

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 13 June 2017

Public Authority: Chief Constable of Nottinghamshire
Constabulary

Address: Nottinghamshire Police HQ
Sherwood Lodge
Arnold
Nottingham
NG5 8PP

Decision (including any steps ordered)

1. The complainant has requested information about Nottinghamshire Police's use of covert communications data capture technology. Nottinghamshire Police would neither confirm nor deny holding any information citing the exemptions at sections 23(5) (security bodies), 24(2) (national security), 30(3) (investigations and proceedings) and 31(3) (law enforcement) of the FOIA.
2. The Commissioner's decision is that sections 23(5) and 24(2) were cited correctly and so Nottinghamshire Police was not obliged to confirm or deny whether the requested information was held.
3. The Commissioner does not require any steps to be taken.

Background

4. The request refers to IMSI catchers, "IMSI" being an acronym for "International Mobile Subscriber Identity". According to a response on Hansard¹:

"Investigative activity involving interference with property or wireless telegraphy, such as International Mobile Subscriber Identity (IMSI) grabbers, is regulated by the Police Act 1997 and the Intelligence Services Act 1994 which sets out the high level of authorisation required before the police or Security and intelligence agencies can undertake such activity. Use of these powers is overseen by the Intelligence Services Commissioner and the Office of Surveillance Commissioners. In any case involving the interception of the content of a communication, a warrant authorised by the Secretary of State under the Regulation of Investigatory Powers Act 2000 is required".

5. Nottinghamshire Police cited decision notice FS5049944² as evidence to support the principle of neither confirming nor denying the use of a particular type of surveillance equipment. It also cited a decision issued by the Scottish Information Commissioner, 201600278³, which refers specifically to IMSI technology.

Request and response

6. On 10 October 2016, the complainant wrote to Nottinghamshire Police and requested information in the following terms:

"Please tell me if the force uses any form of 'IMSI catchers' or 'covert communications data capture' technology, or any other technology to harvest data from mobile devices or using mobile signals (here

¹ <http://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Lords/2014-11-03/HL2602>

² https://ico.org.uk/media/action-weve-taken/decision-notices/2013/825162/fs_50459944.pdf

³ <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2016/201600278.aspx>

referred to collectively as catchers).

Please tell me how any such catcher technology is used by the force and how it works.

How much was spent by the force on any IMSI or CCDC technology in your budgets for each of the past three years.

How many officers make use of it?

How many arrests have been made by the force in the past six months on information acquired by catcher technology?"

7. Nottinghamshire Police responded on 5 December 2016. It refused to confirm or deny holding the requested information, citing sections 23(5), 24(2), 30(3) and 31(3) of the FOIA.
8. The complainant asked Nottinghamshire Police to conduct an internal review, indicating that he would be willing to modify the request in the following ways: in respect of the second point of the request, he was willing to accept a "general" explanation as to how the technology works and is used. In respect of the fourth point of the request (the number of officers making use of the technology), he was willing to substitute instead a request to know how many mobile devices had been accessed by IMSI catchers in 2016.
9. Following an internal review Nottinghamshire Police wrote to the complainant maintaining its position.

Scope of the case

10. The complainant contacted the Commissioner on 31 January 2017 to complain about the way his request for information had been handled. He asked the Commissioner to consider the application of the exemptions cited by Nottinghamshire Police.

Reasons for decision

Section 23 – Information supplied by or relating to security bodies **Section 24 – National security**

11. Under section 23(1), information supplied by or relating to security bodies specified in section 23(3) is exempt from disclosure. Information which does not fall under section 23(1) is exempt from disclosure under

section 24(1), if it is required for the purpose of safeguarding national security.

12. Sections 23(5) and 24(2) exclude the duty of a public authority to confirm or deny whether it holds information which, if held, would be exempt under section 23(1) or 24(1) respectively.
13. By virtue of section 23(5) 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 which relates to, any of the bodies specified in section 23(3).
14. By virtue of section 24(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.
15. Nottinghamshire Police considers that both sections 23(5) and 24(2) are engaged in this case. The Commissioner does not consider the exemptions at section 23(5) and 24(2) to be mutually exclusive and she accepts that they can be relied upon independently or jointly in order to conceal whether or not one or more of the security bodies has been involved in an issue which might impact on national security.
16. With regard to section 23(5), Nottinghamshire Police argued that if the information specified in the request did exist, it is "highly likely" that it would have come from, or be related to, a section 23(3) body. Were it the case that absolute certainty of the connection between the information and a section 23(3) body was required, this might mean that the possibility, however slim, of Nottinghamshire Police holding relevant information that was not related to, or supplied by, a section 23(3) body would undermine its reliance on section 23(5).
17. In the Tribunal case *The Commissioner of Police of the Metropolis vs Information Commissioner* (EA/2010/0008) the argument was advanced that it was *highly likely* that any information held by the public authority that fell within the scope of the request would have been supplied to it by a section 23(3) body and, therefore, section 23(5) was engaged. The counterargument was made that only certainty as to the source of the information would be sufficient. The Tribunal rejected this counterargument and stated:

"[The evidence provided] *clearly establishes the **probability** that the requested information, if held, came through a section 23 body.*"
(paragraph 20)
18. The approach of the Commissioner on this point is that she accepts the Tribunal view that the balance of probabilities is the correct test to apply. This means that for section 23(5) to be engaged, the evidence

must suggest to a sufficient degree of likelihood (rather than certainty) that any information falling within the scope of the request would relate to, or have been supplied by, a body specified in section 23(3).

19. In this case, the Commissioner considers it clear that the subject matter of the request – data capture from mobile phones – is within the area of the work of bodies specified in section 23(3). This view is strengthened by the citation in paragraph 4, above, which states that any use of IMSI technology would be regulated by the Police Act 1997 and the Intelligence Services Act 1994.
20. Nottinghamshire Police has also advised the Commissioner:

“Police Forces routinely work alongside other law enforcement agencies especially with regards to areas of counter terrorism and serious and organised crime”.
21. The Commissioner accepts that it is likely that, if the information described in the request does exist, this would be a field of work which is likely to have been conducted in conjunction with, and with the knowledge of, other parties within the policing field, and that this type of work is likely to include security bodies.
22. The test as to whether a disclosure would relate to a security body is decided on the normal standard of proof, that is, the balance of probabilities. In other words, if it is more likely than not that the disclosure would relate to a security body then the exemption would be engaged.
23. From the above it can be seen that section 23(5) has a very wide application. If the information requested is within what could be described as the ambit of security bodies’ operations, section 23(5) is likely to apply. This is consistent with the scheme of FOIA because the security bodies themselves are not subject to its provisions. Factors indicating whether a request is of this nature will include the functions of the public authority receiving the request, the subject area to which the request relates and the actual wording of the request.
24. There is clearly a close relationship between the police service and the security bodies. It is inevitable that it works closely with security bodies in carrying out its role. Therefore, in respect of Nottinghamshire Police’s role and the subject matter being requested, the Commissioner finds that, on the balance of probabilities, any information about its potential use of IMSI technology, if held, could be related to one or more bodies identified in section 23(3) of the FOIA. The Commissioner is therefore satisfied that Nottinghamshire Police is entitled to rely upon section 23(5) in the circumstances of this case.

25. As this conclusion has been reached on section 23(5), it is not strictly necessary to go on to also consider any other exemptions. However, as Nottinghamshire Police also relied on section 24(2), the Commissioner has gone on to consider that exemption.
26. Section 24(2) provides an exemption from the duty to confirm or deny where this is required for the purpose of safeguarding national security. Consideration of this exemption is a two-stage process. First, the exemption must be engaged due to the requirement of national security. Secondly, this exemption is qualified by the public interest, which means that the confirmation or denial must be provided if the public interest in the maintenance of the exemption does not outweigh the public interest in disclosure.
27. The Commissioner has already accepted, when finding that section 23(5) is engaged, that revealing whether or not information is held within the scope of the request would reveal information relating to the role of the security bodies. The Commissioner also accepts that a disclosure that touches on the work of the security bodies would consequentially undermine national security. For that reason section 24(2) is also engaged, as exemption from the duty to confirm or deny is required for the purposes of national security.
28. Turning to the balance of the public interest, the question here is whether the public interest in safeguarding national security is outweighed by the public interest in disclosure of the confirmation or denial. Clearly, the public interest in safeguarding national security carries very great weight. In order for the public interest to favour provision of the confirmation or denial, it will be necessary for there to be public interest factors in favour of this of at least equally significant weight.
29. The view of the Commissioner is that there is some valid public interest in confirmation or denial in response to this request. It would increase public knowledge regarding the extent, or otherwise, of the use of IMSI catchers by Nottinghamshire Police which, in turn, may give an indication regarding their use by the police service as a whole.
30. The Commissioner considers it to be clearly the case, however, that this public interest does not match the weight of the public interest in safeguarding national security. This means that her conclusion is that the public interest in the maintenance of the exemption provided by section 24(2) outweighs the public interest in disclosure of the confirmation or denial.
31. In view of this finding, and that on section 23(5), Nottinghamshire Police was not required to confirm or deny whether it held the information

Reference: FS50665716



requested by the complainant. The Commissioner has not therefore considered the other exemptions cited.

Right of appeal

32. 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

33. 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.
34. 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

Samantha Bracegirdle
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Information Commissioner's Office
Wycliffe House
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