IN THE MATTER OF AN APPEAL TO THE FIRST-TIER TRIBUNAL (INFORMATION RIGHTS) UNDER SECTION 57 OF THE FREEDOM OF INFORMATION ACT 2000

Case No. EA/2018/0164-0172

BETWEEN:

PRIVACY INTERNATIONAL

Appellant

-and-

THE INFORMATION COMMISSIONER

Respondent

RESPONSE TO THE NOTICE OF APPEAL
ON BEHALF OF THE RESPONDENT

Reference to paragraph numbers in the Commissioner's Decision Notice are in the form: DN §1.

References to the Freedom of Information Act 2000 are in the form "FOIA".

Introduction

1. This Response is served in accordance with rule 23 of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 ("the Tribunal Rules").

2. The Respondent ("the Commissioner") submits that the Notices of Appeal dated 7 August 2018 should be dismissed for the reasons given in the Decision Notices ("DN") and in this Response.

Management of the Appeal(s)

3. This is a conjoined appeal brought in respect of nine DNs, resulting from the same or similar requests being made by the Appellant to multiple different police forces and police and crime commissioners (together, "the Forces").[1] In seven cases, the Forces responded to the request in materially identical terms, and the Appellant rightly notes that the DNs were, unsurprisingly, in materially identical terms as a result. In two cases, the Forces responded to the request in a different form but materially identically as between them, and the two DNs in those cases are also in materially identical terms as a result.

[1] It is recognised that a police and crime commissioner is not a police force, but is for present purposes clearly and closely identified with the law enforcement and crime-fighting functions of the police forces. Commissioners exist to ensure the forces fulfil their functions in an efficient and effective way, in the interests of the people of the relevant territorial area. It is appropriate to equate them within the term 'Forces' for the purposes of this Response.

4. In this appeal, the Appellant has drafted its appeal chiefly by reference to the DN concerning the Commissioner of the Metropolitan Police ("the MPS") (FS50728051). The Commissioner intends to adopt the same approach in this Response, but will also address the distinct position of the two DNs to which the MPS approach does not apply.

5. The Commissioner considers that it is appropriate that each of the Forces be joined as parties to these appeals, albeit that it may be that one or more Forces may adopt a lead role and not all need actively participate. The Tribunal is highly likely to be assisted by evidence which only the Forces can provide. The Forces are also likely, very properly, to wish to maintain their reliance on section 31(3) FOIA, which was not the subject of direct consideration in the DNs.

The Background

6. The context to this appeal is the alleged use by law enforcement and security bodies of technical equipment for the purpose of locating mobile telephones. This equipment is sometimes known as 'Covert Communications Data Capture' or 'International Mobile Subscriber Identity' catchers: both terms were used in the requests in issue. In common with the Grounds of Appeal, the Commissioner will use the term "IMSI Catchers" in this Response, but many of the DNs refer to "CCDC".

7. As has been publicly stated in Parliament, and quoted by the Appellant, any use of IMSI Catchers would (at the time of the requests) require authorisation under the provisions of the Police Act 1997 or the Intelligence Services Act 1994 and would be overseen by the Office of Surveillance Commissioners or the Intelligence Service Commissioner. The Regulation of Investigatory Powers Act 2000 (now the Investigatory Powers Act 2016) may also be applicable, depending on the nature of the use. The Written Answers in Parliament quoted by the Appellant do not confirm that such equipment is used (contrary to the Appellant's incorrect assertion in the Grounds): they simply explain how use of IMSI Catchers would be regulated if they were.

8. Although, as the Appellant sets out in its Grounds, there has been reporting alleging that some individual police forces have purchased or used IMSI Catchers, or are reported to have been considering doing so, the Appellant has advanced no evidence to suggest that police forces or security bodies generally, still less all police forces and security bodies, have publicly confirmed that they own and/or use IMSI Catchers.

9. The Appellant made a series of requests under FOIA to nine Forces on 1 November 2016. The details of the dates of the responses sent by the Forces and the internal reviews are all set out in the relevant DNs.

10. The nine DNs in issue may be summarised in the following table:

DN	Public Authority	Request	Outcome in DN
FS50728051	MPS	1. Purchase orders, invoices, contracts, loan agreements, solicitation letters, correspondence with companies and other similar records regarding the Metropolitan 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 the Metropolitan Police relating to CCDC equipment. 3. All requests by CellXion or any other corporation, or any government agency, to the Metropolitan Police to keep confidential any aspect of Metropolitan Police's possession and use of CCDC equipment, including any non-disclosure agreements between Metropolitan Police and CellXion or any other corporation, or government agency, regarding the Metropolitan 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 the	1. Sections 23(5) and 24(2) FOIA correctly applied. 2. MPS required to confirm or deny whether information held. 3. Sections 23(5) and 24(2) FOIA correctly applied. 4. MPS required to confirm or deny whether information held in respect of legislation and codes of practices.

		Metropolitan 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.	Sections 23(5) and 24(2) otherwise correctly applied. [MPS reliance on section 31(3) not considered.]
FS50728052	Avon and Somerset PCC	Materially identical request to MPS above.	Only 1. and 3. were properly directed to the PCC, and sections 23(5) and 24(2) were correctly applied. [Reliance on sections 30(3) and 31(3) not considered.]
FS50728053	Avon and Somerset Police	Parts 2. and 4. of the request to the Avon and Somerset PCC, but the Force considered the entirety of the request above.	Outcome materially identical to MPS above.
FS50728054	Kent Police	Materially identical request to MPS above.	Outcome materially identical to MPS above.
FS50728055	South Yorkshire Police	Materially identical request to MPS above.	Outcome materially identical to MPS above.
FS50728056	Staffordshire PCC	1. Records relating to the purchase of 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.	1. Sections 23(5) and 24(2) FOIA correctly applied.

		2. Records relating to the "robust safeguards" and "legislation" to govern the use of CCDC equipment by Staffordshire Police that you referred to in the Guardian article referenced above. 3. 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 Staffordshire 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.	2. Sections 23(5) and 24(2) FOIA correctly applied, save in respect of "legislation", for which confirmation or denial required. 3. Sections 23(5) and 24(2) FOIA correctly applied, save in respect of legislation and codes of practice, for which confirmation or denial is required. [Reliance on section 31(3) was not considered.]
FS50728057	Warwickshire PCC	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.	1.-3. Warwickshire having confirmed in its response that it held a business case regarding the replacement of existing IMSI Catcher equipment, section 24(1) FOIA was correctly applied. [Reliance on section 31(1) was not considered.]

		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. Materially identical to 3. in Staffordshire request above.]	4. This part of the request was properly addressed to Warwickshire Police and not the PCC, and the PCC should have so informed the requestor.
FS50728058	West Mercia PCC	Materially identical to Warwickshire PCC request above.	Outcome materially identical to Warwickshire PCC request above.
FS50728059	West Midlands PCC	1. Records relating to the purchase of 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. Legislation, codes of practice, policy statements, guides, manuals, memoranda, presentations, training materials or other records governing the use of CCDC equipment by West	1. Sections 23(5) and 24(2) FOIA correctly applied. 2. Sections 23(5) and 24(2) FOIA correctly applied, save in respect of legislation and codes of practice, for which

		Midlands 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.	confirmation or denial is required. [Reliance on section 31(3) was not considered.]

11. Accordingly, it will be seen that the Commissioner accepted in seven cases the refusal to neither confirm nor deny whether information was held in respect of much of the requests, including any information which revealed whether or not the Forces used IMSI Catchers. However, where confirming or denying parts of the requests would not of itself reveal or tend to reveal whether or not the Forces used IMSI Catchers, the Commissioner held that substantive response was required. In the present context, that meant that publicly available legislation and codes of practice of general application could not be the subject of an NCND answer, and that mere receipt of publicity material by a Force could not be the subject of an NCND answer either.

12. There is no challenge to that part of the Commissioner's reasoning by the Forces or the Appellant, which sought to draw a careful and consistent line between different types of information request.

13. In relation to the two Forces (Warwickshire and West Mercia) which had chosen to confirm that some relevant information was held, the Commissioner accepted that disclosure was not required.

14. Further, the Commissioner understands that there is no challenge to her decisions in respect of Warwickshire and West Mercia that one part of each of those requests was specifically directed at a different public authority (i.e. the Police and not the PCC), such that the PCC was not required to answer it and ought to have directed the requestor accordingly.

The Notice of Appeal

15. In the Grounds of Appeal, the Appellant's challenge can be fairly summarised as disputing:

    (1) The engagement of section 23(5) FOIA;
    (2) The engagement of section 24(2) FOIA;
    (3) That the public interest favoured the maintenance of the section 24(2) exemption;
    (4) Where applicable, the engagement of section 24(1) FOIA; and
    (5) That the public interest favoured the maintenance of the section 24(1) exemption.

Section 23(5) FOIA

16. In the light of the Grounds of Appeal, the Commissioner has reconsidered her position in reliance to section 23(5) FOIA. She considers that the Appellant has failed to have sufficient regard to the fact that section 23(3) lists among the security bodies not just the Security Service, but also the Serious and Organised Crime Agency and the National Crime Agency.

17. The Commissioner presently maintains reliance on section 23(5) FOIA in the light of the arguments made to her by the Forces. However, she recognises the force of the first ground advanced by the Appellant that, in the context of the present appeal, confirming or denying whether information is held does not sufficiently 'relate to' any of the listed security bodies. The Commissioner intends to keep the issue under close review in the light of any Responses and evidence filed on behalf of the Forces.

Section 24 FOIA

18. Section 24 relevantly provides:

    "*(1) Information which does not fall within section 23(1) is exempt information if exemption from section 1(1)(b) is required for the purpose of safeguarding national security.*

    (2) 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."

    Section 24(2) is an exemption permitting the public authority to neither confirm nor deny ("NCND") that it holds relevant information.

19. The principles applicable to section 24 are now well-established:

(1) The term national security has been interpreted broadly and encompasses the security of the United Kingdom and its people and various associated aspects: *Baker v Information Commissioner & Cabinet Office* (EA/2006/0045) at §26, applying *Secretary of State for the Home Department v Rehman* [2001] UKHL 47; [2003] 1 AC 153 at §§15-16 *per* Lord Steyn, §50 *per* Lord Hoffmann and §64 *per* Lord Hutton.

(2) A threat may be direct or indirect: *Quayum v Information Commissioner & Foreign and Commonwealth Office* [2012] 1 Info LR 332 at §42.

(3) The term "*required*" means 'reasonably necessary': *Kalman v Information Commissioner & Department for Transport* [2011] 1 Info LR 664 at §33.

(4) National security is a matter of vital national importance in which the Tribunal should pause and reflect very carefully before overriding the sincerely held views of relevant public authorities: *Quayum* at §43; *R (Binyam Mohammed) v Secretary of State for Foreign Affairs* [2010] EWCA Civ 25; [2011] QB 218 at §131 *per* Lord Neuberger MR; *APPGER v Information Commissioner & Ministry of Defence* [2011] UKUT 153 (AAC); [2011] 2 Info LR 75 at §56 (citing *Rehman*); *R (Lord Carlile of Berriew) v Secretary of State for the Home Department* [2014] UKSC 60; [2015] AC 945.

(5) Even where the chance of a particular harm occurring is relatively low, the seriousness of the consequences (the nature of the risk) can nonetheless mean that the public interest in avoiding that risk is very strong: *Kalman* at §47. As the Upper Tribunal put it: "*the reality is that the public interest in maintaining the qualified national security exemption in section 24(1) is likely to be substantial to require a compelling competing public interest to equal or outweigh it*": *Keane v Information Commissioner, Home Office and Metropolitan Police Service* [2016] UKUT 461 (AAC) at §58 (approving *Kalman*). That does not mean that section 24 carries 'inherent weight', but is rather a reflection of what is likely to be a fair recognition of the public interests involved in the particular circumstances of a case in which section 24 is properly engaged.

20. In *Baker* the Tribunal ruled that the Cabinet Office's refusal to confirm or deny whether it held requested information was in accordance with FOIA. The applicant had requested information about the number of MPs subject to telephone tapping or other surveillance since the Wilson Doctrine was set out. The Cabinet Office refused to confirm or deny whether it held such

information in by virtue of section 24(2). The Tribunal accepted that knowing that any number of MPs or that no MPs were under surveillance would be of significant interest (and would or would be likely to endanger national security).

21. In *Savic v Information Commissioner, Attorney General's Office and Cabinet Office* [2016] UKUT 535 (AAC) the Upper Tribunal made clear that it was inappropriate for the Commissioner or the Tribunal to assess an NCND exemption by reference to the substantive information: at §§47-48. The Upper Tribunal stressed that consideration of an NCND response must be made by reference to the public interest in generating a 'yes' or 'no' answer to the request, and not to the underlying content of any information which is held: at §70.

22. There is no requirement in any case law considering the express statutory right of the Forces to seek to rely on an NCND exemption which has the effect of imposing any different or higher level of scrutiny of such reliance on the part of the Tribunal (or indeed, the Commissioner) than reliance on any other permitted exemption under FOIA.

23. The Master of the Rolls has explained in *Department of Health v Information Commissioner & Lewis* [2017] EWCA Civ 374 at §46 that there is no presumption in favour of disclosure under FOIA once an exemption is engaged. The fact that the exemption relied upon here is an NCND provision does not render it any the less an exemption to which that binding guidance applies.

Engagement of Section 24(2)

24. Section 24(2) is not engaged, unlike the majority of the qualified exemptions, by a consideration of prejudice. Its engagement is deliberately differently worded: section 24(2) applies to information the confirmation or denial of the holding of which is reasonably necessary (i.e. "*required*") in the interests of national security.

25. It is agreed that the focus under section 24(2) must be on whether confirming or denying whether information is held in and of itself would undermine the interests of national security.

26. The basic rationale for an NCND approach in the present context is a simple one. So far as the Commissioner is aware, and despite much media speculation and reporting, there has been no public confirmation by any of the 43 territorial police forces of England and Wales that any of those forces use IMSI Catchers, still less which of them use IMSI Catchers.

27. IMSI Catchers have the potential to be used as an important piece of equipment in the fight against serious and organised crime, and in counter-terrorism investigations. As the Appellant explains, the way IMSI Catchers work better and more quickly enables the location of mobile telephones to be traced, leading to the identification of the location and/or movements of potential suspects. The legal authorisations restrictions applicable – as set out in Parliament, see above – to such equipment would tend to mean that any such equipment is only used in more serious and/or significant criminal investigations, such as counter-terrorism. It is not necessary to rely on section 24 that the IMSI Catchers would be of use only in counter-terrorism investigations.

28. The nature of counter-terrorism (and indeed organised and serious crime) investigations is likely often to involve multiple territorial police areas and Forces. They are likely to involve sophisticated suspects.

29. Where a request seeks to uncover whether any particular Force – or, in this case, multiple Forces – possess IMSI Catchers (along with all of the accompanying related information sought by the Appellant) and accordingly may be able to use that equipment in the course of its investigations, every individual Force which confirms or denies that it holds such information – and thereby that it uses or does not use IMSI Catchers, which is understood to be precisely the core of what the Appellant sought to establish by its requests – allows a map to be created of where the equipment is available for use. Such a map allows sophisticated individuals to seek to locate themselves in areas in which their location is less likely to be identified, or will be identified less quickly. The avoidance of such a risk in counter-terrorism cases is reasonably required in the interests of national security.

30. The Commissioner has had appropriate regard to the expertise of the Forces in consideration of this risk and in concluding that section 24(2) was accordingly engaged. She carefully sought to differentiate within the requests between information for which a confirmation or denial would not reveal use (i.e. generally applicable legislation and codes of practice, and the mere receipt of marketing material encouraging the purchase of IMSI Catchers) and information which directly or indirectly would reveal use or non-use.[2]

[2] It is not correct that West Mercia PCC was permitted to rely upon section 24(2) as the Grounds of Appeal assert. West Mercia in fact never relied on section 24(2) (although it did at one time rely on section 23(5) in relation to the fourth part), and in relation to the fourth part of the request concerning legislation, codes of practice etc, the DN held that that part had been expressly directed at a different public authority and West Mercia PCC was not required to answer it. There is no appeal against that finding, which was plainly correct.

31. The fact that terrorists (and other criminals) will be aware that the Forces use a variety of operationally sensitive methods of information gathering, and may be able to identify the location of a mobile telephone by other means, is nothing to the point. As the Appellant spends some time explaining, IMSI Catchers are a particularly effective and potentially rapid tool about which a person planning, for example, a terrorist attack and concerned about police attempts to identify and locate him would be concerned and wish to avoid where possible.

32. The Commissioner does not accept that the different stance taken by Warwickshire and West Mercia undermines the NCND reliance on the part of the other Forces. It is always a matter of fact and degree as the extent to which a uniform reliance on NCND is undermined by a substantive response in certain individual cases. In the present context, a substantive response that information was relevantly held by just two Forces does not undermine the ability of the remaining Forces of England and Wales to rely on section 24(2).

Engagement of Section 24(1) (Warwickshire and West Mercia)

33. Section 24(1) is similarly not engaged by a consideration of prejudice. It applies to information which is withheld because to do so is reasonably necessary (i.e. "*required*") in the interests of national security.

34. In the cases of Warwickshire and West Mercia, the Commissioner understands that section 24(1) was relied upon rather than an NCND response because of information incorrectly released into the public domain. No criticism is attached to these Forces in acknowledging the different factual context of their positions.

35. Accordingly, in respect of these two Forces, the national security interests are different to those of the NCND cases. However, the same points in relation to the likely context in which IMSI Catchers would be used – in particular, for counter-terrorism investigations – apply equally.

36. In that context, the Commissioner has considered the contents of the withheld information (the 'business case' documents) and accepts the position of the two Forces that to reveal the specific contents would release matters of operational and policing sensitivity. Not revealing that information is reasonably necessary in the interests of national security.

Public Interest Balance

37. The Commissioner accepts that there are weighty public interests in transparency, accountability and in the specific context of the public understanding what potentially intrusive surveillance equipment is, or is not, being used by the Forces.

38. The Commissioner further accepts that there is a public debate about the use of equipment such as IMSI Catchers, including in the national press. That debate is particularly focussed on the impact on individual privacy if such surveillance equipment were used.

39. However, this aspect of the public interest is mitigated to some extent by the clear statements in the public domain, and the conclusions of the DNs requiring further confirmation or denial, as to the applicable legislative regimes and oversight mechanisms applicable to IMSI Catchers, if they were used by any of the Forces or a security body. A debate is accordingly enabled about whether that system of legal oversight and regulation is sufficient in the light of potential privacy issues.

40. The complaint advanced that there can be little public interest in withholding policy statements or guidance on the use of IMSI Catchers would ordinarily be a compelling one. However, as explained above, in the circumstances of this case a Force revealing whether or not it held information concerning, say, guidance on the use of IMSI Catchers would inevitably tend to reveal whether or not it held other information, including whether it did use them. Subject to any further differentiated arguments which have not been advanced in the Grounds of Appeal, the Commissioner considers that she has accepted the NCND line to be drawn in the correct place to reflect the wider public interest balance in relation to use of IMSI Catchers.

41. The Appellant's own Grounds establish that a public debate about the appropriateness of the use of IMSI Catchers by law enforcement bodies has been able to take place, even with a general refusal on the part of those bodies to confirm or deny use. The weight favouring disclosure can be reduced accordingly.

42. There is no error in recognising the inevitably strong public interest in avoiding undermining national security and thereby requiring compelling countervailing interests. This is entirely consistent with both principle and the Upper Tribunal's approach in *Keane* (above). The Commissioner considers that the public interest in preventing any undermining of national security in the context of counter-terrorism investigations is a contextually very weighty one.

43. It is not suggested that the level of national security threat from terrorism is specific to IMSI Catchers and the NCND approach to their use. It is nonetheless a further contextual indicator that any response which undermines the Forces' ability effectively to respond to terrorism threats can have real and serious implications. There were at the time of the request (and remain now) extremely serious national security threats. The public interest does not favour disclosure which undermines countering those threats.

Section 31 FOIA

44. It was not necessary for the Commissioner to consider the application of section 31 in light of the conclusion reached in the DN. It would not, accordingly, be appropriate for her formally to adopt section 31 in this Response.

45. However, as the Commissioner understands the arguments advanced by the Forces in relation to section 31, there is a very considerable overlap with the basic point made in support of the reliance on section 24. The use, and certainly the extent of the use, of IMSI Catchers by the 43 individual police forces across England and Wales is not in the public domain. Information as to the use, or non-use, of IMSI Catchers by individual forces would allow those involved in serious criminality to build a cohesive picture of the locations where particular equipment is available and, potentially, be more likely to evade detection as a result. That rationale is equally applicable to section 31.

46. In principle, and subject to the specific reasons advanced by any of the Forces, the Commissioner anticipates that she would support additional reliance by the Forces on section 31(3) (or, in the cases of West Mercia and Warwickshire, section 31(1)).

Procedural Matters

47. A complaint is made in the Grounds that the Commissioner had regard to submissions made to her by the Forces in confidence, and it is suggested that there is no power to do so. That is, with respect, a misconceived complaint. Nothing in FOIA prescribes the nature of the Commissioner's investigation. Just as the Tribunal may need to hear evidence and submissions in a closed format so as not to undermine the very purpose of the appeal, so the Commissioner may need to receive some degree of submissions on a confidential basis so as not to undermine the purpose of her adjudication in the DN.

48. Given the nature of this appeal the Commissioner considers that an oral hearing is appropriate. It is not permissible for the Appellant to seek, as it does in his Grounds, a paper hearing if the Tribunal agrees with it, and an oral hearing if they do not.

Conclusion

49. For the reasons set out, the Commissioner submits that the conjoined appeals should be dismissed.

CHRISTOPHER KNIGHT

11KBW

5 October 2018