

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 10 July 2018

Public Authority: Police and Crime Commissioner for
Warwickshire

Address: Warwickshire Office of the Police and Crime
Commissioner
3 Northgate Street
Warwick
Warwickshire
CV34 4SP

Complainant: Rosie Brighouse 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 Warwickshire 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 information citing section 23(5) (information supplied by, or relating to, bodies dealing with security matters); it also cited section 21(1) (information accessible by other means) which it later retracted. During the Commissioner's investigation the OPCC withdrew reliance on section 23(5), saying that it should have advised the complainant that part (4) of the request related to a different public authority.
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 Warwickshire police forces.

I refer, in particular, to the recent article written by the journalist collective The Bristol Cable titled "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 minutes 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."

[Name removed] requests the following records:

- 1. Records relating to the purchase of "existing" CCDC equipment, referred to in the Alliance Government Group minutes 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 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 above, including any records referred to or consulted in reaching that decision.*
- 4. Legislation, codes of practice, policy statements, guides, manuals, memoranda, presentations, training materials or other records governing the use of CCDC equipment by Warwickshire 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 [International Mobile Subscriber Identity] 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. The OPCC responded on 20 December 2016. 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).
7. On 22 May 2017 the complainant requested an internal review. Following its internal review the OPCC wrote to the complainant on 13 July 2017. It maintained its position, adding reliance on 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

8. 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.
9. 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.
10. During her investigation, the Commissioner raised queries regarding the OPCC's citing of section 21 (information accessible by other means) to part (4) of the request, commenting that it had only provided a general link to the 'UK legislation' website without any indication as to which piece/s of legislation would apply. She reminded the OPCC that information is only reasonably accessible to an applicant if a public authority either (a) knows that the applicant has already found the information or (b) it is able to provide the applicant with precise directions to the information so that it can be found without difficulty.
11. In responding to her enquiries the OPCC explained:

"... the OPCC, by seeking to rely upon s.21, was making a general observation that legislation is available to the applicant in the public domain rather than directing [name removed] to any specific legislation. In fact, no consideration would have been given to any relevant legislation that may apply in respect of CCDC equipment as the OPCC would have no knowledge of the legislation in question. The OPCC's function is non-operational; its function is to hold the Chief Constable to account and the OPCC must not fetter the Chief Constable's operational independence.

Upon reflection, the s.21 exemption is not engaged as there was no intention to provide precise directions to specific legislation and as such I confirm that the OPCC does not wish to rely upon s.21 but instead s.16 of the Act as its actions were that of discharging its duty to advise and assist the applicant".

12. The Commissioner accepts that this is a reasonable explanation and agrees that section 21 would not be engaged as the description as to where any relevant information was located would not be specific enough. She also accepts that the OPCC itself would have no requirement to use CCDC so would not be expected to know what legislation, etc, would be relevant.
13. The Commissioner raised further queries with the OPPC 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 Warwickshire Police*", ie **not** by the OPPC.
14. In responding the OPPC advised:

"On reflection, the OPCC's view is that it should have asked [the complainant] to forward part 4 of their request ... to Warwickshire 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".

15. 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 Warwickshire Police rather than the OPCC itself. She therefore accepts the OPPC's revised position that it should have directed the complainant to either make this part of the request to Warwickshire 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.
16. The OPPC'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.
17. The request in this case is similar to a request for information which the Commissioner has considered alongside this case, reference FS50728058. The decision notice in that case is also being issued at the same time as this case, with this case taking the 'lead'. Both of these

public authorities have confirmed that they hold a small amount of relevant material in relation to parts (1) to (3) of the request.

18. 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

19. The OPCC has provided some of its reasoning and evidence 'in confidence' to the Commissioner and she is unable to cite or comment directly about it in this decision notice. It has been taken into account in her deliberations.
20. The OPCC has also confirmed that it holds one piece of information in respect of parts (1) to (3) of the request namely: "*a business case regarding the replacement of existing CCDC equipment*"; the amount of information held has not been challenged. The business case has been withheld under sections 24(1) and 31(1)(a) and (b). The Commissioner has had sight of the business case.

Section 24 – national security

Parts (1) to (3) of the request

21. This exemption is being considered in respect of the parts (1) to (3) of the request in connection with a business case.

22. Section 24(1) of the FOIA states:

"Information which does not fall within section 23(1) [information supplied by, or relating to, bodies dealing with security matters] is exempt information if exemption from section 1(1)(b) is required for the purpose of safeguarding the national security."

23. In broad terms section 24(1) allows a public authority not to disclose information if it considers that the release of the information would make the United Kingdom or its citizens vulnerable to a national security threat.
24. The term "national security" is not specifically defined by UK or European law. However in *Norman Baker v the Information Commissioner and the Cabinet Office* (EA/2006/0045 4 April 2007) the Information Tribunal was guided by a House of Lords case, *Secretary of State for the Home Department v Rehman* [2001] UKHL 47, concerning whether the risk posed by a foreign national provided grounds for his

deportation. The Information tribunal summarised the Lords' observations as:

- "national security" means the security of the United Kingdom and its people;
 - the interests of national security are not limited to actions by the individual which are targeted at the UK, its system of government or its people;
 - the protection of democracy and the legal and constitutional systems of the state are part of national security as well as military defence;
 - action against a foreign state may be capable indirectly of affecting the security of the UK; and
 - reciprocal cooperation between the UK and other states in combating international terrorism is capable of promoting the United Kingdom's national security.
25. The exemption provided by section 24 applies in circumstances where withholding the requested information is "*required for the purpose of safeguarding national security*". Required is taken to mean that the use of the exemption is reasonably necessary.
26. "Required" is defined by the Oxford English Dictionary as 'to need something for a purpose'. This could suggest that the exemption can only be applied if it is absolutely necessary to do so to protect national security. However, the Commissioner's interpretation is informed by the approach taken in the European Court of Human Rights, where the interference of human rights can be justified where it is 'necessary' in a democratic society for safeguarding national security. 'Necessary' in this context is taken to mean something less than absolutely essential but more than simply being useful or desirable. The Commissioner therefore interprets 'required' as meaning 'reasonably necessary'.
27. It is not necessary to show that disclosing the withheld information would lead to a direct threat to the United Kingdom.
28. The Commissioner's approach is set out by the House of Lords in *Secretary of State for the Home Department v Rehman* (as referred to above). Lord Slynn found that:

"To require the matters in question to be capable or resulting 'directly' in a threat to national security limits too tightly the discretion of the executive in deciding how the interests of the state, including not merely military defence but democracy, the legal and constitutional systems of the state need to be protected. I accept that there must be a real possibility of an adverse effect on the United Kingdom for what is done by the individual under inquiry but I do not accept that it has to be direct or immediate."

29. Therefore, firstly, the exemption must be engaged due to the requirement of national security. Secondly, this exemption is qualified by the public interest, which means that the information must be disclosed if the public interest in the maintenance of the exemption does not outweigh the public interest in disclosure.

30. In its refusal notice the OPCC advised that:

"The document in question is a confidential strategic paper, it was produced to evaluate the functionality and options in respect of existing and replacement CCDC equipment, and if disclosed would undermine national security".

31. The complainant does not accept that the exemption is engaged. She does not believe that the OPCC has provided sufficient reasons for its engagement and considers that disclosing the capabilities and uses of a particular technique or tool would not negatively impact national security.

32. As mentioned above, the Commissioner has viewed the withheld document. And, also as stated above, she has previously issued a decision notice concerning the purchase or rental of IMSI catchers in respect of a different OPCC¹. In that case, the public authority would NCND holding any related information citing (amongst others) the exemption at 24(2), a position which the Commissioner upheld. Whilst the subject matter is slightly different in this case, ie it is not about whether or not equipment has been acquired but about whether or not to replace it, she does consider there is a similarity. She also notes that this OPCC has confirmed that some information is held, however, she is advised that such confirmation has only been given because of an unintentional disclosure on a website and any related information, which had been temporarily available, has since been redacted.

33. The Commissioner accepts that the acquisition and / or use of CCDC equipment, as per parts (1) to (3) of this request, falls within a sufficiently similar genre of information to be likened to that considered in the other case *FS50660527* referred to above. She is therefore satisfied that section 24(1) is engaged in respect of the remainder of the request.

¹ <https://ico.org.uk/media/action-weve-taken/decision-notices/2017/2014349/fs50660527.pdf>

34. Turning to the balance of the public interest, the question here is whether the public interest in safeguarding national security is outweighed by the public interest in disclosure of the information. Clearly, the public interest in safeguarding national security carries very great weight. In order for the public interest to favour disclosure of the requested information it will be necessary for there to be public interest factors in favour of this of at least equally significant weight.

Public interest arguments in favour of disclosure

35. The OPPC recognises that there is a public interest in how public funds are spent. It further accepts that there is a natural concern to ensure that any measures in place to safeguard national security are effective, and that any covert activities are proportionate to the risks that a public authority may be seeking to address.
36. The complainant considers that the public should be informed about methods of surveillance that could have an impact on their fundamental rights, stressing that because CCDC equipment can indiscriminately collect data its use can interfere with the rights of many, including those who are not the intended targets.
37. The complainant also believes that, because she is part of an organisation which acts as a public watchdog, this particular role should be taken into account when evaluating the public interest.

Public interest arguments in favour of maintaining the exemption

38. The OPCC has advised that whilst there is a level of public awareness in this area, the exact nature of the discussions regarding the equipment or any associated issues, are not widely known.
39. It argued:

"There is an inherent public interest in safeguarding national security to ensure the safety of the UK. The disclosure of this information would undermine the strategic aims and deliberations in respect of the equipment by exposing them to opportunist criminals and terrorists who would seek to use the information to their advantage. Any information which undermines the operational integrity and effectiveness of the OPCC's activities (and that of other agencies) would adversely affect public safety and this would not be in the wider public interest. Therefore, after due consideration, and on balance, we consider that the public interest favours maintaining this exemption".

The Commissioner's view

40. The view of the Commissioner is that there is some valid public interest in disclosure. It would increase public knowledge regarding the consideration of the purchase / replacement of CCDC equipment by the OPCC which, in turn, may give an indication regarding its use by the police service as a whole. However, she also notes that the current national security level of risk, as set by the government, sits at 'severe'² and she has taken into consideration the other arguments presented to her by the OPCC which she is unable to reproduce here due to their sensitivity.
41. She further notes the complainant's own role but she does not consider that represents a valid argument in favour of disclosure as the FOIA is applicant blind.
42. The Commissioner considers it to be clearly the case that the public interest in disclosure does not match the weight of the public interest in safeguarding national security. This means that her conclusion is that the public interest in the maintenance of the exemption provided by section 24(1) outweighs the public interest in disclosure of the requested information.
43. In view of this finding the OPCC was not required to disclose the information requested by the complainant. The Commissioner has not therefore considered the other exemptions cited.

Other matters

44. Although they do not form part of this notice the Commissioner wishes to highlight the following matters of concern.
45. The Commissioner has produced a flowchart for public authorities to refer to when dealing with a request³. 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.

² <https://www.gov.uk/terrorism-national-emergency>

³ https://ico.org.uk/media/for-organisations/documents/1167/flowchart_of_request_handling_under_foia.pdf

46. Part (4) of the request refers to information held by Warwickshire Police. The OPPC should have advised the complainant accordingly and suggested to her that it would either transfer the request to Warwickshire Police on her behalf or advised her to make her request to that public authority directly.
47. There is also a Code of Practice⁴ issued under section 45 of FOIA. This includes best practice regarding the transferring requests for information at Part III.

⁴https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/235286/0033.pdf

Right of appeal

48. 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

49. 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.
50. 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 

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