

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 10 July 2018

Public Authority: Police and Crime Commissioner for West Midlands

Address: Office of the Police and Crime Commissioner
Lloyd House
Colmore Circus
Queensway
Birmingham
B4 6NQ

Decision (including any steps ordered)

1. The complainant has requested information about the purchase and use of Covert Communications Data Capture ("CCDC") from the West Midlands Office of the Police and Crime Commissioner (the "OPCC"). The OPCC would neither confirm nor deny ("NCND") whether it holds the requested information, citing the exemptions at sections 23(5) (information supplied by, or relating to, bodies dealing with security matters), 24(2) (national security) and 31(3) (law enforcement) of the FOIA for the request in its entirety.
2. In respect of part (1) and some of part (2) of the request the Commissioner's decision is that sections 23(5) and 24(2) were cited correctly so the OPCC was not obliged to confirm or deny whether the requested information is held.
3. However, for the 'legislation' and 'codes of practice' elements of part (2) of the request, the Commissioner's decision is that the exemptions were applied incorrectly. The OPCC is required to confirm or deny whether this information is held and either disclose it or issue a fresh response compliant with section 17 of the FOIA.
4. The OPCC must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Background

5. 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.
6. 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.
7. The request in this case is similar to the requests for information which the Commissioner has considered under references FS50728051 to FS50728056, all of which are being issued at the same time. The decision notice FS50728051 is taking the 'lead' in respect of these decisions.

Request and response

8. 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 West Midlands 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 minute's state: "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 as option 3."

I am unable to find the relevant information regarding these purchases on the West Midlands Police and Crime Commissioner

website. October – December 2015 is not responsive and January to March 2016 erroneously links to expenditure from July 2015¹.

[Name removed] requests the following records:

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 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.

[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 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".

9. The OPCC responded on 29 November 2016. It stated that to confirm or deny whether it holds any information would exceed the cost limit at section 12 of the FOIA. It invited the complainant to narrow her request and suggested the following ways in which she could do so:

¹ <http://www.westmidlands-pcc.gov.uk/media/382183/july-2015-expenditure-info.pdf>

"Within that cost limit we could the [sic] conduct the following searches using the key words "CCDC", "IMSI Catchers", "IMSI Grabbers", "Cell site simulators" and "Stingrays":-

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

Please note that any located information might be subject to the application of exemptions under the Act. Nothing in this response should be taken as confirming that any information relevant to your request is held or is not held".

10. On 15 December 2016, the complainant submitted a revised request. She accepted the suggestions made but requested that:

"... they be conducted with the following key words/phrases: (1) "Covert Communications Data Capture", (2) "CCDC", (3) "IMSI Catchers", (4) "IMSI Grabbers" and (5) "IMSI Covert Communications."

In addition, we ask you to clarify whether you consider the second part of our records request – for "legislation, codes of practice, policy statements, guides, manuals, memoranda, presentations, training materials or other records governing the use of CCDC equipment by West Midlands" – to fall under the limitation you have identified. We submit that these records do not constitute "data" that requires extensive searches as they relate to the legal framework governing the West Midlands Police's exercise of its powers".

11. The OPCC responded on 19 January 2017. It advised the complainant that it had undertaken the search as described and, if there was any information held governing the use of CCDC, it would have been found whilst undertaking that search. It would NCND holding any information, citing the exemptions at sections 23(5), 24(2), 30(3) and 31(3) of the FOIA.
12. On 22 May 2017 the complainant requested an internal review. This was provided by the OPCC on 20 June 2017; it maintained its position. During the Commissioner's investigation, the OPCC removed reliance on section 30(3).

Scope of the case

13. 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.
14. 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 12 February 2018 with her grounds of complaint in this case. She asked the Commissioner to consider the application of the exemptions cited.

Reasons for decision

15. The request in this case is similar to a request for information which the Commissioner has considered alongside this case, reference FS50728051. The decision notice in that case is also being issued at the same time as this case.
16. Having considered all the factors applicable to this case, the Commissioner is satisfied that the similarity between the information request in this case and the request in case reference FS50728051 is such that she is able to reach the same decision about the citing of sections 23(5) and 24(2) in this case and the lack of necessity to consider section 31(3).
17. For brevity, the Commissioner will not reproduce the content of that decision notice here but she has adopted the same analysis and concluded that OPCC was entitled to rely on sections 23(5) and 24(2) in respect of part (1) and some of part (2) and that in relation to the latter exemption the public interest favoured maintaining the exemption.
18. However, in respect the 'legislation' and 'codes of practice' elements of part (2), the Commissioner finds that none of the exemptions cited are appropriate and OPCC must confirm or deny whether any information is held. If information is held, it should either be disclosed or OPCC should issue a fresh response compliant with section 17 of the FOIA.

Other matters

19. Although they do not form part of this notice the Commissioner wishes to highlight the following matters of concern.

20. The Commissioner has produced a flowchart for public authorities to refer to when dealing with a request². 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.
21. The wording in both part (2) of this request refers to the "*use of CCDC equipment by **West Midlands Police***". In line with the Commissioner's guidance, the OPPC should have advised the complainant accordingly and suggested to her that it would either transfer these parts of the request to West Midlands Police on her behalf or advised her to make her request to that public authority directly.
22. There is also a Code of Practice³ issued under section 45 of FOIA. This includes best practice regarding the transferring requests for information at Part III.

² https://ico.org.uk/media/for-organisations/documents/1167/flowchart_of_request_handling_under_foia.pdf

³https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/235286/0033.pdf

Right of appeal

23. 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

24. 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.
25. 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

**Carolyn Howes
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**