IN THE FIRST TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
(INFORMATION RIGHTS)

Appeal references: EA.2018.0164 - 0172

B E T W E E N :

PRIVACY INTERNATIONAL

Appellant

-and-

(1) THE INFORMATION COMMISSIONER'S OFFICE

(2) COMMISSIONER OF THE METROPOLITAN POLICE[1]

(3) CHIEF CONSTABLE OF AVON AND SOMERSET CONSTABULARY[2]

(4) CHIEF CONSTABLE OF KENT POLICE[3]

(5) CHIEF CONSTABLE OF SOUTH YORKSHIRE POLICE[4]

(6) POLICE AND CRIME COMMISSIONER FOR STAFFORDSHIRE[5]

(7) POLICE AND CRIME COMMISSIONER FOR WARWICKSHIRE[6]

(8) POLICE AND CRIME COMMISSIONER FOR WEST MIDLANDS[7]

Respondents

APPELLANT'S REPLY

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1. This reply is provided, pursuant to r.24, following the receipt of six[8] responses in these linked appeals. For ease of reference, the Appellant replies to each of the six responses together. The Appellant repeats its grounds of appeal. Nothing in this reply should be taken to imply that the factual or legal submissions of any of the Respondents are accepted.

[1] The Second Respondent in appeal reference EA.2018.0164.
[2] The Second Respondent in appeal reference EA.2018.0166.
[3] The Second Respondent in appeal reference EA.2018.0167.
[4] The Second Respondent in appeal reference EA.2018.0168.
[5] The Second Respondent in appeal reference EA.2018.0169.
[6] The Second Respondent in appeal reference EA.2018.0170.
[7] The Second Respondent in appeal reference EA.2018.0172.
[8] From the Information Commissioner, the Metropolitan Police, Avon and Somerset Police, Kent Police, the Warwickshire PCC, and the West Midlands PCC.

A. Section 31(3) Freedom of Information Act 2000

2. The First Respondent ("**the Commissioner**") did not consider s.31 in its decision notices and does not rely on it in these appeals (Commissioner's response, §44). The Metropolitan Police (response, §14), Avon and Somerset Police (response, §8), Kent Police (response, §§46-53), the Warwickshire PCC (response, §12), the West Midlands PCC (response, §12), and South Yorkshire Police[9] each now seek to rely on the s.31 exemption in these appeals.

3. Insofar as reliance is placed on s.31(3), the Respondents are wrong to do so:

   a. The s.31(3) exemption is not engaged:

      i. No adequate basis has been pleaded as to why confirming or denying the information sought would, or would be likely to, prejudice any of the police purposes in s.31(1). The pleadings of the Metropolitan Police and the West Midlands PCC are predicated on a bare assertion. The analogy of the Kent Police with *Willow v Information Commissioner* [2017] EWCA Civ 1876 is flawed. It is unclear how confirming or denying the information sought by the Appellant would enable offenders to develop countermeasures in respect of IMSI catchers;

      ii. It does not inherently follow that disclosing the capabilities and uses of a particular technique or tool reveals information that would negatively impact upon the policing purposes set out at s.31(1). This is evidenced by the approach of a number of public bodies in relation to other forms of surveillance technology, including hacking and mobile phone extraction, where no such negative impact has arisen;[10]

[9] The South Yorkshire Police has not submitted any pleaded case; however, its Form of Response filed on 13th November 2018 states that it adopts and supports the response of the Metropolitan Police. It is therefore assumed that the South Yorkshire Police also seeks to rely on the s.31(3) exemption pleaded by the Metropolitan Police.

[10] See the Appellant's grounds of appeal, at footnote 27.

iii. As set out in the grounds of appeal, at §§11-20, the fact that IMSI Catchers have been purchased by UK forces is already in the public domain. There is no suggestion, let alone evidence, that the revelation of this detail in the national press has led to any prejudice to police purposes;

b. The public interest in disclosure far outweighs the public interest in maintaining the exemption, on the narrow facts of this application. This is for the reasons set out in the Appellant's grounds of appeal, at §34(b).

B. Section 31(1) Freedom of Information Act 2000

4. Similar submissions apply to the s.31(1)(a) and (b) exemption pleaded by the Warwickshire PCC (response, at §§10-12). Although the Warwickshire PCC seeks to avoid disclosure of the information sought (as opposed to merely confirming or denying its existence as with the other Respondents), there is still insufficient evidence to show that the exemption is actually engaged. Even if there were sufficient evidence, the public interest balance is obviously in favour of disclosure.

C. Case Management Directions

5. The Appellant has seen the Metropolitan Police's position as regards case management directions in its response, at §3.

6. All of the Respondents (bar the Staffordshire PCC, which has not responded on the matter[11]) have sought an oral hearing of these appeals.[12] The Appellant agrees.

7. The Appellant respectfully suggests that one day will be sufficient for oral argument, but, in the event that significant evidence is adduced, it may be

[11] The Staffordshire PCC has not submitted any pleaded case or "*Form of Response*", and has not otherwise indicated to the Tribunal (so far as the Appellant has seen) whether it requests an oral hearing.

[12] The West Midlands PCC and the South Yorkshire Police both request an oral hearing in their "*Form of Response"*. The other Respondents have each sought an oral hearing in their pleaded cases: the Commissioner (response, §48), the Metropolitan Police (response, §3(i)), Avon and Somerset Police (response, §3), Kent Police (response, §55), the Warwickshire PCC (response, §6).

more prudent to list this appeal for two days (as suggested by the Metropolitan Police; response, §3(ii)).

8. The Appellant's position as regards closed evidence and submissions is that, in line with the constitutional principle of open justice, any closed material, closed submissions or hearings must be kept to a minimum. In particular, the Appellant does not see that it is justified or fair for the Metropolitan Police to not provide any open submissions on the ss.23(5) and 24(2) exemptions (response, §25).

9. The Appellant's full arguments will be developed in its evidence and written and oral submissions. The Appellant will be submitting further evidence by way of witness statements and supporting exhibits. The Appellant respectfully suggests that the timeline for exchange of this evidence be fixed at the case management hearing which the Tribunal is due to arrange.

JUDE BUNTING
KEINA YOSHIDA
Doughty Street Chambers

16th November 2018