Avon and Somerset Police.

I refer, in particular, to the recent article written by the journalist collective The Bristol Cable "Revealed: Bristol's police and mass mobile phone surveillance".¹ The article makes reference to the purchase of equipment from the company CellXion by Avon and Somerset Police under the item "CCDC equipment" for a cost of £169,575. This purchase was documented in records made publicly available on the Avon and Somerset Police and Crime Commissioner website.²

The article also explains that the acronym "CCDC equipment" appears to refer to "Covert Communications Data Capture" as spelled out in the minutes of an Alliance Governance Group meeting in May 2016 between Warwickshire and West Mercia Police.³ Specifically, the minutes state: "Within the West Midlands region both West Midlands and Staffordshire have recently **purchased and operated 4G compatible CCDC equipment.**"

Privacy International requests the following records:

1. Purchase orders, invoices, contracts, loan agreements, solicitation letters, correspondence with companies and other similar records regarding Avon and Somerset Police's acquisition of CCDC equipment held by the Police and Crime Commissioner. Please include records of all purchase orders, invoices, contracts, agreements, and communications with CellXion.
2. Marketing or promotional materials received by Avon and Somerset Police relating to CCDC equipment.

¹ <https://thebristolcable.org/2016/10/imsi/>

² <https://thebristolcable.org/wp-content/uploads/2016/10/09-imsi-2.pdf>. *

³ <https://thebristolcable.org/wp-content/uploads/2016/10/09-imsi-4.pdf>

3. All requests by CellXion or any other corporation, or any government agencies, to Avon and Somerset Police, or to the Police and Crime Commissioner to keep confidential any aspect of Avon and Somerset's possession and use of CCDC equipment, including any non-disclosure agreements between Avon and Somerset Police and CellXion or any other corporation, or government agency, regarding Avon and Somerset Police's possession and use of CCDC equipment.
4. Legislation, codes of practice, policy statements, guides, manuals, memoranda, presentations, training materials or other records governing the possession and use of CCDC equipment by Avon and Somerset Police, including restrictions on when, where, how, and against whom it may be used, limitations on retention and use of collected data, guidance on when a warrant or other legal process must be obtained, and rules governing when the existence and use of CCDC equipment may be revealed to the public, criminal defendants, or judges.

Privacy International seeks records regardless of how CCDC equipment is identified. In this respect, Privacy International notes that CCDC equipment can be referred to using a range of other terms, including "IMSI Catchers", "IMSI Grabbers", "Cell site simulators" and "Stingrays".

Please include copies of material that you hold either in the form of paper or electronic records, including emails. If possible, please provide all requested records in electronic format.

Upon locating the requested records, please contact us and advise us of any costs of providing copies, so that we may decide whether it is necessary to narrow our request.

We would appreciate a response as soon as possible and look forward to hearing from you shortly. Please furnish the requested records to:

Matthew Rice
Privacy International
62 Britton Street
London EC1M 5UY
matthew@privacyinternational.org

If any portion of this request is denied for any reason, please inform us of the reasons for the denial in writing and provide the name and address of the body to whom an appeal should be directed.

Please do not hesitate to contact me at 020 3422 4321 or matthew@privacyinternational.org if you have any questions about this request. Thank you for your prompt attention.

Sincerely,

Matthew Rice
Advocacy Officer

cc: Scarlet Kim
Legal Officer

EXHIBIT B



AVON AND SOMERSET POLICE AND CRIME COMMISSIONER

Valley Road, Portishead, Bristol BS20 8JJ

E-Mail Address: pcc@avonandsomerset.pnn.police.uk

Telephone (01275) 816377

Facsimile (01275) 816388

29 November 2016

Dear Mr Rice

RE: FREEDOM OF INFORMATION REQUEST – FOI 634

Avon and Somerset Police and Crime Commissioner's office have now completed the search for the information which you requested on 1 November 2016.

INFORMATION PROVIDED

A response to your request for information is provided below, with answers in blue:

Questions:

Privacy International requests the following records:

1. Purchase orders, invoices, contracts, loan agreements, solicitation letters, correspondence with companies and other similar records regarding Avon and Somerset Police's acquisition of CCDC equipment held by the Police and Crime Commissioner. Please include records of all purchase orders, invoices, contracts, agreements, and communications with CellXion.
2. Marketing or promotional materials received by Avon and Somerset Police relating to CCDC equipment.
3. All requests by CellXion or any other corporation, or any government agencies, to Avon and Somerset Police, or to the Police and Crime Commissioner to keep confidential any aspect of Avon and Somerset's possession and use of CCDC equipment, including any non-disclosure agreements between Avon and Somerset Police and CellXion or any other corporation, or government agency, regarding Avon and Somerset Police's possession and use of CCDC equipment.
4. Legislation, codes of practice, policy statements, guides, manuals, memoranda, presentations, training materials or other records governing the possession and use of CCDC equipment by Avon and Somerset Police, including restrictions on when, where, how, and against whom it may be used, limitations on retention and use of collected data, guidance on when a warrant or other legal process must be obtained, and rules governing when the existence and use of CCDC equipment may be revealed to the public, criminal defendants, or judges.

Privacy International seeks records regardless of how CCDC equipment is identified. In this respect, Privacy International notes that CCDC equipment can be referred to using a

range of other terms, including “IMSI Catchers”, “IMSI Grabbers”, “Cell site simulators” and “Stingrays”.

Please include copies of material that you hold either in the form of paper or electronic records, including emails. If possible, please provide all requested records in electronic format.

Answer:

Regarding question 2 and 4, these questions are directed at Avon and Somerset Police and not the office of Avon and Somerset Police and Crime Commissioner. Avon and Somerset Police is aware of your Freedom of Information request and will reply to you directly.

Regarding question 1 and 3, Avon and Somerset Police and Crime Commissioner (PCC) can neither confirm nor deny that the PCC’s office holds any information relevant to your request as the duty in s1(1)(a) of the Freedom of Information Act 2000 does not apply, by virtue of the following exemptions:

Exemptions Applied:

Section 23(5) – Information relating to the Security bodies

Section 24(2) – National security

Section 30(3) – Investigations

Section 31(3) – Law enforcement

Section 23 is an absolute class-based exemption and there is no requirement to consider the public interest test.

Sections 24 and 31 are prejudice based qualified exemptions and there is a requirement to articulate the harm that would be caused in confirming or not that the information is held as well as carrying out a public interest test.

Section 30 is a qualified class-based exemption and there is a requirement to conduct a public interest test.

Overall harm for NCND

By confirming or denying that the Avon and Somerset Police and Crime Commissioner (PCC) holds any information regarding these techniques would in itself disclose exempt information. Stating information is held would confirm usage and the opposite if there is no such information.

Any disclosure under the Freedom of Information Act (FOIA) is a disclosure to the world at large, and confirming or denying the use of specialist techniques which may or may not exist, and which (should they exist) the police service may or may not deploy in specific circumstances would prejudice law enforcement. If the requested information were held by the PCC, confirmation of this fact would reveal that the PCC or Police has access to sophisticated communications analysis techniques.

This would be damaging to Avon and Somerset PCC and also to Avon and Somerset Police as it would:

- i. limit operational capabilities as criminals/terrorists would gain a greater understanding of the police's methods and techniques, enabling them to take steps to counter them; and
- ii. provide an indication to any individual who may be undertaking criminal/terrorist activities that the police service may be aware of their presence and taking counter terrorist measures.

Conversely, if information was not held by the PCC and a denial were issued, this would reveal to those same individuals that their activities are unlikely to have been detected by the police. It may also suggest (whether correctly or not) the limitations of police capabilities in this area, which may further encourage criminal/terrorist activity by exposing a potential vulnerability. Disclosure of the information could confirm to those involved in criminality or terrorism that they are or have been the subject of such activity, allowing them to gauge the frequency of its use and to take measures to circumvent its use. Any compromise of, or reduction in technical capability by Police forces would substantially prejudice the ability of forces to police their areas which would lead to a greater risk to the public.

This detrimental effect is increased if the request is made to several different law enforcement bodies and also PCCs. In addition to the local criminal fraternity now being better informed, those intent on organised crime throughout the UK will be able to 'map' where the use of certain tactics are or are not deployed. This can be useful information to those committing crimes of drugs and terrorist activities.

For example, to state that no information is held in one area and then exempt information held in another, would itself provide acknowledgement that the technique has been used at that second location. This could have the likelihood of identifying location-specific operations, enabling individuals to become aware of whether their activities have been detected. This in turn could lead to them moving their operations, destroying evidence, or avoiding those areas, ultimately compromising police tactics, operations and future prosecutions.

Any information identifying the focus of policing activity could be used to the advantage of terrorists or criminal organisations. Information that undermines the operational integrity of these activities will adversely affect public safety and have a negative impact on both national security and law enforcement.

Public Interest Test

Factors favouring confirming or denying whether any other information is held for Section 24
The public is entitled to know where their public funds are being spent and a better informed public can take steps to protect themselves.

Factors against confirming or denying whether any other information is held for Section 24
By confirming or denying the use of specialist techniques could render Security measures less effective. This could lead to the compromise of ongoing or future operations to protect the security or infra-structure of the UK and increase the risk of harm to the public.

Factors favouring confirming or denying whether any other information is held for Section 30
The public are entitled to know what their public funds are spent on. Investigations may be closed and any proceedings may have been completed, and the investigations may have been high profile and had national implications.

Factors against confirming or denying whether any other information is held for Section 30
By confirming or denying the use of specialist techniques, the force's future law enforcement capabilities would be affected and this would hinder the prevention and detection of crime.

Factors favouring confirming or denying whether any other information is held for Section 31
Better awareness may reduce crime or lead to more information from the public, and the public would be able to take steps to protect themselves. Some information is already in the public domain.

Factors against confirming or denying whether any other information is held for Section 31
By confirming or denying whether such techniques were used would compromise law enforcement tactics and undermine the partnership approach which would hinder the prevention or detection of crime. This would impact on police resources, more crime would then be committed and individuals placed at risk.

Balance Test

The security of the country is of paramount importance and neither the PCC nor the Police service will divulge whether information is or is not held if to do so could undermine National Security or compromise law enforcement. Whilst there is a public interest in the transparency of policing operations and in this case providing assurance that the police service is appropriately and effectively engaging with the threat posed by the criminal fraternity, there is a very strong public interest in safeguarding both national security and the integrity of police investigations and operations in this area.

As much as there is public interest in knowing that policing activity is appropriate and balanced in matters of national security this will only be overridden in exceptional circumstances.

There is also no requirement to satisfy any public concern over the legality of police operations and the tactics the police may or may not use. Police forces are already held to account by statute, for example the Police and Criminal Evidence Act and the Regulation of Investigatory Powers Act and independent bodies such as Her Majesty's Inspectorate of Constabulary, the Independent Police Complaints Commission and the Office of the Surveillance Commissioner. Police accountability is therefore not enhanced by confirming or denying whether any information is held. The PCC is also held to account by bodies such as the Police and Crime Panel and the Independent Police Complaints Commission. PCC accountability is therefore not enhanced by confirming or denying whether any information is held.

Therefore, it is considered that for these issues the balancing test for confirming or denying whether any information is held regarding these techniques is not made out.

None of the above can be viewed as an inference that the information you seek does or does not exist.

If you have any queries about this letter then please contact me, quoting the reference number above in any future communications.

If you are unhappy about how your request has been handled and wish to make a complaint or request a review of the decision then you should write to:

The Chief Executive
Avon and Somerset Police and Crime Commissioner's Office
Valley Road
Portishead
Bristol
BS20 8JJ

Please note, Avon and Somerset Police and Crime Commissioner's office provides you with the right to request a re-examination of your case under its review procedure. The appeals document is attached for your reference.

If you are not content with the outcome of your complaint, you may apply directly to the Information Commissioner for a decision. Generally, the ICO cannot make a decision unless you have exhausted the complaints procedure provided by Avon and Somerset Police and Crime Commissioner's office. The Information Commissioner can be contacted at: <http://ico.org.uk/> or on 0303 123 1113 (local rate) or 01625 545 745 if you prefer to use a national rate number.

Yours sincerely,
Freedom of Information Officer

EXHIBIT C

The Chief Executive
Avon and Somerset Police and Crime Commissioner's Office
Valley Road
Portishead
Bristol
BS20 8JJ

30 January 2017

Re: Freedom of Information Request Reference No. 634

A. Introduction

1. This is an appeal following a refusal to disclose information made by the Avon and Somerset Police and Crime Commissioner ("PCC") on 29 November 2016. Privacy International respectfully requests an internal review of the decision.
2. Privacy International is a UK registered charity. The organisation's mission is to defend the right to privacy and to fight unlawful surveillance and other intrusions into private life, with a focus on the technologies that enable these practices. In seeking the information requested, Privacy International seeks to bring greater accountability and transparency to surveillance practices.

B. Background

3. On 1 November 2016, Privacy International wrote to the Freedom of Information Officer seeking records, pursuant to the Freedom of Information Act 2000, relating to the purchase and use of mobile phone surveillance equipment by Avon and Somerset Police.
4. The request referred to a recent article by a journalist collective making reference to the purchase of equipment from the company CellXion by Avon and Somerset Police under the item "CCDC equipment" for the cost of £169,575. This purchase was documented in records made publically available on the Avon and Somerset PCC website.
5. The request stated that CCDC equipment can be referred to using a range of other terms, including "IMSI Catchers", "IMSI Grabbers", "Cell site simulators" and "Stingrays". For the purposes of this appeal, Privacy International refers to such equipment as "IMSI Catchers".

6. Privacy International requested the following records:

“1. Purchase orders, invoices, contracts, loan agreements, solicitation letters, correspondence with companies and other similar records regarding Avon and Somerset Police’s acquisition of CCDC equipment. Please include records of all purchase orders, invoices, contracts, agreements, and communications with CellXion;

2. Marketing or promotional materials received by Avon and Somerset Police relating to CCDC equipment;

3. All requests by CellXion or any other corporation or any government agencies to Avon and Somerset Police, or to the Police and Crime Commissioner to keep confidential any aspect of the Avon and Somerset’s possession and use of CCDC equipment, including any non-disclosure agreements between Avon and Somerset Police and CellXion or any other corporation or government agency regarding the Avon and Somerset Police’s possession and use of CCDC equipment;

4. Legislation, codes of practice, policy statements, guides, manuals, memoranda, presentations, training materials or other records governing the possession and use of CCDC equipment by Avon and Somerset Police, including restrictions on when, where, how, and against whom it may be used, limitations on retention and use of collected data, guidance on when a warrant or other legal process must be obtained, and rules governing when the existence and use of CCDC equipment may be revealed to the public, criminal defendants, or judges.”

C. The Refusal

7. On 29 November 2016, the Freedom of Information Officer refused the request. The Officer stated that, regarding questions 2 and 4, these were directed at Avon and Somerset Police and not the office of the PCC. These matters were transferred to Avon and Somerset Police.

8. With regards to questions 1 and 3, the refusal relied on ss.23(5), 24(2), 30(3), and 31(3) Freedom of Information Act 2000. The reasons given for the overall harm identified can be summarised as follows:

8.1 That confirming or denying that the Avon and Somerset PCC holds information regarding these techniques would in itself disclose exempt information. Stating information is held would confirm usage and the opposite if there is no such information;

8.2 Any disclosure under the Freedom of Information Act 2000 is a disclosure to the world at large, and NCND use of specialist techniques which may or may not exist, and which (should they exist) the police may or may not deploy in specific

circumstances would prejudice law enforcement. If the requested information was held by the Avon and Somerset PCC, confirmation of this fact would reveal that the Avon and Somerset PCC or police have access to sophisticated communications analysis techniques. This would be damaging as it would:

8.2.1 Limit operational capabilities as criminals/terrorists would gain a greater understanding of the Avon and Somerset PCC and police's methods and techniques, enabling them to take steps to counter them; and

8.2.2 Provide an indication to any individual who may be undertaking criminal/terrorist activities that the Avon and Somerset PCC and police may be aware of their presence and taking counter terrorist measures.

8.3 Conversely, if information was not held by the Avon and Somerset PCC, and a denial was issued, this would reveal to those same individuals that their activities are unlikely to have been detected by the police. It may also suggest (whether correctly or not) the limitations of the police's capabilities in this area, which may further encourage criminal/terrorist activity by exposing a potential vulnerability.

8.4 Disclosure of the information could confirm to those involved in criminality or terrorism that they are or have been the subject of such activity, allowing them to gauge the frequency of its use and to take measures to circumvent its use. Any compromise of, or reduction in technical capacity by the police would substantially prejudice their ability to police their areas which would lead to a greater risk of the public.

8.5 The information could be useful to those committing crimes of drugs and terrorist activity who would be able to 'map' where the use of certain tactics are or are not deployed. Information could enable individuals to become aware of location-specific operations. This could lead to them moving their operations, destroying evidence, or avoiding those areas, ultimately compromising police tactics, operations and future prosecutions.

8.6 There is a very strong public interest in safeguarding both national security and the integrity of police investigations and operations in this area.

8.7 The refusal sets out some of the competing factors under the public interest test under sections 24, 30 and 31.

D. The Appeal

9. The reasons provided by the Avon and Somerset PCC, as set out above, fail to justify the application of NCND in this case. This is for the following four reasons.

10. Firstly, the Avon and Somerset PCC response is predicated on a series of *non-sequiturs*:
 - 10.1 It simply does not follow that merely confirming or denying that a police force uses IMSI catchers would reveal operationally sensitive information about the scope of police activities and operations. This reasoning is not understood. It appears that the Avon and Somerset PCC has confused consideration of “*neither confirm nor deny*” with consideration of the provision of information itself;
 - 10.2 Equally, it does not follow that making similar request to multiple police forces could identify how individuals could map or be aware of how operationally sensitive information is obtained by the various police forces. Different police forces could obtain intelligence in multiple ways. Confirming or denying that a police force holds the requested information does not automatically reveal how tactics are deployed or what technical operations each force has;
 - 10.3 It is not understood why revealing that a police force has sophisticated capabilities to analyse data would limit operational capabilities. The reasoning is nonsensical.
11. Secondly, it fails to have regard to obviously material considerations, including, but not limited to:
 - 11.1 The fact that the Avon and Somerset Police’s purchase of IMSI catchers is already in the public domain, as set out in Privacy International’s original request;
 - 11.2 The fact that the legislative provisions and/or policy guidance requested cannot conceivably fall within any exemption;
 - 11.3 The significant public interest in the topic of IMSI catchers and the regulation of related communications surveillance technologies.
12. Thirdly, when considered forensically, the exemptions relied upon do not apply.
 - 12.1 Under Section 23(5), there has to be a realistic possibility that a security body would be involved in the issue the request relates to in order for the exemption to apply. No such possibility has been set out. Any possibility that is particularised would be too remote to justify the application of this exemption;
 - 12.2 Section 24(2) provides an exemption from the duty to confirm information is held, where the exemption is required for the purposes of safeguarding national security. Section 31(3) also provides an exemption where it is necessary for the prevention or detection of crime. In terms of the public interest, under Section

24, it is alleged that confirming or denying the use of specialist techniques could render security measures less effective. Under section 30, the refusal states that the force's future law enforcement capabilities would be affected and that this would hinder the prevention and detention of crime;

12.3 No real reasons have been set out as to why either exemption applies. By way of example, it cannot seriously be suggested that it would damage national security and/or the prevention or detection of crime to confirm the existence of legislative powers and/or policy guidance;

12.4 Section 30(3) provides that the duty to confirm or deny does not arise in relation to information which is exempt information by virtue of subsection 30(1) or (2). Section 30(1) can only be claimed by public authorities that have a duty to investigate whether someone should be charged with an offence, or the power to conduct such investigations and/or institute criminal proceedings. Section 30(2) protects the identity of confidential sources, primarily to ensure informants are not deterred from supplying law enforcement agencies with valuable intelligence. The ICO Guidance makes it clear at §53 that the s.30 exemptions “*exist to ensure the effective investigation and prosecution of offences and the protection of confidential sources. They recognise the need to prevent disclosures that would prejudice either a particular investigation or set of proceedings, or the investigatory and prosecution processes generally, including any prejudice to future investigations and proceedings.*”¹ None of these matters have been addressed in the response to the request. There is no risk of prejudice to a specific investigation, there is no risk to informants, and there is no risk to confidential sources.

13. When considering whether or not any of these exemptions apply, it is necessary to have regard to the language and purpose of the Freedom of Information Act 2000. The language and purpose of the Act require exemptions to be narrowly construed:

13.1 The word “*required*” in s.1(1)(a) “... *means reasonably necessary. It is not sufficient for the information sought simply to relate to national security; there must be a clear basis for arguing that disclosure would have an adverse effect on national security before the exemption is engaged*”;²

13.2 It is therefore clear that a decision to “*neither confirm nor deny*” requires a clear justification and merits close scrutiny. This is because it flies in the face of the “*default setting*” in the Freedom of Information Act 2000, which is in favour of

¹ <https://ico.org.uk/media/for-organisations/documents/1205/investigations-and-proceedings-foi-section-30.pdf>

² *Philip Kalman v Information Commissioner and the Department of Transport* (EA/2009/111 8 July 2010).

disclosure.³ It also flies in the face of the Article 10 right to receive information, as recently confirmed by the European Court of Human Rights;⁴

13.3 This submission reflects the approach taken to “*neither confirm nor deny*” in parallel contexts. A decision to “*neither confirm nor deny*” “... requires justification similar to the position in relation to public interest immunity ... It is not simply a matter of a governmental party to litigation hoisting the NCND flag and the court automatically saluting it”.⁵

14. Fourthly, as regards the qualified exemptions relied upon, the public interest balancing exercise falls squarely in favour of disclosure:

14.1 No meaningful reasons have been provided as to why there is a public interest in neither confirming nor denying the matters requested in this request;

14.2 There is currently no evidence at all to suggest that the public interest will be harmed to any material extent by disclosure of the information sought;

14.3 The public interest in disclosure is real, it is important that the public are reassured that the measures used to safeguard national security are proportionate and effective;

14.4 Whilst the refusal recognizes that there is a public interest in knowing how public funds are spent, and in knowing that policing activity is appropriate, the refusal states that “*There is no requirement to satisfy any public concern over the legality of police operations and tactics the police may or may not use.*” Inadequate regard has been had to the public interest in the disclosure of the information requested. There is currently a wide-ranging public debate taking place on the ambit of privacy rights in the context of surveillance and technology. There has also been widespread coverage of the purchase and use of IMSI catchers by police forces across the country. The refusal fails to take into account material considerations.

³ *Galloway v Information Commissioner v The Central and North West London NHS Foundation Trust* (2009) 108 BMLR 50, at §70.

⁴ *Magyar Helsinki Bizottság v Hungary* (App. no. 18030/11).

⁵ *Mohamed and another v Secretary of State for the Home Department* [2014] 1 WLR 4240, per Maurice Kay LJ, at §40.

E. The Appeal

15. Privacy International respectfully requests the Avon and Somerset PCC to re-consider the original request made for information as set out above.

Scarlet Kim
Legal Officer
Privacy International

cc: Matthew Rice
Advocacy Officer
Privacy International

EXHIBIT D

From: #PCC PCC@avonandsomerset.police.uk 
Subject: Reply re: Appeal – FOI ref 634 / 17487
Date: 13 February 2017 at 17:53
To: scarlet@privacyinternational.org, matthew@privacyinternational.org

P

For the attention of Scarlet Kim, Legal Officer, Privacy International

Dear Ms Kim

Thank you for your email on 30 January 2017 and I am sorry that you are dissatisfied with the response received from the Police and Crime Commissioner's (PCC's) Freedom of Information Officer.

As Chief Executive Officer for the Avon and Somerset Police and Crime Commissioner, I have the responsibility (delegated by the PCC) to handle this matter and I am independent from the original decision maker, i.e. the PCC's FOI Officer .

You state the following in your section D – The Appeal, starting at paragraph 9:

D. The Appeal

9. The reasons provided by the Avon and Somerset PCC, as set out above, fail to justify the application of NCND in this case. This is for the following four reasons.

10. Firstly, the Avon and Somerset PCC response is predicated on a series of nonsequiturs:

10.1 It simply does not follow that merely confirming or denying that a police force uses IMSI catchers would reveal operationally sensitive information about the scope of police activities and operations. This reasoning is not understood. It appears that the Avon and Somerset PCC has confused consideration of "neither confirm nor deny" with consideration of the provision of information itself;

10.2 Equally, it does not follow that making similar request to multiple police forces could identify how individuals could map or be aware of how operationally sensitive information is obtained by the various police forces. Different police forces could obtain intelligence in multiple ways. Confirming or denying that a police force holds the requested information does not automatically reveal how tactics are deployed or what technical operations each force has;

10.3 It is not understood why revealing that a police force has sophisticated capabilities to analyse data would limit operational capabilities. The reasoning is nonsensical.

11. Secondly, it fails to have regard to obviously material considerations, including, but not limited to:

11.1 The fact that the Avon and Somerset Police's purchase of IMSI catchers is already in the public domain, as set out in Privacy International's original request;

11.2 The fact that the legislative provisions and/or policy guidance requested cannot conceivably fall within any exemption;

11.3 The significant public interest in the topic of IMSI catchers and the regulation of related

communications surveillance technologies.

12. Thirdly, when considered forensically, the exemptions relied upon do not apply.

12.1 Under Section 23(5), there has to be a realistic possibility that a security body would be involved in the issue the request relates to in order for the exemption to apply. No such possibility has been set out. Any possibility that is particularised would be too remote to justify the application of this exemption;

12.2 Section 24(2) provides an exemption from the duty to confirm information is held, where the exemption is required for the purposes of safeguarding national security. Section 31(3) also provides an exemption where it is necessary for the prevention or detection of crime. In terms of the public interest, under Section 24, it is alleged that confirming or denying the use of specialist techniques could render security measures less effective. Under section 30, the refusal states that the force's future law enforcement capabilities would be affected and that this would hinder the prevention and detection of crime;

12.3 No real reasons have been set out as to why either exemption applies. By way of example, it cannot seriously be suggested that it would damage national security and/or the prevention or detection of crime to confirm the existence of legislative powers and/or policy guidance;

12.4 Section 30(3) provides that the duty to confirm or deny does not arise in relation to information which is exempt information by virtue of subsection 30(1) or (2).

Section 30(1) can only be claimed by public authorities that have a duty to investigate whether someone should be charged with an offence, or the power to conduct such investigations and/or institute criminal proceedings.

Section 30(2) protects the identity of confidential sources, primarily to ensure informants are not deterred from supplying law enforcement agencies with valuable intelligence.

The ICO Guidance makes it clear at §53 that the s.30 exemptions “exist to ensure the effective investigation and prosecution of offences and the protection of confidential sources. They recognise the need to prevent disclosures that would prejudice either a particular investigation or set of proceedings, or the investigatory and prosecution processes generally, including any prejudice to future investigations and proceedings.”¹ None of these matters have been addressed in the response to the request. There is no risk of prejudice to a specific investigation, there is no risk to informants, and there is no risk to confidential sources.

13. When considering whether or not any of these exemptions apply, it is necessary to have regard to the language and purpose of the Freedom of Information Act 2000. The language and purpose of the Act require exemptions to be narrowly construed:

13.1 The word “required” in s.1(1)(a) “... means reasonably necessary. It is not sufficient for the information sought simply to relate to national security; there must be a clear basis for arguing that disclosure would have an adverse effect on national security before the exemption is engaged”;²

13.2 It is therefore clear that a decision to “neither confirm nor deny” requires a clear justification and merits close scrutiny. This is because it flies in the face of the “default setting” in the Freedom of Information Act 2000, which is in favour of disclosure.³ It also flies in the face of the Article 10 right to receive information, as recently confirmed by the European Court of Human Rights;⁴

13.3 This submission reflects the approach taken to “neither confirm nor deny” in parallel contexts. A decision to “neither confirm nor deny” “... requires

justification similar to the position in relation to public interest immunity ... It is not simply a matter of a governmental party to litigation hoisting the NCND flag and the court automatically saluting it".⁵

14. Fourthly, as regards the qualified exemptions relied upon, the public interest balancing exercise falls squarely in favour of disclosure:

14.1 No meaningful reasons have been provided as to why there is a public interest in neither confirming nor denying the matters requested in this request;

14.2 There is currently no evidence at all to suggest that the public interest will be harmed to any material extent by disclosure of the information sought;

14.3 The public interest in disclosure is real, it is important that the public are reassured that the measures used to safeguard national security are proportionate and effective;

14.4 Whilst the refusal recognizes that there is a public interest in knowing how public funds are spent, and in knowing that policing activity is appropriate, the refusal states that "There is no requirement to satisfy any public concern over the legality of police operations and tactics the police may or may not use." Inadequate regard has been had to the public interest in the disclosure of the information requested. There is currently a wide-ranging public debate taking place on the ambit of privacy rights in the context of surveillance and technology. There has also been widespread coverage of the purchase and use of IMSI catchers by police forces across the country. The refusal fails to take into account material considerations.

1 <https://ico.org.uk/media/for-organisations/documents/1205/investigations-and-proceedings-foi-section-30.pdf>

2 *Philip Kalman v Information Commissioner and the Department of Transport* (EA/2009/111 8 July 2010).

3 *Galloway v Information Commissioner v The Central and North West London NHS Foundation Trust* (2009) 108 BMLR 50, at §70.

4 *Magyar Helsinki Bizottság v Hungary* (App. no. 18030/11).

5 *Mohamed and another v Secretary of State for the Home Department* [2014] 1 WLR 4240, per Maurice Kay LJ, at §40.

Having considered the arguments in the original response to Mr Rice on 29 November 2016 by the PCC's FOI officer, your appeal arguments on 30 January 2017 – and considering that utilizing the 'neither confirm nor deny' approach requires a broad/non-case specific public interest test - and reviewing all the circumstances, I conclude that this approach has been satisfactorily applied in this case. Therefore, I do not uphold the appeal.

I would like to reiterate that none of the information in the response can be viewed as an inference that the information you seek does or does not exist.

If you are still dissatisfied then you have the right to direct your comments to the Information Commissioner who will give it due consideration. The Information Commissioner can be contacted at: <http://ico.org.uk/> or on 0303 123 1113 or 01625 545 745.

Yours sincerely

John Smith

Chief Executive Officer

Tel: 01275 816377



POUCE & CRIME
COMMISSIONER

Avon and Somerset Police and Crime Commissioner,
Valley Road, Portishead, Bristol, BS20 8JJ

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Avon and Somerset Constabulary

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EXHIBIT E

A Comparative Perspective: IMSI Catcher Freedom of Information Requests in the United States

I. Introduction

In the United States, a range of requests pursuant to federal and state freedom of information laws relating to law enforcement acquisition, use and regulation of IMSI Catchers have resulted in the disclosure of relevant records, including purchase records, product descriptions, non-disclosure agreements and policy guidance. These records were disclosed notwithstanding exemptions under the relevant laws protecting certain categories of information, including information classified to protect national security and information related to law enforcement techniques and procedures. Privacy International provides an overview of US freedom of information laws, a summary of these requests, and a summary of the records produced, which are publicly available. It believes that this comparative perspective may prove useful to the Information Commissioner in considering the refusals of the public bodies to confirm or deny the existence of records relating to the acquisition, use and regulation of IMSI Catchers in the UK.

II. A Summary of US Freedom of Information Laws

In the United States, the Freedom of Information Act (“FOIA”), which took effect in 1967, provides that any person has a right, enforceable in court, to obtain access to federal agency records, except to the extent that such records (or portions of them) are protected from public disclosure pursuant to an exemption or exclusion.¹ FOIA therefore established a statutory right of public access to information held by the Executive Branch in the federal government. The United States Supreme Court has explained that “[t]he basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed.”² It has further submitted that FOIA is a “means for citizens to know ‘what their Government is up to’” and that “[t]his phrase should not be dismissed as a convenient formalism” but rather, “defines a structural necessity in a real democracy.”³ Thus FOIA features “broad provisions favouring disclosure, coupled with the specific exemptions” reflecting the intent of Congress “to reach a workable balance between the right of the public to know and the need of the Government” to protect certain information.⁴

¹ 5 U.S.C. §552 (2006), amended by OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524; see also DOJ Guide to the Freedom of Information Act (2009 edition), available at <https://www.justice.gov/oip/doj-guide-freedom-information-act>. Unlike the UK, which excludes certain bodies like the National Crime Agency and Government Communications Headquarters from the Freedom of Information Act 2000, no federal agency benefits from a similar blanket exclusion from FOIA. As a point of comparison, both the Federal Bureau of Investigation (“FBI”) and the National Security Agency are subject to FOIA.

² NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978).

³ NARA v. Favish, 541 U.S. 157, 171-72 (2004) (quoting DOJ v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 774 (1989)).

⁴ John Doe Agency v. John Doe Corp., 493 U.S. 146, 152-53 (1989) (quoting H.R. Rep. No. 89-1497, at 6 (1966)); see also Dep’t of the Air Force v. Rose, 425 U.S. 352, 361 (1976) (holding that “limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act”).

FOIA articulates nine exemptions from disclosure, and they are generally discretionary, rather than mandatory, in nature.⁵ The exemptions are:⁶

1. Information that is classified in the interest of national defence or foreign policy
2. Information related solely to the internal personnel rules and practices of an agency⁷
3. Information that is specifically exempted from disclosure by another federal law
4. Trade secrets and commercial or financial information obtained from a person and privileged or confidential
5. Privileged communications within or between agencies, such as those protected by attorney-work product privilege and attorney-client privilege
6. Information that, if disclosed, would constitute a clearly unwarranted invasion of personal privacy, such as personnel or medical files
7. Information compiled for law enforcement purposes that
 - a. Could reasonably be expected to interfere with enforcement proceedings
 - b. Would deprive a person of a right to a fair trial or impartial adjudication
 - c. Could reasonably be expected to constitute an unwarranted invasion of personal privacy
 - d. Could reasonably be expected to disclose the identity of a confidential source
 - e. Would disclose techniques and procedures for law enforcement investigations or prosecutions or guidelines for investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law
 - f. Could reasonably be expected to endanger the life or physical safety of any individual
8. Information that concerns the supervision of financial institutions
9. Geological and geophysical information on wells

In addition to exemptions, FOIA also articulates three narrow categories of exclusions for particularly sensitive law enforcement matters. These exclusions permit a federal law enforcement agency, in three exceptional circumstances, to “treat the records as not subject to the requirements of [FOIA].”⁸ The exclusions are designed to protect the existence of:

1. An ongoing criminal law enforcement investigation when the subject of the investigation is unaware that it is pending and disclosure could reasonably be expected to interfere with enforcement proceedings
2. Informant records when the informant’s status has not been officially confirmed (limited to criminal law enforcement agencies)

⁵ See 5 U.S.C. §552(b), (d); see also *Chrysler Corp. v. Brown*, 441 U.S. 281, 293 (1979).

⁶ For detail on the exemptions and general FOIA processes, see *Federal Open Government Guide*, RCFP (2009) <https://www.rcfp.org/rcfp/orders/docs/HOW2FOI.pdf>; *Freedom of Information Act Exemptions*, U.S. Dept. of Justice, 23 July 2014, <https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/foia-exemptions.pdf>.

⁷ This exemption covers both internal “housekeeping” or personnel documents that Congress determined were not within the public interest, and any documents that could be used to circumvent laws or gain unfair advantage over members of the public.

⁸ 5 U.S.C. § 552(c)(1), (c)(2), (c)(3).

3. Foreign intelligence or counterintelligence, or international terrorism records when the existence of such records is classified (limited to the FBI)

Unlike the UK's Freedom of Information Act 2000, there are no provisions explicitly addressing a "neither confirm nor deny" response to an information request in the federal FOIA. However, the US government has sometimes taken the position that even confirming or denying the existence of information is necessary pursuant to two of the exemptions. This position is referred to as a "Glomar" response. First, agencies may assert that confirming or denying the existence of information could compromise national security (under the first exemption).⁹ Second, agencies may assert that confirming or denying the existence of information relating to a person's involvement in a criminal investigation would constitute a violation of privacy (under the seventh exemption).¹⁰

Generally speaking, the FOIA process is as follows. An individual submits a written FOIA request, which must "*reasonably describe*" the records sought, to an agency's designated FOIA office.¹¹ The agency has 20 working days to make a determination on the request. A requester has the right to administratively appeal any adverse determination made on the initial request. The agency has 20 working days to make a determination on an administrative appeal.¹² A requester may thereafter seek to compel production of any requested records by filing a complaint in a United States federal district court.

States also have their own open records laws, which govern access to state agency records. While the specific provisions of these frameworks vary state by state, many of these frameworks mimic the purpose and structure of federal FOIA.¹³ For example, the New York Freedom of Information Law ("FOIL") was intentionally "*patterned after the federal Freedom of Information Act, and accordingly, federal case law and legislative history on the scope of the federal act are instructive in interpreting New York's law, including its exemptions.*"¹⁴ Thus, FOIL similarly provides a right, enforceable in court, to obtain access to state agency records, except to the extent that such records (or portions of them) are protected from public disclosure pursuant to an exemption. Many of the exemptions are similar to those articulated in FOIA, including, *inter alia*, information specifically exempted from disclosure by another state or federal law; trade secrets; and information compiled for specified law enforcement purposes. The procedure for requesting records and challenging adverse

⁹ Reporters Committee for Freedom of the Press, *Federal FOIA Appeals Guide*, Exemption 1, Pt. II.F, <https://www.rcfp.org/federal-foia-appeals-guide/exemption-1/ii-appealing-agency%E2%80%99s-withholding-records-substantive-grou-10>.

¹⁰ *Id.* at Exemption 7, Pt. I.C.iii. <https://www.rcfp.org/federal-foia-appeals-guide/exemption-7/ii-harm-disclosure/c-7c/iii-glomar-response>.

¹¹ 5 U.S.C. § 552 (a)(3)(A).

¹² An agency's failure to comply with the time limits to respond to an initial request or an administrative appeal may be treated as "constructive exhaustion", entitling the requester to seek judicial review. *See* 5 U.S.C. § 552(a)(6)(C).

¹³ A comprehensive guide to each state's open laws framework is available at Reporters Committee for a Free Press, *Open Government Guide*, <https://www.rcfp.org/open-government-guide>.

¹⁴ Reporters Committee for Freedom of the Press, *New York – Open Government Guide*, Pt. II.A.1.c, <https://www.rcfp.org/new-york-open-government-guide/ii-exemptions-and-other-legal-limitations/exemptions-open-records-s-3> (citing relevant New York case law in support of this statement).

determinations is also similar to that provided by FOIA, albeit with slightly different timelines for an agency's response.

III. FOIA Requests to Federal Agencies for IMSI Catcher Records

In the United States, a wide array of federal agencies deploy IMSI Catchers, including the FBI, the Drug Enforcement Administration (“DEA”), and Immigration and Customs Enforcement (“ICE”).¹⁵ Civil society organisations have managed to obtain information regarding these agencies' acquisition, use and regulation of IMSI Catchers through FOIA requests. Below, Privacy International summarises several of these requests and the information that was disclosed as a result. It is worth noting that none of the federal agencies subject to FOIA requests in the examples described below relied on a Glomar (*i.e.* NCND) response.

A. Electronic Privacy Information Center – FBI

In February 2012, the Electronic Privacy Information Center (“EPIC”) submitted a FOIA request to the FBI seeking information concerning contracts relating to IMSI Catchers, technical specifications of IMSI Catchers, the legal basis for the use of IMSI Catchers, procedural requirements or guidelines for using IMSI Catchers, and Privacy Impact Assessments or Reports concerning the use of IMSI Catchers.¹⁶ The FBI released documents in 13 batches, in part as a result of an EPIC suit to compel production. The disclosed records include internal DOJ guidance on IMSI Catchers, including procedures for loaning electronic surveillance devices to state police.¹⁷ They further reveal that the FBI has been using IMSI Catchers since at least the mid-1990s,¹⁸ has established a specialist mobile phone surveillance group called the “Wireless Intercept and Tracking Team”, and uses other mobile phone surveillance devices, in addition to IMSI Catchers.¹⁹

B. American Civil Liberties Union of Northern California – Department of Justice

In April 2013, the American Civil Liberties Union (“ACLU”) of Northern California submitted a FOIA request to the Department of Justice (“DOJ”) seeking information about

¹⁵ ACLU, *Stingray Tracking Devices: Who's Got Them?*, <https://www.aclu.org/issues/privacy-technology/surveillance-technologies/stingray-tracking-devices-whos-got-them>.

¹⁶ *EPIC v. FBI – Stingray / Cell Site Simulator*, EPIC, <https://epic.org/foia/fbi/stingray/>.

¹⁷ Ryan Gallagher, *FBI Documents Shine Light on Clandestine Cellphone Tracking Tool*, Slate, 10 Jan. 2013, http://www.slate.com/blogs/future_tense/2013/01/10/stingray_imsi_catcher_fbi_documents_shine_light_on_controversial_cellphone.html. All of the disclosed records are available on the EPIC website at *EPIC v. FBI – Stingray / Cell Site Simulator*, EPIC, <https://epic.org/foia/fbi/stingray/>.

¹⁸ Ryan Gallagher, *FBI Files / History Behind Clandestine Cellphone Tracking Tool*, Slate, 15 Feb. 2013, http://www.slate.com/blogs/future_tense/2013/02/15/stingray_imsi_catcher_fbi_files_unlock_history_behind_cellphone_tracking.html.

¹⁹ Ryan Gallagher, *FBI Files Reveal New Info on Clandestine Phone Surveillance Unit*, Slate, 8 Oct. 2013, http://www.slate.com/blogs/future_tense/2013/10/08/fbi_wireless_intercept_and_tracking_team_files_reveal_new_information_on.html.

the federal government's use of IMSI Catchers.²⁰ Following a suit to challenge DOJ's refusal to disclose the requested records, the court ordered the government to produce a portion of the requested records. The disclosed records include memos and "template" court applications that DOJ provides to federal prosecutors as well as procedures for the "Emergency Installation" of IMSI Catchers.²¹

C. American Civil Liberties Union – Various Federal Agencies

In November 2014, the ACLU sent a FOIA request to several federal law enforcement agencies seeking information concerning their use of IMSI Catchers mounted on aircraft to track and locate cell phones.²² The request was sent to the FBI, DEA, ICE and the U.S. Marshals Service. The disclosed records include:²³

- Contracts and other purchase records, which reveal that the U.S. Marshals Service spent more than \$10 million in hardware and software purchases from Harris Corporation, the leading U.S. vendor of IMSI Catchers, from 2009 to 2014
- Policy directives from the U.S. Marshals Service Technical Operations Group, which discuss the rules for various kinds of electronic and aerial surveillance, although they do not clearly explain the rules applying to airborne IMSI Catchers
- Purchase records, which reveal that the DEA's El Paso Division purchased \$412,871 in IMSI Catcher equipment in 2013

A similar request by the Electronic Frontier Foundation to the DOJ and the FBI also resulted in the disclosure of records. Those records include internal emails and presentations from the FBI, which contain discussions between FBI lawyers and the Operational Technology Division, which develops and oversees the FBI's surveillance techniques.²⁴

IV. Freedom of Information Requests to State Agencies for IMSI Catcher Records

In addition to the federal agencies, a large number of state agencies also deploy IMSI Catchers. Civil society organisations and journalists have similarly managed to obtain

²⁰ *ACLU v. DOJ*, ACLU of Northern California, 13 Jan. 2016, <https://www.aclunc.org/our-work/legal-docket/aclu-v-doj-stingrays>.

²¹ All of the disclosed records are available on the ACLU of Northern California website at Linda Lye, *New Docs: DOJ Admits that StingRays Spy on Innocent Bystanders*, ACLU of Northern California, Oct. 28, 2015, <https://www.aclunc.org/blog/new-docs-doj-admits-stingrays-spy-innocent-bystanders>.

²² Nathan Freed Wessler, *ACLU Releases New FOIA Documents on Aerial Cell Phone Surveillance*, ACLU, 17 Mar. 2016, <https://www.aclu.org/blog/privacy-technology/surveillance-technologies/aclu-releases-new-foia-documents-aerial-cell-phone>.

²³ All of the disclosed records are available at Wessler, *ACLU Releases New FOIA Documents*, <https://www.aclu.org/blog/privacy-technology/surveillance-technologies/aclu-releases-new-foia-documents-aerial-cell-phone>.

²⁴ Andrew Crocker, *New FOIA Documents Confirm FBI Used Dirtboxes on Planes Without Any Policies or Legal Guidance*, Electronic Frontier Foundation, 9 Mar. 2016, <https://www.eff.org/deeplinks/2016/03/new-foia-documents-confirm-fbi-used-dirtboxes-planes-without-any-policies-or-legal>. All of the disclosed records are available at *US Marshals Airborne IMSI Catchers*, Electronic Frontier Foundation, <https://www.eff.org/cases/us-marshals-airborne-imsi-catchers>.

information regarding these agencies' acquisition, use and regulation of IMSI Catchers through FOIA requests. Below, Privacy International summarises several of these requests and the information that was disclosed as a result.

A. Florida

In 2014, the ACLU sent a request pursuant to the Florida Public Records Law to three dozen police and sheriffs' departments in Florida seeking information, *inter alia*, concerning the acquisition, use, and regulation of IMSI Catchers.²⁵ The records disclosed include:²⁶

Florida Department of Law Enforcement ("FDLE")

- Documents revealing the FLDE has:
 - Spent more than \$3 million on IMSI Catchers and related equipment since 2008
 - Signed agreements with at least 11 local and regional law enforcement agencies to permit them to use and share its IMSI Catchers
 - Identified 1,835 uses of IMSI Catcher equipment in Florida
- A confidentiality agreement between the FLDE and Harris Corporation

Tallahassee Police Department ("TPD")

- Documents revealing the TPD has:
 - Used IMSI Catchers in more than 250 investigations between 2007 and 2014, with robbery, burglary, and theft investigations representing nearly a third of the total
 - Permitted other police departments to use IMSI Catchers the TPD had borrowed from the FLDE
- The full investigative files from 11 cases where IMSI Catchers were used

Miami-Dade Police Department

- Purchase records for IMSI Catchers from Harris Corporation
- Documents indicating it has used IMSI Catchers in 59 closed criminal cases within a one-year period ending in May 2014

In general, the records disclosed revealed that in many investigations, the police failed to seek a court order to use an IMSI Catcher and, in circumstances where they did, they failed to seek a warrant (relying instead on a court order with a lower legal threshold). Furthermore, they revealed a pattern of secrecy, including concealing information about the use of IMSI Catchers in investigative files and court filings. None of the agencies produced any policies

²⁵ Nathan Freed Wessler, *ACLU-Obtained Documents Reveal Breadth of Secretive Stingray Use in Florida*, ACLU, 22 Feb. 2015, <https://www.aclu.org/blog/free-future/aclu-obtained-documents-reveal-breadth-secretive-stingray-use-florida?redirect=blog/national-security-technology-and-liberty/aclu-obtained-documents-reveal-breadth-secretive-sting>.

²⁶ All of the disclosed records are available at *Florida Stingray FOIA*, ACLU, 22 Feb. 2015, <https://www.aclu.org/cases/florida-stingray-foia>.

or guidelines governing their use of IMSI Catchers or restricting how and when they can be deployed.²⁷

B. New York

In 2014, the New York Civil Liberties Union (“NYCLU”) sent a FOIL request to the New York State Police and the Erie County Sheriff’s Office seeking information, *inter alia*, concerning the acquisition, use, and regulation of IMSI Catchers. In 2014, it sent the same FOIL request to the New York City Police Department (“NYPD”) and the Rochester Police Department (“RPD”).

The records disclosed by the New York State Police include invoices and purchase orders for IMSI Catchers.²⁸

The records disclosed by the Erie County Sheriff’s Office following a lawsuit by the NYCLU include:

- Purchase orders
- A letter from the manufacturer of the IMSI Catcher
- A confidentiality agreement between the Sheriff’s Office and the FBI, requiring the Sheriff’s Office to maintain near total secrecy over Stingray records, including in court filings, unless the Office receives written consent from the FBI
- A procedural manual
- Summary reports of instances when the IMSI Catcher was used, revealing that the Sheriff’s Office used Stingrays at least 47 times between 2010 and 2014 and only obtained a court order in one of those instances

It is worth noting that the court determined that the Sheriff’s Office had “*no reasonable basis for denying access*” to the records sought by the NYCLU.

The records disclosed by the RPD include:

- Documents revealing that the RPD has spent approximately \$200,000 since 2011 on IMSI Catcher hardware, software and training
- Correspondence between the RPD and Harris Corporation suggesting that IMSI Catchers may require costly yearly maintenance subscriptions to remain operational and revealing that Harris Corporation attempted to coax the RPD to spend approximately \$388,000 to upgrade their existing IMSI Catcher in 2013
- A confidentiality agreement between the RPD and the FBI
- Surveillance policies, including instructions regarding use of its IMSI Catcher

²⁷ See Wessler, *ACLU-Obtained Documents Reveal Breadth of Secretive Stingray Use in Florida*, <https://www.aclu.org/blog/free-future/aclu-obtained-documents-reveal-breadth-secretive-stingray-use-florida?redirect=blog/national-security-technology-and-liberty/aclu-obtained-documents-reveal-breadth-secretive-sting>.

²⁸ All of the disclosed records are available at *Stingrays*, NYCLU, <https://www.nyclu.org/en/stingrays>.

- Documents revealing that the RPD used its IMSI Catcher 13 times between 2012 and 2015 and sought legal authorization approximately 69% of the time

The records disclosed by the NYPD include documents revealing that it used IMSI Catchers over 1,000 times between 2008 and 2015 without a written policy and without obtaining a warrant (but rather a “pen register order” that requires the government to meet a lower legal threshold). The NYCLU is engaged in ongoing litigation against the NYPD to compel production of other records pursuant to its FOIL request.²⁹

C. Michigan

In 2015, the ACLU of Michigan submitted a request pursuant to the Michigan Freedom of Information Act to the Michigan State Police (“MSP”) seeking records, *inter alia*, concerning the acquisition, use, and regulation of IMSI Catchers.³⁰ The MSP released records in two batches; those records include:³¹

- Invoices, emails and other documents relating to the purchase and upgrade of IMSI Catcher equipment
- Documents revealing that IMSI Catchers were used in 128 cases ranging from homicide to burglary and fraud in 2014

D. CityLab

In 2016, the media outlet CityLab sent freedom of information requests to 50 of the largest police departments across the United States seeking information relating to the acquisition of mobile phone surveillance devices, including IMSI Catchers.³² Of the 50 departments who received such requests, only eight claimed not to have acquired any of the mobile phone surveillance tools identified by CityLab; at least 12 admitted to having IMSI Catchers. CityLab also identified that departments with IMSI Catchers were largely seeking to improve their surveillance capabilities through upgrades to this equipment.³³

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²⁹ *NYCLU Sues NYPD After It Refuses to Disclose Critical Information about Stingrays*, NYCLU, 19 May 2016, <https://www.nyclu.org/en/press-releases/nyclu-sues-nypd-after-it-refuses-disclose-critical-information-about-stingrays>.

³⁰ *See MSP Stingray FOIA*, ACLU, <https://www.aclu.org/legal-document/msp-stingray-foia>.

³¹ All of the disclosed records can be found at *MSP Stingray FOIA – Initial Release*, ACLU, <https://www.aclu.org/legal-document/msp-stingray-foia-initial-release> and *MSP Stingray FOIA - Second Release*, ACLU, <https://www.aclu.org/legal-document/msp-stingray-foia-second-release>; see also Joel Kurth, *Michigan State Police Using Cell Snooping Devices*, *The Detroit News*, 22 Oct. 2015, <http://www.detroitnews.com/story/news/local/michigan/2015/10/22/stingray/74438668/>.

³² George Joseph, *Cellphone Spy Tools Have Flooded Local Police Departments*, CityLab, 8 Feb. 2017, <https://www.citylab.com/equity/2017/02/cellphone-spy-tools-have-flooded-local-police-departments/512543/>.

³³ All of the disclosed records can be found at <https://www.documentcloud.org/public/search/projectid:%2031525-police-acquisitions-of-cell-phone-surveillance-devices>.