

**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.s EA/2018/016 & 0170

**BETWEEN:**

**PRIVACY INTERNATIONAL**

**Appellant**

**-and-**

**THE INFORMATION COMMISSIONER**

**Respondent**

**-and-**

**THE COMMISSIONER OF POLICE OF THE METROPOLIS**

**THE POLICE AND CRIME COMMISSIONER FOR WARWICKSHIRE**

**Second Respondents**

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**SKELETON ARGUMENT ON BEHALF OF THE INFORMATION COMMISSIONER  
For the Hearing commencing on 27 August 2019**

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**Hearing Management Matters**

- *References in this skeleton to the Freedom of Information Act 2000 are in the form: “FOIA”.*
- *References to neither confirm nor deny are in the form: “NCND”.*
- *References to the Information Commissioner are in the form: “the Commissioner”; to the Second Respondents jointly: “the Forces”; to the Second Respondents individually: “the MPS” and “the PCCW”; and to Privacy International: “the Appellant”.*
- *References to the bundles will follow the Appellant’s suggested form: for the first open bundle for the MPS appeal [1A/page]; for the first open bundle for the PCCW appeal [1B/page]; for the common second bundle [2/page]; and for the CLOSED bundle [CB/page]. References will be taken from bundle 1A where a document appears in both 1A and 1B (as many do).*
- *References to (open) witness statements will be in the form: W/S Name at §x.*
- *The Commissioner agrees with all the other parties that two days should be sufficient in the light of the material before the Tribunal and the issues.*

- *The Commissioner confirms that she does not wish to cross-examine any witness of the Appellant. However, it is likely that she will wish to test the evidence of DSU Williams (for the MPS) and DSU Nolan (for the PCCW), particularly in CLOSED. The Appellant has not indicated any questions it wishes to have put to those witnesses, but the Commissioner will be happy to put any which are raised.*
- *It will be necessary – and appropriate – for the Tribunal to hold a CLOSED session, both in relation to the witness evidence and to hear CLOSED submissions. (Again, the Commissioner will be content to put any points the Appellant might have wished to put in CLOSED submissions.)*
- *The Commissioner agrees that a three hour pre-reading estimate is appropriate for the documents suggested by the Appellant, but agrees that the Tribunal should, if possible, consider the CLOSED submissions and evidence as part of that pre-reading.*
- *The Commissioner does not intend to file a CLOSED skeleton but will make CLOSED submissions.*

## **Introduction**

1. Following a Case Management Hearing convened by the Registrar, this appeal will consider the position of two designated lead appeals: EA/2018/0164, involving the MPS, on the use of the NCND exemptions, and EA/2018/0170, involving the PCCW, on the use of the substantive exemptions. All the various other appeals, raising precisely the same issues for other Forces, have been stayed [1A/84-85]. That is a proportionate approach to the Tribunal’s resources.
2. The appeal concerns requests for information made by the Appellant on 1 November 2016 to a number of Forces<sup>1</sup> essentially seeking information which confirmed the use by that Force of mobile telephone surveillance equipment, International Mobile Subscriber Identity (“IMSI”) Catchers, and various forms of detailed information relating to the purchase and governance of IMSI Catchers. IMSI Catchers are a form of Covert Communications Data Capture (“CCDC”) equipment.
3. The MPS, along with most other Forces, issued an NCND response in reliance on sections 23(5), 24(2) and 31(3) FOIA [1A/111-115]. The Commissioner generally upheld the application of sections 23(5) and 24(2) in the DN, but did not consider section 31(3) [1A/1-17].

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<sup>1</sup> 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.

However, it is worth reiterating – although not in issue in the appeal – that the Commissioner did not uphold the NCND response in relation to the part of the request which sought legislation and publicly available codes of practice which would govern IMSI Catchers, or the receipt of marketing material, and a substantive response was required: DN §3 [1A/1].

4. The PCCW, along with the West Mercia PCC, took a different approach. Recognising that they had inadvertently published some information which revealed the purchase of CCDC equipment [2/150-159], the PCCW did not issue an NCND response. Instead, it relied upon sections 24(1) and 31(1) in respect of the single responsive document it held, namely a business case [1B/97-99]. The Commissioner generally upheld the application of section 24(1) in the DN but did not consider section 31(1) [1B/1-12]. One part of the request – again, not in issue in this appeal – was held to have been made to the wrong public authority: DN §2 [1B/1].
5. The Appellant challenges the engagement of all three exemptions, whether substantive or NCND, and argues that the public interest favours disclosure in any event.
6. The Commissioner maintains her position that the exemptions are engaged - including, as indicated in her Response, section 31 – and that the public interest favours the maintenance of the exemptions.

### **Background Documents**

7. The Tribunal has the benefit of three detailed skeleton arguments from the Appellant and the Forces. It is unnecessary to repeat all of the background matters here, and the focus of the *de novo* appeal will doubtless not be on the precise drafting of any individual letter or DN in any event, given the much fuller picture now before the Tribunal. It is therefore sufficient to set out where the relevant documents may be found in the bundles.

<b>Document</b>	<b>MPS Bundle</b>	<b>PCCW Bundle</b>
FOIA request (1/11/16)	1A/108-110	1B/95-96
Response	1A/111-115 (29/11/16)	1B/97-99 (20/12/16)
Internal review request	1A/116-121 (24/1/17)	1B/100-105 (22/5/17)
Internal review response	1A/122-129 (13/6/17)	1B/106-113 (13/7/17)
Authority position as explained to the Commissioner (open)	1A/171-181 (13/4/18)	1B/150-154 (23/4/18)
DN	1A/1-17 (10/7/18)	1B/1-12 (10/7/18)

Appellant Grounds of Appeal (7/8/18)	1A/24-45	1B/19-40
Response of Commissioner (5/10/18)	1A/46-60	1B/41-55
Response of authority	1A/61-73 (30/10/18)	1B/56-62 (15/11/18)
Appellant's Reply (16/11/18)	1A/74-77	1B/63-66

### The Structure of the Argument

8. In this skeleton, the Commissioner will address the issues in the following order:
- (1) The principles applicable to section 31 FOIA;
  - (2) The principles applicable to section 24 FOIA;
  - (3) The engagement of sections 31 and 24 FOIA;
  - (4) The public interest balance;
  - (5) The engagement of section 23(5) FOIA.

### The Principles Applicable to Section 31 FOIA

9. The Forces have relied in their Responses, as they are entitled to do and as they did in response to the request, on section 31. The MPS relies on section 31(3), as the NCND provision, and the PCCW relies on section 31(1).
10. Section 31 FOIA relevantly provides:
- “(1) Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice—*
- (a) the prevention or detection of crime,*
  - (b) the apprehension or prosecution of offenders,*
- ...
- (3) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice any of the matters mentioned in subsection (1).”*
11. Section 31(3) is an exemption permitting an NCND response to whether or not it holds the requested information.
12. The concept of ‘would, or would be likely to, prejudice’ is part of the ordinary currency of the information rights jurisdiction and needs no further elucidation. The Commissioner accepts,

below, that the ‘would be likely to prejudice’ (at least) is satisfied in both appeals, in the light of the evidence and arguments presented.

13. The essence of the Forces’ argument under section 31, that confirmation or denial of use of IMSI Catchers in the case of the MPS or disclosure of the business case document in that of the PCCW would be likely to prejudice law enforcement by informing serious criminals of a significant potential investigative technique and enable them to seek to avoid the application of it, is a well-established principle in the case law of the Tribunal. For example:

(1) The Forces both cite *Mathieson v Information Commissioner & Chief Constable of Devon and Cornwall* (EA/2010/0174) concerning the location of all ANPR cameras in the county;

(2) The well-known *Hogan v Information Commissioner & Oxford City Council* (EA/2005/0026), usually cited for the meaning of the ‘likely to prejudice test’, was itself a section 31 case accepting the application of section 31 to a list of vehicle information numbers because of a risk of cloning of them;

(3) *Armitt v Information Commissioner & Home Office* (EA/2012/0041) concerning operational tactics of customs officers conducting vehicle stops at ports;

(4) *Hemsley v Information Commissioner & Chief Constable of Northamptonshire* (EA/2005/0025) concerning information which would tend to reveal the operational times of a speed camera.

14. The Commissioner also recognises the close analogy drawn by the Forces with the protective approach taken by the courts outside of FOIA to operational matters of policing under public interest immunity: *R v H* [2004] UKHL 3; [2004] 2 AC 134 at §18 *per* Lord Bingham and *R (Metropolitan Police Service) v Chairman of the Inquiry into the Death of Azelle Rodney* [2012] EWHC 2783 (Admin) at §§34-35 *per* Pitchford LJ (concerning the technological capabilities of a covert aerial platform)

15. There is, in short, therefore nothing unusual or surprising about the nature of the Forces’ case on section 31.

### **The Principles Applicable to Section 24 FOIA**

16. 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.”

17. Section 24(2) is an exemption permitting an NCND response as to whether or not it holds the requested information. The MPS relies on section 24(2); the PCCW relies on section 24(1).

18. The principles applicable to section 24 are now well-established but because reliance is placed by the Forces on them as set out in the Commissioner’s Response they are repeated here for ease:

(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) Section 24 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 required in the interests of national security. The Tribunal has some greater flexibility in balancing the risk of the relevant harm against the nature of that risk (and see (6) below).

(4) The term “required” means ‘reasonably necessary’: *Kalman v Information Commissioner & Department for Transport* [2011] 1 Info LR 664 at §33.

(5) 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.

- (6) 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.
19. The Forces argue that the scope of national security encompasses serious organised crime and is not restricted to, say, terrorism. Although the Commissioner would certainly not accept that all crime falls within the scope of section 24, she does agree that serious organised crime does so. There cannot be a bright line distinction between crime and national security. In particular, she has regard to:
- (1) The points made in *W/S Nolan* at §§9-11 [1A/203-204];
  - (2) The inclusion by Parliament within the section 23(3) designation of “*security bodies*” of two policing bodies responsible for responding to serious organised crime: the National Crime Agency (“the NCA”) and its predecessor, the Serious Organised Crime Agency. The statutory focus of the functions of the NCA is on addressing “*organised crime and serious crime*”: section 1 of the Crime and Courts Act 2013. It may further be noted that section 5(5) of that Act the NCA may direct any other Force to carry out a task on its behalf.
  - (3) Section 1(4) of the Security Service Act 1989 provides that: “*It shall also be the function of the Service to act in support of the activities of police forces, the National Crime Agency and other law enforcement agencies in the prevention and detection of serious crime.*”
  - (4) Sections 1(2)(c) and 3(2)(c) of the Intelligence Services Act 1994 defines the functions of SIS and GCHQ respectively as being exercisable: “*in support of the prevention or detection of serious crime*”.
20. In *Savic v Information Commissioner, Attorney General’s Office and Cabinet Office* [2016] UKUT 535 (AAC) the Upper Tribunal made clear that it was generally inappropriate for the Commissioner or the Tribunal to assess an NCND exemption by reference to the substantive

information: at §§47-48. However, it recognised that it would be necessary in some cases, and as such, open reference to any particular information received should be avoided: at §49. 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, 89. An NCND response is a protective concept to stop inferences being drawn on the existence of types of information and enables an equivalent position to be taken on other occasions: at §60.

21. 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.

#### **The Engagement of Sections 31 and 24**

22. As the Commissioner noted in her Response, the basic argument for the engagement of sections 31 and 24 is materially the same.

23. It may be summarised from the evidence in this way:

- (1) *“The exact detail and extent of law enforcement capabilities are not widely known. To put this in context, the use of certain types of covert capabilities are only known about by a small number of people within the MPS. These people work within dedicated teams and are appropriately vetted”*: W/S Williams at §5 [1A/185]; W/S Nolan at §12 [1A/204].
- (2) *“defendants will often attempt to find out how police come into possession of the intelligence that resulted in their arrest. Disclosure of our capabilities or tactics (or lack thereof) would seriously undermine future operations and place people’s lives at risk”*: W/S Williams at §6 [1A/186].
- (3) *“Criminal Networks and terrorists are actively trying to find out which covert tactics and capabilities law enforcement utilise. The internet is scattered with pages and forums dedicated to people speculating on police tactics and capabilities”*: W/S Williams at §9 [1A/186-187]. *“If criminals or terrorists know about the capabilities of covert technology, they will adjust their behaviour accordingly”*: W/S Williams at §10 [1A/187].
- (4) *“Even when specific tactics are discussed, people are not aware of their capabilities, limitations or true nature of how they are used”*: W/S Williams at §9 [1A/187].



(5) “disclosure of tactics and capabilities information, which is carefully sought by Organised Crime Groups and terrorist networks”: W/S DCC Baker at §2 [1A/198] (emphasis added).

(6) “organised crime groups are increasingly run by younger, technology-savvy offenders”: W/S Nolan at §9 [1A/204].

24. In relation to the PCCW’s case, DSU Nolan further explains that “if the business case were to be disclosed, it would allow terrorists and criminal networks to build up a picture of different forces’ abilities to respond to the activities of these groups and thus increase the threat to the public”: W/S Nolan at §16 [1A/205].

25. The Commissioner has, of course, also had careful regard to the further CLOSED evidence of DSU Williams and DSU Nolan which supports – in appropriate detail – the specifics of the general arguments articulated in their open evidence.<sup>2</sup>

26. 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, and leaving aside the evidence relied on by the Appellant as to precisely how the technology can work, IMSI Catchers better and more quickly enable the location of mobile telephones to be traced, leading to the identification of the location and/or movements of potential suspects.

27. As a matter of generality, the Commissioner has no doubt that serious criminals and terrorists believe or suspect that that the Forces have covert surveillance equipment which includes capabilities to locate mobile telephones. But the Appellant’s evidence is lengthy and detailed in seeking to explain why IMSI Catchers are particularly effective (and, the Appellant says, intrusive), beyond other mechanisms. That countermands its case on engagement. In any event, speculation and suspicion is no substitute for official confirmation (or denial), and still less details.

28. There appears to be no serious dispute that serious criminals and terrorists are actively engaged in seeking to understand and thereby react to the capabilities available to law enforcement. Not only is this evidenced, but it is a matter of common sense. The nature of counter-terrorism (and

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<sup>2</sup> For the avoidance of doubt, the Commissioner does not accept the position of the Forces that disclosure would be likely to harm co-operation between law enforcement agencies such as to engage the exemptions. She considers that to be speculative and unrealistic, but a peripheral point which does not undermine the central argument.

indeed organised and serious crime) investigations is likely often to involve multiple territorial police areas and Forces. They are likely to involve sophisticated suspects. This is borne out by the evidence of the Forces.

29. An NCND approach in the present context is permissible and appropriate given that there has been no direct 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.

(1) The MPS is clearly correct in its skeleton argument at §§6-8 that confirmation or denial of most of the various categories of information requested would inevitably confirm or deny whether a covert operational technique, IMSI Catchers, was available for use by the MPS.

(2) It is notable that the press reports relied on by the Appellant uniformly contain an NCND response from the force supposedly involved, particularly the MPS: [2/140], [2/143-144], [2/148].

(3) The Hansard statements relied upon by the Appellant do not confirm use of IMSI Catchers – as appears from time to time to be suggested – but simply how they would be regulated by law if they were used.

(4) The Appellant has impressively drawn together a forensic analysis of some fragmentary budgetary or accounts information of a small number of Forces. The Commissioner accepts that that is consistent with the use by Forces of IMSI Catchers, but not confirmatory proof of it. Some documents refer only to purchases from a particular company or companies [e.g. West Midlands Police: 2/178, 180, 182, 184] which appears to sell IMSI Catchers but alongside many other items. Some documents refer to CCDC, which the Commissioner does not understand to be exclusively synonymous with IMSI Catchers<sup>3</sup> [e.g. Avon and Somerset Police: 2/166; MPS: 2/174; Essex Police: 2/186; Kent Police: 2/189]. Even the unredacted PCCW/West Mercia minutes only refer to CCDC [2/151-152]. (The Commissioner notes that the redacted minutes continue to include reference to expenditure on CCDC: [1A/220].) Only in the case of South Yorkshire Police does a budget document appear specifically to refer to expenditure connected to IMSI Catchers [2/162]. That is not a sufficient basis, in the Commissioner's view, to nullify an NCND approach on the part of the MPS.

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<sup>3</sup> The request itself was of course framed by reference to CCDC, but the Appellant's appeal is framed entirely by reference to IMSI Catchers. It is clear from both the request and the Grounds of Appeal that the Appellant treats the terms as inter-changeable, and in any event there is no dispute that CCDC at the least encompasses IMSI Catchers, and so there is no particular issue arising on the scope or construction of the request.

- (5) Even to the extent that it were considered that the PCCW's position (and/or that of West Mercia Police and/or South Yorkshire Police) meant that it could not be said that there was no official information about any Force possessing IMSI Catchers, that would not invalidate the reliance on NCND by other Forces.
- (6) It is not understood why the approach of the Scottish Prison Service [2/262-263] is of any relevance here. It does not engage anything like the same concerns: there is no possibility of those adversely affected materially altering their behaviour to avoid the effect of the use of IMSI Catchers where they are imprisoned.
- (7) It is no answer to the evidence of the MPS and PCCW that in other jurisdictions there has been public acknowledgement of the use of IMSI Catchers, with or without the unevidenced assertion of the Appellant that there has been no effect on the effectiveness of law enforcement. Leaving aside the different legislative and policing contexts of different jurisdictions, the Forces rightly make the point that serious criminals and terrorists do not tend to explain the decisions they have made (even if those decisions are uncovered), still less by filling in some form of detailed cause and effect questionnaire.
30. 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 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 plainly engages both exemptions.
31. The Appellant rightly acknowledges and accepts the experience of DSUs Williams and Nolan and recognises that the Tribunal will afford their evidence respect. The Tribunal is right, indeed bound, to do so. The evidence of senior and experienced police officers should be accorded significant weight by the Court, and their operational judgments should not be lightly interfered with: *Chief Constable of Humberside Police v Information Commissioner* [2009] EWCA Civ 1079; [2010] 1 WLR 1136 at §§42-43 *per* Waller LJ, §§92-98 *per* Carnwath LJ (and the cases there cited) and §107 *per* Hughes LJ. Moreover, the present context is one in which the witnesses are seeking to explain, by reference to their professional experience, understanding and judgement, a predicative judgement on their part as to the likely effects of disclosure. That

is a context in which the Tribunal should be particularly slow to second-guess the witnesses, as Lord Sumption explained at §32 of *Lord Carlile*:

*“The executive's assessment of the implications of the facts is not conclusive, but may be entitled to great weight, depending on the nature of the decision and the expertise and sources of information of the decision-maker or those who advise her. Secondly, rationality is a minimum condition of proportionality, but is not the whole test. None the less, there are cases where the rationality of a decision is the only criterion which is capable of judicial assessment. This is particularly likely to be true of predictive and other judgmental assessments, especially those of a political nature. Such cases often involve a judgment or prediction of a kind whose rationality can be assessed but whose correctness cannot in the nature of things be tested empirically.”*

32. In the context of the PCCW, the Commissioner has considered the contents of the withheld information (the ‘business case’) and accepts the position of the PCCW that to reveal it would release matters of operational and policing sensitivity, essentially for the contents-based specific reasons set out in the CLOSED skeleton argument of the PCCW and the CLOSED evidence of DSU Nolan.

33. For these reasons, all of which materially inter-relate and overlap, the Commissioner submits that the MPS is entitled to rely on sections 31(3) and 24(2), and the PCCW is entitled to rely on sections 31(1) and 24(1).

### **Public Interest Balance**

34. The Master of the Rolls has explained in *Department of Health v Information Commissioner & Lewis* [2017] EWCA Civ 374; [2017] 1 WLR 3330 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 and the Appellant’s suggestion otherwise is wrong in law.

35. Sections 31 and 24 are both qualified exemptions and subject to the public interest balancing test.

36. 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.

37. The Commissioner further accepts that there is at least some measure of a public debate about the use of equipment such as IMSI Catchers, including in the national press, and that the

Appellant (as an NGO working in this field and acting as a ‘public watchdog’) contributes significantly to that debate. That debate is particularly focussed on the impact on individual privacy if such surveillance equipment were used. The Commissioner accepts that disclosure would enable a better informed and more specific debate, but it is clear from the Appellant’s evidence that it has been able to contribute to a public debate about the appropriateness of the use of IMSI Catchers by law enforcement bodies, even with a general refusal on the part of those bodies to confirm or deny use. That has tended to occur on the basis of assumptions least advantageous to the Forces: i.e. that use and possession of IMSI Catchers is widespread; that they are used to monitor public protests (which DSU Williams expressly denies: W/S Williams at §46 [1A/195]); about how the technology functions: W/S Callander [2/125-127]. In other words, to the extent that the debate is less informed than it might be it has not stopped the debate generally, nor tilted that debate in favour of the public authority.

38. Moreover, any debate about the use of IMSI Catchers does not require disclosure or confirmation/denial to be able to consider the utility, propriety and effectiveness of the applicable legislative regimes and oversight mechanisms applicable to IMSI Catchers if they were used by any of the Forces. The evidence of DSU Williams [1A/188-195] and DSU Nolan [1A/205-208] set out the details of these regimes and mechanisms in considerable detail and it is unnecessary to repeat them here. In short, the use of an IMSI Catcher would constitute targeted equipment interference, which has always required specific authorisation under Part III of the Police Act 1997 (and subject to the oversight of the Office of Surveillance Commissioners). It is now addressed in detail by Part 5 of the Investigatory Powers Act 2016, including the usual requirement for judicial authorisation (and subject to the oversight of the Investigatory Powers Commissioner’s Office). There is a detailed ‘Equipment Interference Code of Practice’ (March 2018) issued pursuant to Schedule 7 and running to nearly 150pp.<sup>4</sup> The regime is subject to the oversight of the Investigatory Powers Tribunal. Both the current and previous regime restrict authorisations issued under them to cases of “*serious crime*”.<sup>5</sup> The Divisional Court has very recently upheld the compatibility of Part 5 with Article 8 ECHR – at least in respect of a challenge concerning the possibility of ‘thematic’ warrants (i.e. permitting bulk use) – in *R (Liberty) v Secretary of State for the Home Department* [2019] EWHC 2057

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[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/715479/Equipment\\_Interference\\_Code\\_of\\_Practice.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/715479/Equipment_Interference_Code_of_Practice.pdf). There were also previous versions of the Code under the earlier legislation.

<sup>5</sup> Defined in section 263 of the 2016 Act as: “*“serious crime” means crime where— (a) the offence, or one of the offences, which is or would be constituted by the conduct concerned is an offence for which a person who has reached the age of 18 (or, in relation to Scotland or Northern Ireland, 21) and has no previous convictions could reasonably be expected to be sentenced to imprisonment for a term of 3 years or more, or (b) the conduct involves the use of violence, results in substantial financial gain or is conduct by a large number of persons in pursuit of a common purpose*”.

(Admin) at §§204-209. It is perfectly possible to debate the sufficiency of the oversight regime, and indeed to litigate about its legality.

39. There is an 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. Given the strong overlap between the section 24 and 31 concerns, much the same must apply in the present context to section 31.
40. There can be no serious doubt that the ongoing level of national security threat from terrorism is an important contextual indicator that any response which undermines the Forces' ability effectively to respond to terrorism threats can have real and serious implications to public safety and security.
41. Mindful of the different approach which must be taken to the public interest balance on an NCND analysis, to that arising from the content of withheld information, the Commissioner nonetheless considers that in the circumstances of this case the revelation of the extent of the operational capabilities of the Forces would be contrary to the public interest.
42. It is neither necessary nor especially helpful to expend time on the application or otherwise of Article 10 ECHR, a matter which is currently before the Upper Tribunal (in *Moss v Information Commissioner & Cabinet Office (intervening)*). It is sufficient to note the following in relation to *Magyar Helsinki Bizottsag v Hungary* (App. No. 18030/11) (8 November 2016):
  - (1) The Supreme Court expressly held in *Kennedy v Charity Commission* [2014] UKSC 20; [2015] AC 455 ("*Kennedy*") that Article 10 ECHR did not encompass a right of access to State information, and the Tribunal should respect and follow that ruling notwithstanding subsequent case law from the European Court of Human Rights, and notwithstanding that the Supreme Court's discussion may have been technically *obiter*: *R (Youngsam) v Parole Board* [2017] EWHC 729 (Admin); [2017] 1 WLR 2848 at §§20-40 *per* Turner J.
  - (2) It is important to recognise the deliberately limited nature of the ruling of the ECtHR in *Magyar*. The ECtHR had, at §§127-130, noted and reiterated the lengthy line of authority rejecting any right of access to information arising under Article 10. In the core paragraph of its reasoning at §156, where it sought to "*clarify the classic principles*", it specifically reiterated the general principle that: "*Article 10 does not confer on the individual a right of*

*access to information held by a public authority nor oblige the Government to impart such information to the individual*". That absence of such a right is the basic starting point.

- (3) *Magyar* then proceeded to set out two contexts in which such a right "*may*" arise under Article 10(1). These are by way of exception to the general principle articulated in §156. The relevant one is where access to the information is instrumental for the individual's exercise of his or her right to freedom of expression, and where its denial constitutes an interference with that right.
- (4) The ECtHR then set mandatory threshold criteria which must be met to fall within the scope of the exception in "*order to define further the scope of such a right*": at §157. If the criteria are not met, the exceptional category does not arise, the general principle applies and there is no right arising under Article 10(1) at all. The criteria set out are:
  - (a) The purpose of the requestor is to seek information necessary for the exercise of freedom of expression, and in particular as a relevant preparatory step in journalistic activities: at §§158-159.
  - (b) The nature of the information sought must be information of which disclosure would be in the public interest: at §§160-163.
  - (c) The role of the requestor is of special importance, and must be in the form of some sort of public 'watchdog' (which includes the press, campaigners, researchers and authors): at §§164-168.
  - (d) The information requested must be ready and available to the public authority: at §§169-170.
- (5) Even assuming in the Appellant's favour that it can satisfy (a) and (c), the criteria, and particularly (b), ultimately lead to nothing more than the application of the public interest test which the Tribunal is already required to apply.
- (6) Further, even if the Appellant does have a right of access to the information under Article 10, it does not follow that any such right requires to be vindicated through the mechanism of FOIA. The majority of the Supreme Court held in *Kennedy* that even if there was an Article 10 right of access to State-held information, UK law would not fail to comply with the ECHR simply by virtue of the fact that particular information was not available via FOIA, because section 78 FOIA preserves the ability of public authorities to disclose information pursuant to their statutory and/or common law powers.

## The Engagement of Section 23(5) FOIA

43. In the light of the application of sections 31(3) and 24(2) FOIA to the MPS appeal, it may be unnecessary for the Tribunal to address the application of section 23(5) FOIA. The Commissioner recognises that the application of section 23(5) is more complicated.
44. Section 23(5), replicating the language of section 23(1), provides:
- “The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would involve the disclosure of any information (whether or not already recorded) which was directly or indirectly supplied to the public authority by, or relates to, any of the bodies specified in subsection (3).”*
45. Section 23(3) lists among the security bodies not just the Security and Intelligence Services (“the SIAs”) (who, as set out above, have serious crime functions), but also the National Criminal Intelligence Service, the Serious and Organised Crime Agency and their successor body: the NCA.
46. Section 23 affords the “*widest protection*” of any of the exemptions: *Home Office v Information Commissioner & Cobain* [2015] UKUT 27 (AAC) at §§19(b) and 29.
47. The legislative choice of Parliament was that “*the exclusionary principle was so fundamental, when considering information touching the specified bodies, that even perfectly harmless disclosure would only be made on the initiative or with the consent of the body concerned*”: *Cobain*, at §28, approving a passage of the First-tier Tribunal. See too: *APPGER v Information Commissioner & Foreign and Commonwealth Office* [2015] UKUT 377 (AAC) at §16.
48. When applying the ‘relates to’ limb, that language is used in “*a wide sense*”, and the first port of call should always be the statutory language: *APPGER* at §23, 25. As a matter of ordinary language, ‘relates to’ means ‘connected with’ or ‘arising out of’: *APPGER* at §18. In the context of the security bodies, it may be helpful to consider the synonyms of “*some connection*”, or “*that it touches or stands in some relation to*”: *APPGER* at §§13, 25. The Upper Tribunal reiterated in *Savic* (above) at §§40 and 42 that the focus should always be on the statutory language.
49. In *Corderoy & Ahmed v Information Commissioner, Attorney General’s Office & Cabinet Office* [2017] UKUT 495 (AAC), the Upper Tribunal reiterated its approval of its previous guidance in *APPGER*: at §§53-54. It also emphasised the ‘revelatory problem’ concern which is the focus of section 23:



*“We reiterate that Parliament clearly did not intend information to be obtained from or about security bodies through the back door and we acknowledge that there can be difficulty:*

*(a) in an outsider identifying what the revelatory nature of information, if any, which is said to be subject to the absolute section 23 exemption might be, and so*

*(b) in the application of an approach that asks whether the information is or might be revelatory of the Security Services’ activities, their intelligence or intelligence sources, and that these points support a wide approach to the reach of section 23.”*

50. The information which must meet the statutory language of section 23(5) is that of the ‘yes’ or ‘no’ answer that information was held responsive to the request. The question is whether Parliament intended such an answer to be absolutely exempt in the context of this case, having regard to the need to address the revelatory problem which section 23 seek, in wide terms, to meet.

51. The application of that test is most straightforward where the request itself seeks information about a security body: e.g. any correspondence the MPS has had with the NCA about IMSI Catchers. Either a confirmation or denial would plainly (at least) relate to the NCA in that example. But the test cannot be so limited, not least because requestors will not ask for information they know to be subject to the absolute exemption. The fact that it may not be obvious on the face of the confirmation or denial itself, even when read with the request, does not mean that the confirmation or denial may not in fact relate to a section 23(3) body. In other words, when deciding what information ‘derives from’ a ‘yes’ or ‘no’ answer, it is legitimate to consider both any information expressly communicated by the public authority and any inferences the public would draw from the information. A good example of this is *Commissioner of Police of the Metropolis v Information Commissioner* (EA/2010/0008), accepting section 23(5) where confirmation or denial would indirectly also answer whether the Security Service held or did not hold particular information, due to the practical operation of inter-agency relationships.

52. On the open evidence alone, the Commissioner continues to take the view that section 23(5) is engaged. She accepts that its application is not an easy case, such as where the request itself links the information to a security body. But the request, and the confirmation or denial, must be considered through a ‘real world’ lens:

(1) The use of IMSI Catchers would amount to equipment interference requiring authorisation on terms which, under the relevant legislation, are limited to circumstances of “*serious crime*”.

- (2) The statutory functions of the NCA and the SIAs concern the fight against “*serious crime*” and (particularly for the latter) the protection of national security.
- (3) It is not a secret that the Forces can, and indeed must, work operationally with the NCA and the SIAs. The former is set out on the face of section 5 of the Crime and Courts Act 2013 (by way of both request and direction), and the latter is well-known and follows, not least, from the absence of any power of arrest given to the SIAs.
- (4) The obvious inference to be drawn is that confirmation of the possession of IMSI Catchers by the MPS<sup>6</sup> is more likely than not to be combined with an inference of operational activity alongside, or supporting, section 23 security bodies. (The Appellant’s own evidence includes press coverage which links the MPS and the NCA in relation to IMSI Catchers: [2/142-144].)
- (5) Likewise, denial of the possession of IMSI Catchers would give rise to the inference that any use of IMSI Catchers is carried out only by section 23 bodies themselves, which tends to be revelatory of the likely operational priorities of the section 23 bodies.

53. That open processing of reasoning is only further supported by the CLOSED submissions of the Forces.

## **Conclusion**

54. For the reasons set out, the Commissioner submits that the appeal should be dismissed.

55. For the avoidance of doubt, were the appeal to be allowed against the MPS the appropriate course under section 58, read with section 50(4)(a), would be to issue (in effect) a substituted DN requiring the MPS to confirm or deny what information it holds responsive to the various parts of the request. The MPS would be entitled to consider whether or not such information falls within the scope of any substantive exemption under FOIA, doubtless closely informed by the outcome of the PCCW appeal. Nothing in *Malnick* requires the Tribunal to insist that the MPS is not entitled to consider the application of substantive exemptions; that would frustrate the distinction drawn in section 1(1) (and maintained in sections 17 and 50(4)(a)) between the two aspects of the right.

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<sup>6</sup> Strictly, the Commissioner accepts, information concerning the purchase of IMSI Catchers but, as set out above, it is not possible practically to distinguish the two and nor does the Appellant claim to be doing so.

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