Neutral Citation Number: [2017] UKIPTrib15_586-CH

IN THE INVESTIGATORY POWERS TRIBUNAL

Nos. IPT/15/586/CH
IPT/16/448/CH

Thursday, 15th December 2016

Before:

THE PRESIDENT (SIR MICHAEL BURTON)
MR. JUSTICE EDIS
MR. CHARLES FLINT QC
PROFESSOR GRAHAM ZELLICK QC
SIR RICHARD McLAUGHLIN

B E T W E E N :

(1) MARK DIAS
(2) STEPHEN MATTHEWS — Claimants

- and -

THE CHIEF CONSTABLE OF CLEVELAND POLICE — Respondent

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JUDGMENT

31 January 2017

A P P E A R A N C E S

MR. A. RATHMELL (instructed by Cartwright King Solicitors) appeared on behalf of the First Claimant.

MR. H. TOMLINSON QC (instructed by Taylor Goodchild Solicitors) appeared for the Second Claimant.

MR. J. WAITE (instructed by Cleveland Police) appeared on behalf of the Respondent.

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THE PRESIDENT:

1 This is the judgment of the Tribunal.

2 This has been the hearing of applications by two former police officers in the Cleveland Police Force brought against the Chief Constable of Cleveland Police. Mr. Mark Dias, the First Claimant, brought his complaint on 20 November 2015, and the complaint by Mr. Stephen Matthews, the Second Claimant, was made subsequently on 12 September 2016 and was joined with that of the First Claimant by the Tribunal's Order of 31 October 2016 ("the October Order"), as they both arise out of the same facts. The First Claimant served with the Cleveland Police between 2004 and 2013, latterly as a Temporary Inspector. The Second Claimant retired in October 2013 after 27 years' service; he was Chairman of the Cleveland Police Federation between 2007 and 2013.

3 The claims arise directly out of an Application for Communications Data ("CDA") made, by reference to s.22 of the Regulation of Investigatory Powers Act 2000 ("RIPA"), on 17 May 2012 ("the first CDA") by the Cleveland Police (whom we shall call "the Respondent"). The Application was to obtain traffic data (incoming and outgoing call data) in respect of identified mobile telephone numbers of the First and Second Claimants in respect of the period 1 January to 1 May 2012. On the same day an application was made by the

Respondent to obtain such traffic data in respect of identified telephone numbers said to relate to four others, Mr. S, a solicitor, and three journalists, Mr. H, Ms. B and Mr. W, in respect of whom it was asserted there had been links with the First and Second Claimants relevant to alleged leaks of information ("the second CDA").

4 There were, in all, seven CDAs drafted on the Respondent's behalf in respect of the subject matter being considered before us, but in the event only three others were pursued, namely the fourth, fifth and seventh CDAs. Although those three CDAs, as well as the second CDA, all indirectly concerned the Claimants, the only CDA which was pursued specifically in respect of the First and Second Claimants' telephone numbers was the first CDA. By the October Order the Tribunal directed that (i) if the Respondent disputed the Tribunal's jurisdiction to rule in respect of any other CDA than the first, then such questions should be resolved at the hearing, but no such challenge has been made (ii) the issue to be tried was "*whether, assuming the facts alleged in the authorisations are true, the requirements of s.22 were met and the authorisations were lawful, taking into account in particular the decision of this Tribunal in* ***News Group Newspapers v Commissioner of Police of the Metropolis [2015] UKIP Trib 14_176-H***". In the light of the making of that assumption, the Tribunal recorded in the October Order that it was not necessary at this stage to decide any disputed questions of fact. The Respondent did not need to produce evidence to justify what was stated in the

CDAs, and no evidence was at this stage to be adduced (without permission, which was not sought) from the Claimants.

5 At the hearing, the First Claimant was represented by Mr. Aaron Rathmell of Counsel and the Second Claimant by Mr. Hugh Tomlinson QC. Both of them served very helpful skeleton arguments, which we read prior to the hearing, as well as the agreed documents. The Respondent was represented at the hearing by Mr. Waite of Counsel, who took over at relatively the last moment from other counsel who, through no fault of his own, had become unable to attend, and Mr. Waite adopted his predecessor's submissions, which we also read.

6 At the outset of the hearing we indicated that we did not require to call on the Claimants to open their case or expand it beyond that which had been clearly set out in their skeleton arguments, and we immediately called upon Mr. Waite for the Respondent. In the event, we did not need to hear the Claimants' counsel in response, save that Mr. Tomlinson QC shortly supplemented his skeleton orally, but we concluded that the Claimants' cases, as expanded in their skeletons, were convincing and not answered by the Respondent. We indicated that our reasons for so concluding and thus finding in favour of the Claimants would be given in writing, and we now do so.

7 The first and second CDAs were made on 17 May 2012 by reference to s.22(2)(b). S.22 ("*Obtaining and disclosing communications data*") reads in material part as follows:-

> "*(1) This section applies where a person designated for the purposes of this Chapter believes that it is necessary on grounds falling within subsection (2) to obtain any communications data.*
>
> *(2) It is necessary on grounds falling within this subsection to obtain communications data if it is necessary –*
>
> *...*
>
> *(b) for the purpose of preventing or detecting crime or of preventing disorder;*
>
> *...*
>
> *(3) subject to subsection (5), the designated person may grant an authorisation for persons holding offices, ranks or positions with the same relevant public authority as the designated person to engage in any conduct to which this Chapter applies.*
>
> *...*

(5) The designated person shall not grant an authorisation under subsection (3)… unless he believes that obtaining the data in question by the conduct authorised or required by the authorisation … is proportionate to what is sought to be achieved by so obtaining the data."

8 In Chapter 2 of the Acquisition and Disclosure of Communications Data Code of Practice issued pursuant to s.71 of RIPA in 2007 (and still in force in May 2012) it was provided by Footnote 14 that:

"Detecting crime includes establishing by whom, for what purpose, by what means and generally in what circumstances any crime was committed, the gathering of evidence for use in any legal proceedings and the apprehension of the person (or persons) by whom any crime was committed … Where an investigation relates to an allegation of criminal conduct by a member of a public authority, that public authority … may use their powers under Chapter II to obtain communications data for the purpose of preventing and detecting the alleged or suspected crime where the investigating officer intends the matter to be subject of a prosecution within a criminal court."

It is plain that this does not require that the investigating officer's mind is already made up before obtaining the information, but that his intention should

be that, if the evidence obtained substantially and sufficiently supports a case that he intends to bring, then there should be a prosecution (although always subject to the decision of the Crown Prosecution Service ("CPS") and, in the case of s.55 of the Data Protection Act 1998 ("the DPA"), with the consent of the Director of Public Prosecutions). Thus such information is not to be sought simply for the purpose of establishing a breach of discipline, or misconduct in the course of employment short of a criminal offence.

The Facts.

9 The first and second CDAs were made by DC Geoff Cox and approved the following day, 18 May 2012, by Superintendent McPhillips as designated person ("DP"). They were based upon the Respondent's belief that there had been three leaks to the Press by police officers, believed to be the First and Second Claimants, in April 2012:

(i) The Internal Grievance. The first CDA described how on 3 April 2012 a journalist (Mr. H) from the Northern Echo contacted the Cleveland Police Press Office, and stated that "*someone who wanted to remain anonymous had rung him, telling him there was an internal grievance investigation into the actions/behaviour of a serving officer within the Professional Standards Unit. He stated that he had been provided with information in respect of a series of complaints which*

[Temporary Assistant Chief Constable] *Roberts was dealing with. Mr. H then divulged further in depth knowledge of these matters which could have only been provided by someone who had been made privy to the inquiry."* There was reference in the CDA to the fact that a solicitor, a Mr. S of Russell Jones & Walker, on 3 January 2012, instructed by the Police Federation on behalf of an ex-police officer, for whom he was acting in an employment tribunal claim, had sent an email to the Respondent asking for disclosure of that Internal Grievance, on the basis that it could be relevant to the case which he was handling: this request had been denied.

(ii) <u>The Interim Equality Report.</u> The second leak the subject matter of the CDA was explained as follows: "*On 18 April 2012 Ms. B of the Northern Echo ran a story under the headline 'Racism Found in police force'. This article referred to an inquiry which had been instigated by the Temporary Chief Constable and which had been marked by her as 'Restricted'. Ms. B had previously contacted the force Press Office, stating that she had received a tip-off of its existence. She also stated that she had spoken to* [the Second Claimant], *the Chairman of Cleveland Police Federation, who had confirmed the existence of the report and informed her that its findings were confidential. As a result of these two instances the* [Temporary] *Chief Constable, Mrs. Cheer, issued a request to all staff for the leaks of information to the Press to*

stop and for the person responsible to come forward. From this request [the First Claimant] *contacted the Press Office and admitted that he had spoken to the Northern Echo and discussed the findings contained within the* [Interim Equality Report], *against the express order of the Chief Constable.*"

(iii) <u>The Murder Inquiry.</u> The CDA continued: "*In addition to these leaks, Cleveland Police were involved in a high profile murder inquiry which involved a number of police forces trying to locate a suspect named …. Although the inquiry was made public, certain aspects of the inquiry were not. At around 17:30 on 26 April* [Mr. W] *who was also a journalist with the Northern Echo contacted the Cleveland Police Press Office and requested confirmation of information he was in possession of in respect of sexual assaults committed by* [the suspect] *which had not been made public. When challenged as to his source he refused to disclose but did confirm to the press office that it was a police source … [T]hat which was divulged … potentially jeopardised an ongoing inquiry in which a violent, dangerous male was at large in the community, a man who had, it was suspected, already been responsible for the death of two people, thus by disclosing other facts it may well have put other witnesses in danger.*"

10 The case made out against the First and Second Claimants was summarised in the CDA as follows:

> "*In respect of the disclosures to the Northern Echo in relation to the 'Restricted'* [Interim Equality Report], *the First Claimant has admitted that he was the source of that disclosure and that he had gone against an express order of the Chief Constable in doing so. He also admitted discussing the grievance procedure with* [the Second Claimant], *who was one of a very small number of people who had knowledge of the fact that the* [Interim Equality Report] *was to be given to the officers involved that day.*"

11 The steps which were sought in the CDA and approved were as follows:

> "*In order to investigate these matters further it is felt necessary to obtain incoming and outgoing call data in respect of all mobile telephones used by those named, from 1 January 2012 until 1 May 2012, in order that any telephone contact between the subjects of this investigation may be established.*"

12 We were assisted by the witness statements prepared by the Respondent pursuant to the October Order and, in particular, by the "narrative statement" prepared by Mr. Simon Nickless, the Temporary Deputy Chief Constable of

Cleveland Police who, though without direct knowledge of the underlying facts as he did not join Cleveland Police until 1 July 2014, gives an account by reference to the disclosed documents and evidence. The history can be summarised as follows:

(i) He recounts that on 3 January 2012 the solicitor, Mr. S, emailed the Respondent to the effect that he understood that there had been lodged against a named senior police officer, by another police officer, a grievance, the allegations in which had the potential to undermine evidence in relation to the client whom he was representing in a misconduct investigation, and he requested disclosure of such Internal Grievance. Mr. S's request was refused.

(ii) In early February an Interim Report of the Cleveland Police Equality Review Team was distributed to those officers and members of staff who had participated in it. The First Claimant was one of the recipients of that Interim Report, which was confidential. The First Claimant requested permission, via his Police Federation representative, the Second Claimant, to supply a copy of the Interim Report to his legal representative in the employment tribunal claim which he was bringing against the Respondent. On 27 February such permission was refused on the basis that the Interim Report was classified as 'Restricted', that it contained sensitive information and that assurances had been given to

those who took part in the review that their participation would be handled with the utmost confidence. The First Claimant's request was thus (at any rate for the time being) refused by email to the First Claimant and his representative, the Second Claimant.

(iii) On 3 April the journalist, Mr. H, called the Cleveland Press Office, to the effect that someone who wanted to remain anonymous had contacted Mr. H, telling him that there was an internal grievance investigation into the actions of the senior police officer, relating to conduct going back more than ten years. On 5 April TCC Cheer emailed all members of Cleveland Police, sternly counselling them against leaks to the press, and Detective Inspector Rock was requested to conduct an investigation into the leak of the Internal Grievance.

(iv) Mr. Nickless said in his narrative statement at paragraph 20 as follows:

"*DI Rock sought legal advice from Julia Hatton, Cleveland Police Force solicitor, as to whether or not the leaking of information to the press could amount to misconduct in a public office or any other criminal offence."*

In the Respondent's skeleton argument, as described above prepared by Mr. Waite's predecessor and adopted by him, the following is said:

"*24. It is obvious that at the outset of the investigation DI Rock was unsure as to whether or not criminal offences were being committed. It is equally clear that he sought legal advice in relation to this matter and consulted with others in relation to it. All concerned acted in good faith throughout and the investigation team were entitled to, and indeed should have, relied upon Ms. Julia Hatton's legal advice.*
25. Ms. Hatton was clear in her view that the disclosures could amount to misconduct in a public office."

Mr. Nickless continued in his narrative statement:

"23. *At 15:22 on 10 April 2012, Ms. Hatton gave advice that the leak could amount to a criminal offence - either an offence under the* [DPA] *or misconduct in a public office.*"

(v) On 5 April DI Rock sought what is called a '*TIGER*' check, being a request for a Lawful Business Monitoring Application, i.e. a search of the Respondent's own telecommunications systems which would have no need for a RIPA application. The request was for a TIGER check "*to establish who may have leaked this information to* [Mr. H] *between the*

dates of 1 April and 3 April 2012 inclusive." On 10 April 2012, DI Rock recorded that the TIGER checks had had a negative result.

(vi) On 16 April 2012, another former Cleveland police officer received a compensation package of more than £800,000 from Cleveland Police, on the basis that he had been wrongfully prosecuted and dismissed. On the same day ACC White, on behalf of the Respondent, made a Press statement to the effect that he did not believe that the Cleveland force was a racist organisation. As the First Claimant admitted the next day (and as was subsequently shown by the communications data obtained), he telephoned Mr. H at the Northern Echo on 17 April (in a call which the communications data showed to have lasted for some 85 seconds).

(vii) At 11:21 on 17 April, Ms. B of the Northern Echo contacted the Cleveland Police Press Office to the effect that she had received a tip-off stating that there was some kind of report of the Respondent into racism. Ms. B stated that she had spoken to the Second Claimant at the Federation, who had confirmed the existence of the report but said that it was confidential at the moment, and (as Ms. McDonald of the Press Office recorded in a contemporaneous email) that "*he understands there was nothing to worry about within its findings at the moment*". Ms. B went on to say to the Press Officer that she had been told that the Interim Report was '*damning*', and asked if the Press Office would confirm the

existence of the Interim Report. As a result of the media contact, on 17 April the Respondent issued a press release confirming the existence of the Interim Report, which it described as "*a positive move for the Force*".

(viii) In a series of calls and emails on 17 and 18 April, the First Claimant admitted that, because he had been angry about the content of ACC White's press release, he had spoken to the Northern Echo, but denied that he had handed over his copy of the Interim Report, which he confirmed that he still retained: he acknowledged that what he had done was wrong and that he should not have done what he did. He was as from 18 April on sick leave, and was suspended on 20 April. DI Rock concluded that the First Claimant was responsible for disclosure of details of the Interim Report to the Northern Echo, and that he also could have been responsible for the disclosure to the Press of the existence of the Internal Grievance.

(ix) A murder inquiry had commenced on 21 April 2012, in which the First Claimant was not involved. On 26 April, Mr. W of the Northern Echo contacted the Press Office and queried whether a suspect in the murder investigation had been connected with two violent sexual offences, information which was not in the public domain and which Mr.

H confirmed had been provided by a 'police source', making it evident that there had been a further police leak.

(x) On 2 May 2012, DI Rock extended the criminal investigation to cover the Interim Equality Report as well as the Internal Grievance. On 4 May he sent a series of what have been called "*trigger emails*" to Mr. S, Mr. H and Ms. B, in the hope of obtaining further information. This exercise did not take the matter any further, save that Mr. H responded that he genuinely did not know the name of the person who had contacted him with regard to the Internal Grievance, and Mr. S, the solicitor, said that the complaints against the senior police officer the subject of the Internal Grievance had been "*common knowledge at least within your force and a source of gossip*", and he did not recall which person or persons had mentioned it to him.

(xi) On 17 May the first and second CDAs were made. In the two CDAs together there were applications for the communications data in respect of the mobile telephone numbers relating to six people, including the First and Second Claimants, the journalists Mr. H and Ms. B and also Mr. W (although it now appears that the number may not have been his) and the solicitor Mr. S. The application was for all incoming and outgoing communications data for the period from 1 January to 1 May 2012.

(xii) Both applications were approved by Superintendent McPhillips as DP on 18 May 2012. He wrote as follows:-

"I am the Designated Person with Cleveland Police who has the authority to authorise applications for communications data as defined within section 21(4) Regulation of Investigatory Powers Act (RIPA) 2000.

I have read the attached application and I believe that acquiring this communications data is necessary for the prevention and detection of crime as defined in section 22(2)(b) of RIPA. I am also satisfied that the acquisition of this communications data complies with the Code of Practice for the Acquisition and Disclosure of Communications Data, pursuant to section 71 RIPA.

The crimes being investigated by the police in respect of this application is that [sic] *Misconduct in Public Office and Data Protection Act. Securing this communications data is likely to support the police investigation into this alleged crime in that it may assist in the identification of the person responsible for committing them.*

The data requested is intended to show prior and current links between two Cleveland Police officers, T/Insp Mark Dias and [PC 'M'] and members of the press and legal profession namely [Mr 'H'] (Northern Echo), [Ms 'B'] (Northern Echo), Mr 'W' (Northern Echo) and [Mr 'S'] (Solicitor) with regards to leaks of information.

Public confidence in the Police is hugely affected by cases such as this and the police have a strong public duty to identify those involved in the type of activity.

I believe that the conduct involved in obtaining this communications data is proportionate to the objectives of the investigation in that it will assist the police in identifying the links between the officers and the named persons and any person(s) who can also be linked to this alleged criminal activity. I have balanced the extent of this level of intrusiveness with the interference of an unknown individual's rights of respect for their private life against the benefit to the on-going police investigation. I believe that this is the most appropriate method that can be employed by the police at this time and the level of intrusiveness taking into consideration the offence timescales, both proportionate and justified.

In making my determination whether to approve or reject this application, I have also given consideration to any collateral Intrusion

that may occur. It is likely, through any application for communications data, that collateral intrusion may occur against innocent members of the community, friends and family but until the data is received this cannot be realistically assessed, which has to be balanced against the overall objectives of the police investigation. Nevertheless, I am satisfied, in this case, that where collateral intrusion does occur it can be effectively managed by the investigating officer (IO)."

(xiii) A conference with the CPS was fixed on 26 June for 9 July. The CPS advice was given on 19 July that no further action should be taken in relation to criminal proceedings against the First Claimant in respect of the Interim Equality Report (being the matter which had been the subject of the First Claimant's admissions), although criminal investigations continued in respect of the leak relating to the Internal Grievance, at least in relation to the Second Claimant.

(xiv) In the meantime, a further CDA had been prepared in relation to obtaining the First Claimant's emails (the third CDA), though this was not pursued in light of the CPS decision, but further CDAs were made (the fourth, fifth and seventh CDAs) relating to communications data with regard to Mr. S, Ms. B and Mr. H on 20 and 23 July and 3 August (granted on 9 and 20 August), still relying in part on the First Claimant's admissions in relation to the Interim Equality Report.

(xv) On 30 August 2012, DI Rock informed the First Claimant that there would be no further action in relation to the criminal investigation against him. On 13 June 2013, the CPS advised DI Rock that no charges should be brought against the Second Claimant.

13 At the outset of the hearing, Mr. Waite conceded that there was no case against the First Claimant from the date of the CPS decision on 19 July, and consequently that, as he put it, the CDAs were not lawful as from that date with regard to him. He made no concession so far as concerns the fourth, fifth and seventh CDAs (the third and sixth not having been pursued), and made no specific concession in relation to the Second Claimant, but it is clear, in respect of the First and Second Claimants, that the legality of the first CDA is what is of primary importance, and its legality from the outset, not simply as from the subsequent date when the decision not to prosecute was made. As to the impact of such concession as was made by Mr. Waite upon Mr. S, Mr. H, Ms. B and Mr. W, they are not parties to these proceedings, and indeed to date no applications to the Tribunal have been issued by them, but, notwithstanding the October Order, Mr Waite made no submissions in relation to the other CDAs, and accepted, as was put to him in argument by Mr Flint QC, that if the first and second CDAs were unlawful, justification for the others would fall away.

<u>The Issues.</u>

14 It is common ground that the questions for us, both as a result of the statutory provisions and the Code of Practice and our decision in **News Group** (and the authorities there referred to), are as follows:

> Question 1. Was the first CDA believed to be necessary for the purpose of *preventing or detecting crime or of preventing disorder*, within s.22(2)(c) of RIPA? Was there an offence which the Respondent believed to have been committed which, if the evidence produced by the CDAs was sufficient, was committed (i) by the First Claimant (ii) by the Second Claimant and (iii) intended to be the subject of prosecution (rather than simply disclosing disciplinary offences or misconduct allegations).
>
> Question 2. Was there consideration of whether the matters reached the threshold of seriousness for such a step, in the public interest or by virtue of pressing social need, in the light of the fact that the contemporaneous first and second CDAs involved or included applications for communications between the police officers and three journalists and a practising lawyer advising on or involved with those offences. It is not in dispute that there is a CPS Guidance (specifically referred to and relied upon in paragraph 25 of the Respondent's

Skeleton), namely "Prosecuting Cases Where Public Servants Have Disclosed Confidential Information to Journalists", which reads:

> *"• As a matter of general principle the 'necessity' of any restriction of freedom of expression must be convincingly established,*
>
> • *Limitations on the confidentiality of journalistic sources call for the most careful scrutiny by the court.*
>
> • *The exercise of the jurisdiction should meet a 'pressing social need', and*
>
> • *The restriction should be proportionate to a legitimate aim which is being pursued.*
>
> *Ultimately, each case must be determined on its own facts and merits, weighing up the conflicting public interests, where they arise. The fact that these two aspects of the public interest can conflict with each other means that the investigation and prosecution of cases involving the leaking of confidential information to journalists can present especial difficulty.*"

Question 3. In connection with Questions 1 and 2, was any legal advice sought or obtained or relied upon for the making or approval of the first and second CDAs?

Question 4. Was there any consideration of proportionality, with regard to:-

(i) other methods of obtaining further information, whether prior to or instead of the step taken to obtain the CDAs?

(ii) A less drastic application than one for the communications data (incoming and outgoing) of the officers, three journalists and a solicitor, for the period of four months?

Were there any such lesser steps which were reasonably available?

Question 1.

15 The offences upon which the First and Second CDAs are and were submitted to be based were misconduct in public office and s.55 of the DPA (as appears from the rationale of the DP set out in paragraph 12(xii) above). It is common ground that the elements of the offence of misconduct in public office are set out in **Attorney General's Ref. No. 3 of 2003 [2005] QB 73 (CA)** as follows, namely that the offence is committed when (i) a public officer, acting as such,

(ii) wilfully neglects to perform his duty and/or wilfully misconducts himself (iii) to such a degree as to amount to an abuse of the public's trust in the officeholder (iv) without reasonable excuse or justification. There is agreed to be a high threshold of culpability (see paragraph 56, paragraph 57 and paragraph 62 of the judgment of Pill LJ): the CPS Guidance referred to above emphasises that "*not every act of misconduct by a public official is capable of amounting to a criminal offence*".

16 The other offence relied upon is and was s.55 of the DPA. This reads in material part as follows:-

"*55 - Unlawful obtaining, etc. of personal data.*

(1) A person must not knowingly or recklessly, without the consent of the data controller -

(a) obtain or disclose personal data or the information contained in personal data…

(2) Subsection (1) does not apply to a person who shows -

(a) that the obtaining, disclosing or procuring -

(i) was necessary for the purpose of preventing or detecting crime

…

(b) that he acted in the reasonable belief that he had in law the right to obtain or disclose the data or information …

(c) that he acted in the reasonable belief that he would have had the consent of the data controller if the data controller had known of the obtaining, disclosing or procuring and the circumstances of it, or

(d) that in the particular circumstances the obtaining, disclosing or procuring was justified as being in the public interest.

(3) A person who contravenes subsection (1) is guilty of an offence."

17 The lawfulness of the authorisation must be justified objectively, based upon the information known to the Respondent at the time of the applications (17 May): see **News Group** at paragraphs 34 and 65. Naturally, the availability and strength of any defence (the onus being upon a defendant by s.55(2)) had to be considered. It was perfectly appropriate to take into account the totality of the three leaks during the period under consideration if it was believed that all three were connected. The question of whether legal advice was obtained will be addressed under Question 3 below.

18 It is apparent that these offences involved complex questions, and not just by reference to the statutory defences under s.55(2) of the DPA. As to misconduct in public office, the 'Murder Inquiry' leak would obviously have

fallen into a different category, as putting at risk a criminal investigation. As for the first two leaks, the confidentiality assurances given to third parties in the Interim Equality Report were plainly of importance, as was the apparent clear contravention of an express direction by the Chief Constable, in the context of the inevitable reputational impact of the disclosure of allegations of racism or misconduct within the Respondent. The DP's rationale set out in paragraph 12 (xii) above emphasised that "*public confidence in the Police is hugely affected by cases such as this and the Police have a strong public duty to identify those involved in this type of activity.*" The question would, however, obviously have needed to be considered whether (as per **News Group** at paragraph 13 and paragraph 68) the leaks went beyond disciplinary offences or misconduct, so as to constitute criminal offences.

19 With regard to the DPA, there would be the question of whether what had occurred in relation to the disclosure to the Northern Echo of the existence of the Internal Grievance against the senior police officer and of the Interim Equality Report (both presumably included in the Respondent's electronic records), and possibly the disclosure of the actual Report, was the knowing or reckless disclosure of personal data (including, by reference to s.1(1) of the DPA, "*data which relate to a living individual who can be identified .. from those data*") without the consent of the data controller.

20 We consider first the case against the First Claimant. He had admitted being the source of the leak to the Northern Echo of the existence of the Interim Equality Report, and although there was no indication that the Northern Echo had received a copy of the Report, if the disclosure did include a supply of such a copy the First Claimant had been a recipient of it, and had (through his representative, the Second Claimant) unsuccessfully asked for permission to supply a copy of it to his legal representative in order to be able to rely on it in his own employment tribunal claim against the Respondent.

21 As for the Internal Grievance, the first CDA alleges that "*only a limited number of people had been aware of it, or at least of its dissemination*", although the reply to the trigger email by Mr. S, referred to in paragraph 12 (x) above, suggested otherwise. There is, and seemingly was, no evidence that such limited number included the First Claimant. According to the witness statement of DI Rock at paragraph 29, he made an entry in a log on 18 April that the Claimant might be responsible for the Internal Grievance leak "*as a result of a conversation I had with PC 'GS', when it became clear that PC 'GS' had spoken with* [the First and Second Claimants] *just prior to this leak*". This of itself seems fairly exiguous, but it was not in any event repeated in the CDA, in which what was said was that the First Claimant "*admitted discussing the grievance procedure with* [the Second Claimant]". No evidence was adduced before us with regard to this alleged admission. The reality seems to be that the First Claimant's admission that, angered by the ACC's press release

(referred to in paragraph 12(vi) above), he had discussed with the Northern Echo the Interim Equality Report, led the Respondent to believe that he may also have been the source of the earlier leak in relation to the Interim Grievance two weeks before, although:-

(i) as pointed out by Mr. Tomlinson QC, DI Rock, in paragraph 34 of his witness statement, said that he had made an entry in a log on 8 May that the first and second leaks were to be treated as two separate investigations and

(ii) it is noteworthy that after the decision was made on 19 July to abandon the case in relation to the Interim Equality Report leak, the case was still pursued in respect of the Internal Grievance although, as Mr. Waite now concedes, without justification.

22 In any event, there is no evidence in relation to the third leak, the Murder Inquiry, of any involvement of the First Claimant. The First Claimant was not a member of the murder inquiry team, and that inquiry only commenced on 20 or 21 April, after he had gone on sick leave and then been suspended, and there is no suggestion that he had any means of knowledge about it. As Mr. Tomlinson pointed out in argument, there was no evidence that such inquiry was even limited to the Cleveland Police Force.

23 With regard to the Second Claimant, he was the Chairman of the Police Federation, and is therefore likely to have known, and did know, about the existence of the Internal Grievance and the Interim Equality Report. The reference in an email by Mr. S, the solicitor, in January 2012 to the Internal Grievance is not relied upon as a specific leak, but as leading to an inference that the First and/or Second Claimants had access to/knowledge of it by virtue of their various involvements with Mr. S; but any number of people may well have known about the existence of the Internal Grievance, made by another officer against a senior police officer, which is said to have related to a number of incidents over a ten year period. As for the disclosure of the Interim Report, as set out in paragraph 12 (vii) above the journalist, Ms. B, told the Respondent's press office that she had spoken to the Second Claimant and that, as recorded in the first CDA, the Second Claimant had "*confirmed the existence of the report and informed her that its findings were confidential*". What is, however, not included in the first CDA is what was also the case, as there set out, namely that Ms. B told the Press Officer that the Second Claimant had told her that "*he understands there is nothing to worry about within its findings at the moment*". This would appear inconsistent with any suggestion that the Second Claimant was the source, who had said, as reported by Ms. B, that the Report was "*damning*". As for the Murder Inquiry, there is no suggestion that the Second Claimant was in any way privy to or involved with such inquiry, and no evidence which connects him or the First Claimant to that leak.

Question 2.

24 The ‘threshold of seriousness’ is partly a question of analysis of the alleged offences: Mr. Tomlinson persuasively submitted that the approval by the DP, as set out above, was inadequate in concentrating upon the public impact of the leaks and inadequate in its consideration of whether there was a ground for criminal investigation. But the other ingredient is whether there was consideration of the need for the communications data in the light of the impact upon Article 10 of the ECHR of the investigation of the journalists’ sources, and upon legal and professional privilege, the CDAs also being directed at the solicitor, Mr. S. Supt McPhillips, the DP, stated in his witness statement at paragraph 11 that when making his decision he (surprisingly) did not give consideration to Article 10. He continued that he “*considered all relevant matters and carefully considered Article 8*”. He does not say in terms whether he considered the issue of legal and professional privilege, or if so what conclusions he reached in that regard.

Question 3.

25 Even though not always essential where experienced police officers are involved, having regard to the legislation and the codes, the obtaining of legal advice was clearly advisable here in respect of the complex question of

misconduct in public office and s.55 of the DPA, whether by reference to the specific facts or otherwise. Such advice would also have been useful in respect of the impact of Article 10 and of legal and professional privilege.

26 We refer to the Respondent's evidence and submissions set out in paragraph 12 (iv) above that advice was taken and relied upon. Not surprisingly, the Claimants sought, prior to the hearing, disclosure of such legal advice, given that it was expressly said to have been relied upon, such that any legal privilege in regard to it was plainly waived. This application for disclosure was resisted by the Respondent and granted by the Tribunal.

27 What was produced was plainly inconsistent with the narrative statement of Mr. Nickless at paragraphs 20, 21 and 23 and the Respondent's submissions at paragraphs 24 and 25 ("*Ms. Hatton was clear in her view that the disclosures could amount to misconduct in a public office*"). It was simply an email dated 15:22 on 10 April 2012 (being the date and time when paragraph 23 of Mr. Nickless's narrative statement records that Ms. Hatton gave "*advice that the leak could amount to a criminal offence - either an offence under the [DPA] or misconduct in a public office*") as follows:-

> "*I suggest you speak to Norma Stott as I think we could be looking at offences under the DPA for disclosing personal information. I can't think of anything else other than misconduct in a public office.*"

28 There is no evidence as to whether DI Rock spoke to Ms. Stott, who was, in any event, not a lawyer. In the light of that, in the course of the hearing the concession by Mr. Waite was that "*there was no detailed advice from Ms. Hatton*", but the reality is that there was no legal advice at all, upon which the Respondent could rely, whether on the facts or otherwise, as to whether there was a case (with regard to either Claimant) by reference to misconduct in a public office or s.55 of the DPA, nor any analysis of the requirements of either offence, and certainly no advice as to the impact of Article 10 or of legal and professional privilege.

Question 4.

29 Proportionality and alternatives. There was no consideration of the taking of alternative steps either prior to or instead of the CDAs, and/or no evidence as to why, if they were considered, no such steps were taken or were of no avail:

(i) The Respondent had taken the very sensible step of carrying out TIGER checks (as referred to in paragraph 12 (v) above) which were limited to two days in April. They were negative. No explanation is given as to why, once the investigation was expanded to include the second and third leaks, there could not have been further TIGER checks in respect of an expanded period. In any event no explanation is given as

to why it was thought appropriate to limit the earlier TIGER checks to two days, even though at that stage the involvement of Mr. S in January was known about, and yet when the CPAs were made they were made in respect of a four month period.

(ii) There were no other steps taken by way of investigation: perhaps significantly in light of the fact that in listing the grounds for making the DPAs Mr. Waite added to the matters set out in paragraph 20 to 23 above the absence of any alternative source for the leaks. According to paragraph 39 of DI Rock's statement he believed at the time that they had "*exhausted all other lines of inquiry*".

30 Mr. Rathmell suggested, in paragraph 77 of his submissions, that:-

> (a) A statement could have been taken from the First Claimant or there could have been some less formal inquiries of him or an interview. "*If* [the First Claimant] *was suspected of involvement in the Internal Grievance disclosure or the Murder Inquiry disclosure, he could have been asked. There was nothing to suggest* [the First Claimant] *would not co-operate. Indeed the opposite: when a staff "message to all" email was sent on 18 April 2012, seeking information as to who was responsible for the racism disclosure,* [the First Claimant] *immediately came forward."*

(b) The investigating team could have sought information from potential witnesses, including colleagues of the Claimants.

(c) The investigating team could have conducted an analysis of precisely what was thought to have been leaked to journalists, what might be attributable to the particular suspects and what was already in the public domain.

(d) In relation to the Murder Inquiry, any improper access of records could have been ascertained by auditing the Respondent's information systems, which Mr. Rathmell submitted to be routine procedure in misconduct investigations into alleged misuse of police information, before invoking RIPA.

There would be no reason to believe, as might sometimes be the case in police investigations, that the making of any such further inquiries would lead to the disappearance or contamination of evidence, as the communications data would still remain available.

31 There was no evidence before us as to whether any of these alternative or additional steps were considered or why, if they were considered, they were not concluded to be appropriate or were concluded to be unnecessary or impracticable.

32 There was no consideration at all (nor any evidence if there was) of the making of any prior inquiries as to, or with, the Second Claimant.

33 In addition, there is the significant factor that, particularly by reference to the **News Group** case, in which conspiracy to discredit a government minister was suspected, the width and ambit of the CDAs in this case were so extensive: all incoming and outgoing data over four months (not two days as per the TIGER checks) and in respect of six people, including a solicitor. Given that the three leaks occurred in April, the only justification for taking the request for communications data back to 1 January is by reference to the mention of the Internal Grievance by Mr. S on 3 January. There was no consideration, on the evidence adduced before us, of the necessity for the duration or extent of the communications data, and no evidence of any weighing up of the benefit of obtaining such data against the clear interference with Articles 8 and 10.

34 This analysis of our Four Questions leaves no doubt that the first and second CDAs were unlawful:-

(i) Whatever the subjective belief of the Respondent, there was no lawful basis for obtaining the CDAs against the First or Second Claimant by reference to a case that either had committed a criminal offence. Particularly in the absence of any legal advice at the time, but in the absence, even before us, of any arguable analysis of the offence of

misconduct in public office or s.55 of the DPA based on the facts as known as at 17 May 2012, there was no case justifying the obtaining of communications data, and certainly not of this breadth. The understandable concern of the Respondent at three apparent leaks from members of the police force to the Press in a short period could have led to serious consideration of disciplining the sources of those leaks, and indeed the admission by the First Claimant of his discussion with the Northern Echo about the existence of the Interim Equality Report, confidential and sensitive as it was, plainly merited such consideration. But no such considerations justified the steps taken on 17 May 2012, particularly in the absence of any legal advice or legal analysis of the offences said to form a basis for the applications, and it is significant that the Respondent has unavailingly attempted to assert that there was such advice.

(ii) This is particularly so where there was, contrary to what we would expect from a competent and properly trained DP, admittedly no consideration at all of the impact of Article 10 by way of targeting the communications with journalists, nor, it is clear, of legal and professional privilege in relation to the obvious involvement of a solicitor.

(iii) Other steps could have been taken but were not even considered prior to any application for communications data being made. Had they been taken it might have become apparent that any application for communications data would be unjustified, or alternatively it might have provided some justification for the making of such application, although

(iv) on any basis the duration and extent of the CDAs, and the involvement, without any consideration or legal advice, of journalists and a solicitor would have been most unlikely to be justified.

35 The applications for and approvals of the obtaining of communications data by the first and second CDAs were therefore unlawful and must be quashed. As for the fourth, fifth and seventh CDAs, for the reasons set out in paragraph 13 above they too were unlawful.

36 Copies of this judgment will be sent to the Police and Crime Commissioner for Cleveland, HM Chief Inspector of Constabulary and the Independent Police Complaints Commission and also to the Interception of Communications Commissioner.

37 We shall hear submissions from the parties as to remedies and the consequences of our findings.