

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 10 July 2018

Public Authority: Police and Crime Commissioner for West Mercia
Address: Office of the Police and Crime Commissioner
West Mercia Police
Hindlip Hall
Worcester
WR3 8SP

Complainant: Rosie Brighthouse obo Privacy International
Address: rosieb@libertyhumanrights.org.uk

Decision (including any steps ordered)

1. The complainant has requested information about the purchase and use of Covert Communications Data Capture ("CCDC") from the West Mercia Office of the Police and Crime Commissioner (the "OPCC"). In respect of parts (1) to (3) of the request, the OPCC confirmed holding some information but advised that it was exempt from disclosure under sections 24(1) (national security) and 31(1) (law enforcement). In respect of part (4) of the request it would neither confirm nor deny ("NCND") holding any further information citing section 23(5) (information supplied by, or relating to, bodies dealing with security matters); it also referred to section 21(1) (information accessible by other means) which it later clarified it did not intend to rely on.
2. The Commissioner's decision is that, in respect of parts (1) to (3) of the request, the OPCC was entitled to rely on section 24(1). She also finds that part (4) of the request was addressed to a different public authority and the OPCC should have advised the complainant accordingly. No steps are required.

Background

3. The Commissioner is considering 9 related cases from this complainant in respect of similar information requests being made to different public authorities. They are dealt with under reference numbers FS50728051 to FS50728059 inclusive.
4. As the different authorities dealt with their requests within different time frames the Commissioner agreed to deal with the substantive complaint about all the requests outside of her usual 3 month deadline for accepting complaints. This agreement was made in advance, in May 2017, when some refusal notices / internal reviews were outstanding for some of the public authorities concerned.

Request and response

5. On 1 November 2016 the complainant wrote to the OPCC and requested information in the following terms:

"I am writing on behalf of [name removed] to seek records ... relating to the purchase and use of mobile phone surveillance equipment by the West Mercia Police.

Alliance Governance Group Meeting Minutes

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". The article makes reference to the minutes of an Alliance Governance Group meeting in May 2016 between Warwickshire and West Mercia Police in which the topic of "Covert Communications Data Capture" (CCDC) equipment was discussed.

Specifically, the minute's record that three options relating to "CCDC replacement" were discussed:

"Option 1 – Upgrading the existing equipment with the current supplier.

Option 2 – Replacing the existing equipment with the current supplier's new product.

Option 3 – Replacing the existing equipment with a new supplier."

The minutes go on to observe that: "Within the West Midlands region both West Midlands and Staffordshire Police have recently purchased and operated 4G compatible CCDC equipment. Both have purchased the same equipment from the company referred to

in option 3." The Minutes indicate that the following decision was made: "Both PCCs [West Mercia and Warwickshire Police and Crime Commissioners] agreed to Replacing the existing equipment with a new supplier."

Guardian Article

I also refer to the 10 October 2016, the Guardian published the article "Controversial snooping technology 'used by at least seven police forces'" in which you were quoted as saying¹:

"I have seen real-life examples of the difference this technology can make in protecting extremely vulnerable people in our society. It is absolutely appropriate that the police can make use of this technology in order to keep people safe.

It is very important to me that civil liberties are upheld and respected. I am reassured on behalf of our local communities that the safeguards and processes in place will ensure this technology will be used appropriately and proportionately."

Record Requests

[Name removed] requests the following records:

- 1. Records relating to the purchase of "existing" CCDC equipment, referred to in the Alliance Government Group minutes referenced above, including purchase orders, invoices, contracts, loan agreements, solicitation letters, correspondence with companies and other similar records.*
- 2. Records relating to the purchase of replacement CCDC equipment, referred to in the Alliance Government Group minutes referenced above, including purchase orders, invoices, contracts, loan agreements, solicitation letters, correspondence with companies and other similar records.*
- 3. Records relating to the decision "to Replace[] the existing [CCDC] equipment with a new supplier", referred to in the Alliance Governance Group minutes referenced above, including any records referred to or consulted in reaching that decision.*

¹ https://www.theguardian.com/world/2016/oct/10/controversial-phone-snooping-technologyimsi-catcher-seven-police-forces?CMP=tw_t_gu

4. Records relating to the "safeguards and processes in place" to ensure CCDC equipment "will be used appropriately and proportionately" that you referred to in the Guardian article referenced above.

5. Any other records, including legislation, codes of practice, policy statements, guides, manuals, memoranda, presentations, training materials or other records governing the use of CCDC equipment by West Mercia 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.

[Name removed] seeks records regardless of how CCDC equipment is identified. In this respect, [name removed] 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".

6. Having extended the time in which to consider the public interest, the OPCC responded on 20 December 2016. It summarised the original (5) part request as follows, making no reference to the information which was originally requested at part (4) of the request:

- 1. Records relating to the purchase of existing CCDC equipment;*
- 2. Records relating to the purchase of replacement CCDC equipment;*
- 3. Records relating to the decision to replace existing equipment with a new supplier; and*
- 4. Legislation, codes of practice, policy statements etc governing the use of CCDC equipment.*

7. It stated that, in respect of parts (1) to (3) of the request, it held a small amount of information which was exempt from disclosure by virtue of sections 24(1) and 31(1)(a) and (b) of the FOIA. It would neither confirm nor deny holding any information in respect of part (4) of the request citing section 23(5).

8. On 22 May 2017 the complainant requested an internal review. She made no comment regarding the lack of response to the original part (4) of the request, instead, presenting her arguments based on the same numbering as provided by the OPCC in paragraph (6) above. Therefore, the Commissioner has continued to use this numbering for ease of reference, and, as this omission has not been disputed by the complainant at any point, it will not be further considered.
9. Following its internal review the OPCC wrote to the complainant on 13 July 2017. It maintained its position, also referring to section 21 of the FOIA for part (4) of the request in respect of any relevant legislation which may already be available in the public domain.

Scope of the case

10. The complainant initially contacted the Commissioner on 17 May 2017. She advised of her intention to file a number of related complaints against different public authorities and requested a pause in the time limit for bringing such complaints.
11. Having received the necessary responses from all of the various public authorities, with the exception of two internal reviews, the complainant wrote to the Commissioner again on 16 February 2018 with her grounds of complaint in this case. She asked the Commissioner to consider the application of the exemptions cited.
12. During the Commissioner's investigation, the OPCC confirmed that it was not relying on section 21 saying:

"We did not and do not rely on s21. The reference in the internal review to s21 was only a general comment as part of a concluding discussion".
13. The Commissioner has therefore not considered section 21.
14. The Commissioner raised further queries with the OPCC regarding its citing of section 23(5) to part (4) of the request. She asked whether the PCC itself would actually hold this type of 'operational' information, pointing out that the wording of this part of the request actually specified legislation / documentation "*governing the use of CCDC equipment by West Mercia Police*", ie **not** by the OPCC.
15. In responding the OPCC advised:

"Having checked, we should have asked [the complainant] to forward part 4 of their request ... to West Mercia Police. The OPCC's role is a governance, non-operational role and on a further review

of the wording, of the request, it is clear that it was not for the OPCC to deal with.

The OPCC does not, therefore, wish to maintain reliance on the section 23(5) exemption”.

16. From an objective reading of the wording of the request it is clear to the Commissioner that the complainant is enquiring about any legal basis for the use of CCDC equipment by West Mercia Police rather than the OPCC itself. She therefore accepts the OPCC's revised position that it should have directed the complainant to either make this part of the request to West Mercia Police or offered to transfer it on her behalf. Further comments on this can be found in "Other matters" at the end of this notice.
17. The OPCC's change in position regarding sections 21 and 23(5) have not been put to the complainant to save any further delay in investigating this case.
18. The request in this case is similar to a request for information which the Commissioner has considered alongside this case, reference FS50728057. The decision notice in that case is being issued at the same time as this case, with that case taking the 'lead'. Both of these public authorities have confirmed that they hold a small amount of relevant material. Both requests also include information requests which are made to a different public authority, namely the police force associated with the OPCC rather than the OPCC itself.
19. Both requests also contain an element which is addressed to a different public authority, namely the police force associated with the OPCC rather than the OPCC itself.

Reasons for decision

20. Having considered all the factors applicable to this case, the Commissioner is satisfied that the similarity between the information request in this case and the request in case reference FS50728057 is such that she is able to reach the same decision about the handling of part (4) of the request and also the citing of section 24(1) to the remainder of the request, including the lack of necessity to consider sections 31(1)(a) and (b).
21. For brevity, the Commissioner will not reproduce the content of that decision notice here but she has adopted the same analysis. In respect of part (4) of the request, she has concluded that the OPCC should have either transferred this to West Mercia Police or directed the complainant to send her request to them. She has also found that section 24(1) was

properly cited in respect of parts (1) to (3) of the request and that the public interest favoured maintaining the exemption.

22. Having reached this conclusion on section 24(1), it has not been necessary for the Commissioner to also consider sections 31(1)(a) and (b).

Other matters

23. Although they do not form part of this notice the Commissioner wishes to highlight the following matters of concern.
24. The Commissioner has produced a flowchart for public authorities to refer to when dealing with a request². This clearly indicates that where a request is received which is not proper to the receiving public authority then it should inform the requestor that the information is not held and either transfer the request to the appropriate public authority or advise the requester to write to another public authority.
25. Part (4) of the request refers to information held by West Mercia Police. The OPPC should have advised the complainant accordingly and suggested to her that it would either transfer the request to West Mercia Police on her behalf or advised her to make her request to that public authority directly.
26. There is also a Code of Practice³ issued under section 45 of FOIA. This includes best practice regarding the transferring requests for information at Part III.

² https://ico.org.uk/media/for-organisations/documents/1167/flowchart_of_request_handling_under_foia.pdf

³ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/235286/0033.pdf

Right of appeal

27. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

28. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
29. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed 

Carolyn Howes
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF