THE FIRST-TIER TRIBUNAL **Case No. EA/2018/0164–72**

GENERAL REGULATORY CHAMBER

INFORMATION RIGHTS

PRIVACY INTERNATIONAL

Appellant

-and-

THE INFORMATION COMMISSIONER;
CHIEF CONSTABLE OF AVON AND SOMERSET;
OTHERS

Respondents

CHIEF CONSTABLE OF AVON AND SOMERSET RESPONSE TO THE NOTICE OF APPEAL

---

1. These submissions are made on behalf of the Chief Constable of Avon and Somerset in appeal EA/2018/0166 in respect of decision notice FS50728053,[1] pursuant to the Tribunal's case management directions dated 12 October 2018.

2. The appeal is opposed.

[1] While not material to the present appeal, the covering page to the decision notice on the ICO website states: "Please note that since this decision notice was issued it has come to light that a request for internal review was never received by the public authority and subsequent follow up emails were sent to an incorrect email address. Therefore the public authority was not aware of the internal review request and paragraphs 11 and 20–24 should be disregarded."

3. The Respondent adopts the submissions made in opposition to the appeal by the Information Commissioner (5 October 2018) and the Commissioner of Police of the Metropolis (30 October 2018). It is agreed that there should be a hearing. Three further submissions are made:

4. First, in para. 32 of the grounds of appeal, the Appellant submits that section 23(5) FOIA should be construed "narrowly". That submission should be rejected. Of course, if confirmation or denial of a request does not disclose information supplied by or related to the bodies referred to in section 23(3), the exemption should not be applied. Likewise, if there is only a "theoretical" (*viz*. speculative) possibility that the information relates to one or more of those bodies. But a broad interpretation of section 23(5) is "inevitable" (*Dowling v Information Commissioner* EA/2011/0118, 22 February 2012, paras. 17–22) because of the words selected by Parliament for this exemption – "indirectly" and "related to" – and it makes little sense to mandate a "narrow" interpretation of those words. So long as the relation between the information and the bodies referred to in section 23(3) is a matter of substance and not too remote, section 23(5) applies. In the present appeal, concerned as it is with requests for information relating to a particular covert investigation method, it is appropriate that the statutory phrase "relates to" may mean the same as "could relate to".

5. The Appellant's citation of *Kennedy v Information Commissioner* [2015] A.C. 455 in para. 32(b)(ii) of the grounds of appeal is not explained and may be misconceived. It does not obviously support the Appellant's proposition that "Any absolute exemption is a serious interference with common law information rights".

Rather, *Kennedy* supports the Respondent's case in para. 4 above, that the Tribunal should give the words in section 23 their ordinary (in this case, broad) interpretation.

6. As to para. 32(b)(iii) of the grounds of appeal, it is not apparent that Article 10 ECHR is engaged in the present case, or that "Any absolute exemption is also a serious interference with the rights of applicants under Article 10", as the Appellant contends. But if the Appellant intends to argue that *Magyar Helsinki Bizottsag v Hungary* (Application no. 18030/11, 8 November 2016) requires a different approach to that stated by the majority in *Kennedy* (a decision of the Supreme Court) or otherwise requires a conforming interpretation of relevant provisions of the FOIA, the Appellant should set out that case clearly.

7. Second, the grounds of appeal seek to emphasise the information already, or previously, in the public domain[2] relating to IMSI catchers. In response, it is submitted that:
    a. Section 23(5) FOIA applies whether the information that would be disclosed is already known to the applicant, or not;
    b. In relation to all the exemptions (sections 23, 24 and 31 FOIA), the information published by the Police and Crime Commissioner for Avon and Somerset online (referred to in para. 17 of the grounds of appeal) was limited and has since been withdrawn. That information did not render the

[2] It may assist to have in mind the working definition of "public domain" adopted in *A.-G. v. Guardian Newspapers (No. 2)* [1990] 1 AC 109 per Lord Goff at page 282d: public domain means "no more than that the information in question is so generally accessible that, in all the circumstances, it cannot be regarded as confidential".

neither confirm nor deny responses adopted by the Respondent pointless.[3] Disclosing information in response to the requests would plainly result in materially different and more extensive information than is already in the public domain, which is the Appellant's intention;

c. There has been no official confirmation by the Respondent, or any other law enforcement public authority, of the use IMSI catchers or of the other information requested by the Appellant which remains in issue. There has been no implied waiver[4] or other destruction of the public interest in non-disclosure of information relating to that particular covert investigation method.

8. Third, the Chief Constable of Avon and Somerset maintains his reliance section 31(3) FOIA and, for this purpose, repeats the Information Commissioner's submissions, in particular paras. 26–32 and 45, noting the overlap between arguments made in support of reliance on section 24 and non-national security law enforcement. This is an appropriate case for consistent responses by chief officers to requests by different persons/organisations for the same information, and requests by the same persons/organisations to different police public authorities.

[3] Note that the Bristol Cable online news item relied on by the Appellant states "Unanswered questions It is as yet *unclear* whether Avon and Somerset Police, or other forces, have used IMSI-catchers and, if so, in what operational context. A&S has delayed responding to a Freedom of Information Request lodged by the Cable, citing security concerns", emphasis added.

[4] See in a different context (civil litigation) *Rawlinson & Hunter Trustees SA v Director of the Serious Fraud Office* [2015] 1 W.L.R. 797, para. 44 per Moore-Bick LJ, with whom Longmore and Gloster LJJ agreed: "if a document in respect of which a claim for PII can properly be made is inadvertently produced for inspection the court hearing an application for permission to use it in the proceedings should consider in accordance with established principles whether the public interest would be better served by restraining the use of the document or by allowing it to be used in the proceedings".

9. The Respondent does not intend to rely on any closed evidence or submissions additional to those provided to the Information Commissioner, which should also be considered as closed material by the Tribunal so as not to undermine the purpose of the appeal.

13 November 2018

AARON RATHMELL

Serjeants' Inn Chambers

EC4Y 1AE