IN THE FIRST TIER TRIBUNAL (INFORMATION RIGHTS)

EA/2018/0172

B E T W E E N:-

PRIVACY INTERNATIONAL

Appellant

-and-

THE INFORMATION COMMISSIONER

Respondent

-and-

WEST MIDLANDS OFFICE FOR THE POLICE AND CRIME COMMISSIONER

Second Respondent

RESPONSE OF WEST MIDLANDS POLICE

A Introduction

1 This Response is served by West Midlands Office for the Police and Crime Commissioner (WMOPCC) in reply to the appeal brought by Privacy International ("the Appellant"). The appeal is brought under Section 57 of the Freedom of Information Act 2000 ("FOIA").

2 Identical, or very similar requests were made to a number of Forces and police and crime commissioners, and this is a conjoined appeal in respect of nine Decision Notices issued by the Information Commissioner.

3 This submission deals only with the appeal against the Information Commissioner's Decision Notice FS50728059 and therefore addresses only that Decision Notice and the specific grounds of Appeal brought by the Appellant against WMOPCC. However, given the conjoined nature of the appeal, this submission should be considered alongside the submissions of the Information Commissioner and the other forces and police and crime commissioners, particularly the Commissioner of the Metropolitan Police.

B Background

4 The original request made to WMOPCC was for

"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"

and

"legislation, codes of practice, policy statements, guides, manuals, memoranda, presentations, training materials or other records governing the use of CCDC equipment by West 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 e

obtained, and rules governing when the existence and use of CCDC equipment may be revealed to the public, criminal defendants, or judges".

5 This request was refused because to comply would exceed the appropriate limit (Section 12 FOIA). Instead WMOPCC suggested a keyword search of the following files and folders

- The Police and Crime Commissioner & West Midlands Police procurement system for 2015-16
- The Finance folder in Sharepoint
- The Procurement folder held on Sharepoint
- The Minutes of the Strategic Policing and Crime Board monthly meetings 2015-16

6 The keywords used were agreed with the Appellant and consisted of the phrases 'CCDC', 'IMSI catchers', 'IMSI Grabbers', 'cell site simulators' and 'Stringrays':

7 The response by WMOPCC, upheld at Internal Review, was to neither confirm nor deny (NCND) that any information was held by virtue of

- Section 23(5) Information supplied by, or concerning, certain security bodies
- Section 24 (2) National Security

- Section 30 (3) Investigations and proceedings conducted by public authorities
- Section 31 (3) Law Enforcement

8 When considering the appeal to the Information Commissioner WMOPCC withdrew reliance on Section 30(3) and subsequent to Decision Notice FS50728059 WMOPCC confirmed to the Appellant that the search uncovered no 'legislation' or 'codes of practice'. These aspects are therefore not considered in this submission, although they do appear in the Appellant's grounds of appeal.

C WMOPCC Submission

10 The request relates to the use of specific covert investigative equipment (CCDC/IMSI). This equipment, and how it is used, is described in the grounds of appeal. Privacy International, in their grounds for appeal, accept that, if it were utilised, this equipment would be 'used to safeguard national security' (paragraph 58 c).

11 When considering this appeal it is important to bear in mind the circumstances in which any of the specific documents identified in the request would be held by WMOPCC. It is clear that confirmation or denial would indicate whether or not WMP have this specific equipment at their disposal.

12 The Decision Notice and the submission to this Tribunal by the Information Commissioner clearly describe why Sections 23(5) and 24(2)(a) are applicable in this case. The original response of WMOPCC and response to Internal Review both provide detailed reasoning regarding the applicability of Sections 23(5), 24(2) and 31(3) to this request and explain why a neither confirm nor deny response issued by WMOPCC. As noted in the Information Commissioner's submission to this Tribunal, because the harm would be caused by providing useful intelligence to sophisticated criminals (whether they are terrorists or organised crime gangs) the arguments provided with relation to Section 24(2) are equally applicable to Section 31(3).

13 Despite the assertions made by Privacy International, there has been no public confirmation or otherwise that West Midlands Police (WMP) utilise such equipment. Therefore any response by WMOPCC, other than a NCND, would provide criminals with information which they currently do not have. It would allow organised criminal gangs and terrorists to know whether or not this specific equipment is available to be used in the West Midlands Police area. This would allow sophisticated criminals to either exploit this gap in the ability of WMP (if the equipment was not available), or to change their behaviour, thereby nullifying the equipment's effectiveness (if the equipment was available).

14 Furthermore, as this request has been made to a number of Forces and PCCs, if confirmation or denial was made, it would allow criminals, by piecing together the responses, to construct a 'map' of 'safe' or 'unsafe' areas. It would allow these criminals to relocate their operations to areas where this equipment and techniques were not available, allowing them to more effectively plan and conduct their criminal activities. The detrimental effect on national security and law enforcement of providing this tactical advantage to criminals and terrorists is self-evident.

15 It is for the above reasons that confirmation or denial in this case would reveal operationally sensitive information regarding specific police capabilities.

16 Privacy International correctly contend that it is important that the public are reassured that any use of these measures is proportionate and necessary. The Police Service is committed to demonstrating proportionality and accountability regarding surveillance techniques to the appropriate authorities. However, if the Police Service were to either confirm or deny information exists in this case, this would undermine national security and law enforcement, enabling criminals and terrorists to become surveillance aware.

17 The prevention and detection of crime is the foundation upon which policing is built and the police have a clear responsibility to prevent crime and arrest those responsible for committing crime or those that plan to commit crime. To do this

the police require evidence and that evidence can come from a number of sources, some of which is obtained through covert means. These processes are regulated by the Office of the Surveillance Commissioners or the Intelligence Service Commissioner. These Commissioners assess each constabulary's compliance with the legislation and a full report is submitted to the Prime Minister and Scottish Ministers. There are therefore independent mechanisms to ensure appropriate use, if such equipment was used.

18 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.

19 It is appreciated that members of the public will naturally be interested in covert investigative techniques. Likewise, we also understand some people believe surveillance (in any form) is used too widely, and therefore an unnecessary intrusion into their privacy. However, taking into account the fact that the Police Service are already scrutinised as detailed above and effective operational law enforcement would be compromised by any disclosure, at this moment in time, it is our opinion that for these issues the balance test for confirmation or denial is not made out.

20 In their grounds of appeal Privacy International believe that its role as a public watchdog puts them in a special position and that "its role as a watchdog should be taken into account when evaluating the public interest in this matter" (paragraph 58 d). However, it is well established that FOIA is applicant blind, and therefore the nature of the requester does not, and should not, influence whether the information is released into the public domain. It is the relative weight of the arguments for and against confirmation or denial that need to be considered. As stated in Tribunal EA/2005/0026 and 0030 "First, and most importantly, the identity and, or, the motive of the applicant is irrelevant" (Paragraph 61 Hogan and Oxford City Council v Information Commissioner)

D Conclusion

21 Due to the precise nature of the request, confirmation or denial that any of the specific information requested was held could reveal tactical capability and compromise West Midlands Police's ability to conduct investigations.

22 While there are public interest arguments in favour of confirmation or denial of this specific information, these need to be balanced against the arguments against release and the prejudice to national security and law enforcement that such confirmation or denial would cause. The fact that there is an independent mechanism to oversee the use of this technology (if it was used) is a factor that weighs against confirmation or denial. Therefore the balance of the public

interest favours neither confirming nor denying whether any relevant information are held.

23 For the reasons outlined in this submission West Midlands Police respectfully requests that the Tribunal dismiss the appeal.

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