The Investigatory Powers Tribunal

Report 2021-2023

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Foreword from the President

I am pleased to present the Investigatory Powers Tribunal Public Report which covers the period 2021-2023. I hope that those who wish to know more about the work of the Tribunal will find the content of interest. The Report contains an overview of the work of the Tribunal during the past two years, information regarding the development of the Tribunal's jurisdiction and significant cases, as well as a statistical overview of case determination breakdowns.

I would like to thank everyone who has contributed to the preparation and production of this Report: Lord Boyd of Duncansby, the Vice-President of the Tribunal, and members of staff working at the Tribunal's Secretariat.

Chapter 1 Introduction

The Public Report issued by the Tribunal in 2022 was necessarily a lengthy document as it covered a span of several years (2016-2021). This 2024 Public Report does not replicate information contained in that report where there has been no change. This Report focuses on significant developments in the period 2021-2023 since the previous report.

If readers are interested in the following areas we would recommend you visit the website Home - The Investigatory Powers Tribunal and/or the relevant sections of the 2022 Report IPT Report (investigatorypowerstribunal.org.uk).

- How the Tribunal works
- Frequently asked questions
- Judgments of the Tribunal
- Legislation, Codes of Practice and Tribunal Rules.

Chapter 2 Review of Period Since Last report

Workload

- The workload of the Tribunal has continued to increase since the previous Report. There was a slight decrease in the number of cases[1] received by the Tribunal from 2021 to 2022, but the total number of cases received in 2023 increased to over 400.

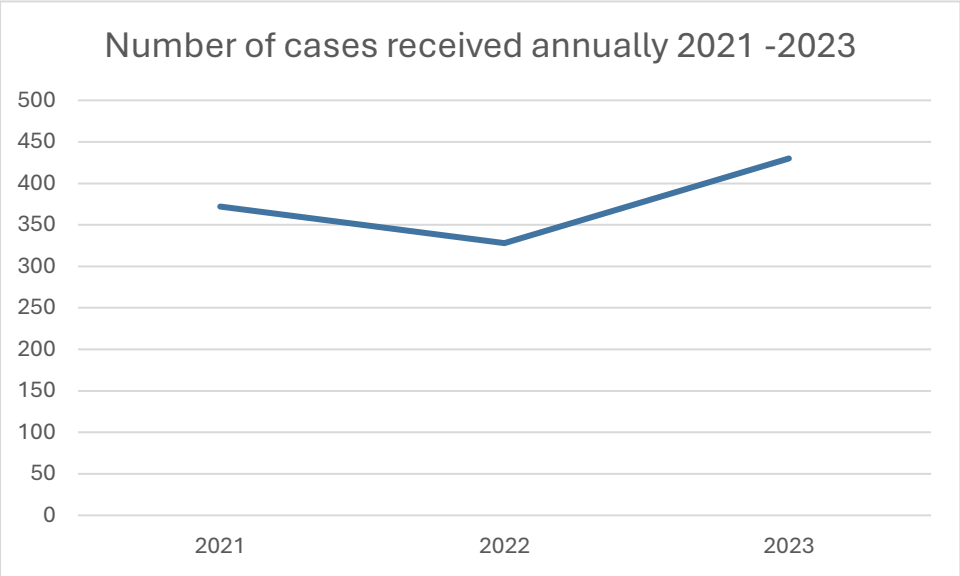

Fig 1: Graph showing the number of cases received annually from 2021- 2023

- The total number of cases received in 2023 was more than double the number of cases received in 2017[2], continuing the upwards trend overall since 2017.

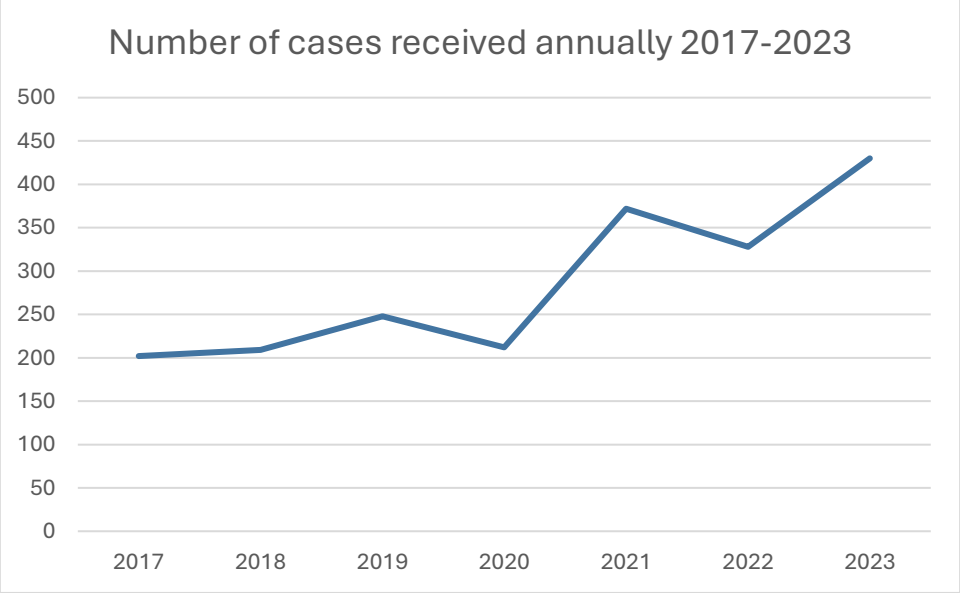

Fig 2: Graph showing the number of cases received annually from 2017- 2023

[1] NB reference to "cases" throughout this report should be taken to include both complaints and claims sent to the Tribunal
[2] 113% increase

- Since the last report was published the Tribunal has significantly increased its capacity to progress cases in an efficient, timely manner. There is no longer the backlog of cases that was created in large part by the Covid19 pandemic.
- The Tribunal has sat in Scotland and Northern Ireland during this period, as well as holding several hearings at the Royal Courts of Justice in London.

Transparency and communication

The Tribunal has taken a number of steps to increase transparency. This will give greater ease of access to information for those who wish to make a complaint/claim to the Tribunal, or to those who are simply interested in the work of the Tribunal.

These steps include:

  - Modernisation of the Tribunal website, with text written in a more accessible format.
  - Re-working of the Claim and Complaint forms, as well as the accompanying information leaflets.
  - OPEN hearings are now listed on the Tribunal website (Hearings page) a week in advance to increase awareness of which cases are being heard before the Tribunal.
  - The Tribunal will provide remote access, where it is available in court, to OPEN hearings to any member of the public, including media, who requests it.
  - The Tribunal has used the Press Association's Alert Service to give notice to their subscribing media applications of issues, which have arisen in the course of a hearing and which may affect the media's rights under Article 10 of the European Convention on Human Rights (ECHR). This has allowed representatives of the Press to make submissions, in writing and orally, to the Tribunal on issues that affect the media reporting of an OPEN hearing.

- The Tribunal has been represented at the following international conferences - the European Intelligence Oversight Conference 2023, and the International Intelligence Oversight Forum 2023. Discussions at these forums focused on accountability and transparency.
- The Tribunal has undertaken familiarisation visits to all of the Security and Intelligence Agencies of the UK since the last report. These visits enable members of the Tribunal to gain a better understanding of how the Agencies operate. The knowledge gained during these visits assists the Tribunal to better investigate claims and complaints and to fairly adjudicate on cases before it. All visits are governed by a protocol between the Tribunal and the agencies which provides that no cases, past or present, may be discussed during these visits. This protocol is strictly adhered to.

Changes to the Law affecting the operation of the Tribunal

- Recent case law in the European Court of Human Rights *Wieder and Guarnieri v UK*[3] ruled that individuals anywhere in the world can make a claim in the Tribunal, if the conduct was by a UK public body and occurred in the UK. The background to this case was a Privacy International campaign, through which it sought to encourage individuals to lodge complaints with the Tribunal via a standard application form made available on Privacy International's website alleging breaches of Articles 8 and 10. In total, 663 claims were submitted by individuals, and a small number of organisations.
- In 2016 the Tribunal handed down the *Human Rights Watch Inc & Ors and The Secretary of State for the Foreign & Commonwealth Office & Ors* judgment[4], which considered the first ten applications lodged pursuant to the Privacy International campaign. All claimants outside the UK were informed that their Human Rights Act claim was dismissed unless they could show they were in the UK and provide more information about their claim. All claimants in the UK, and those outside the UK, who had submitted Complaint forms were informed they needed to provide further information.
- After this judgment several claimants took their challenge to the European Court of Human Rights. This case concerns two of the claimants, Joshua Wieder, who is a US national, living in the US and Claudio Guarnieri, an Italian national, who lives in Germany.

  In September 2023 the European Court of Human Rights held that:

  - Interference with the privacy of communications clearly takes place where those communications are intercepted, searched, examined and used and the resulting injury to the privacy rights of the sender and/or recipient will also take place there.
  - Given the UK intercepted, searched, examined or used the applicants' communications within the United Kingdom's territory, the interference with their right to privacy fell within the territorial jurisdiction of the United Kingdom.
  - The UK government had already accepted the applicants' victim status. The European Court highlighted for the purposes of bulk interception of communications, the "the level of persuasion necessary to establish victim status cannot be unreasonably high".
  - In light of its findings in Big Brother Watch and others v the United Kingdom case, it concluded that there has been a violation of Article 8 of the European Convention.

[3] [2023] ECHR 668
[4] [2016] UKIPTrib15_165-CH (HUMAN RIGHTS WATCH INC & ORS - and - THE SECRETARY OF STATE FOR THE FOREIGN & COMMONWEALTH OFFICE & ORS - The Investigatory Powers Tribunal)

Tribunal procedures and open justice

Since the previous report the Tribunal's jurisprudence in the area of open justice, with specific regard to naming of litigants and access to documents, has been further developed.

The Supreme Court in *Dring v Cape Intermediate Holdings Ltd*[5] emphasised the principle of open justice and the critical importance of enabling public scrutiny of the judicial process. The right of a non-party seeking access to documents is not automatic, and a non-party seeking access must explain why they seek it and how granting access will advance the open justice principle. The court will carry out a fact-specific balancing exercise to take account of factors such as national security, privacy interests or commercial confidentiality.

The Tribunal considered *Dring* in two judgments during this period:

- *Various Claimants v Security Service & Government Communication Headquarters*[6] (also referred to as the Vetting case) which dealt with naming the claimants in an OPEN judgment.
- *Lee & Wilkes v Security Service*[7] which looked at the issue of disclosure of documents in an OPEN hearing.

These judgments set out how the principle of open justice can be applied in the particularly sensitive legal framework in which the Tribunal operates, which often arises even when holding OPEN hearings and preparing OPEN judgments. These judgments can be read in full on the Tribunal website - a summary of how these judgments specifically pertain to open justice can be found below.

Naming of claimants on judgments

Various Claimants v Security Service & Government Communication Headquarters

The Tribunal considered the issue of jurisdiction to hear vetting complaints/claims against the intelligence services case. A sample of four test cases was selected to consider certain preliminary issues common to all of them:

> (1) The Tribunal's jurisdiction in relation to vetting complaints, including what its jurisdiction is over complaints of discrimination concerning vetting.
> (2) Whether Article 6 of the European Convention on Human Rights ("ECHR") applies to vetting complaints.
> (3) Whether there are any other principles of procedural fairness which apply to vetting decisions, including whether there is any duty to give reasons for a refusal to grant vetting approval (subject to any considerations of national security).

[5] [2019] UKSC 38; [2020] AC 629
[6] This judgment can be found either at *Various Claimants v Security Service and another* [2023] 2 All ER 949 or [2022] UKIP Trib 3; IPT/19/04/C IPT-Vetting-judgment-OPEN-Final (investigatorypowerstribunal.org.uk)
[7] This judgment can be found at either *Lee & Wilkes v Security Service (No 2)* [2024] 4 All ER 510 or [2023] UKIPTrib 10; Investigatory Powers Tribunal.

While considering whether the Tribunal should record the names of the parties whose cases they had considered in the OPEN judgment, the Tribunal held that it should not in this case. Given that open justice is a foundational common law principle the Tribunal felt it was important to explain why.

The Tribunal stated that as per *Dring*, the principle of open justice applies to all courts and tribunals exercising the judicial power of the state and that the purposes served by the principle went beyond enabling public scrutiny of the way in which courts decide cases and extended to enabling the public to understand how the justice system works and why decisions are taken.

This means that, ordinarily, courts and tribunals have power to allow members of the public to access material held in court records, if they can show a legitimate interest in doing so which advances the open justice principle and subject to a balancing by the court of that interest against any countervailing interests (such as national security, the protection of the interests of children or mentally disabled adults, the protection of privacy more generally and the protection of trade secrets and commercial confidentiality).

In most court proceedings, the ordinary rule is that the litigant's name will be made public unless the litigant provides a cogent reason for anonymity sufficient to outweigh the interest in open justice. Cogent reasons include those identified by Lady Hale in *Dring*.

In the *Various Claimants* (Vetting) judgment the Tribunal identified a number of points where the procedures of the Tribunal, necessarily differ from those applicable in other court and tribunal proceedings:

- Non-parties have no general right of access to any documents filed by parties with the Tribunal. Indeed, there are procedural rules going in the opposite direction. This is due to the differences between the legislative context in which the Tribunal operates and that which governs ordinary civil proceedings.
    - In *Dring*, at paras. 16-33, Lady Hale referred in detail to the provisions of the Civil Procedure Rules which either confer a right on third parties to obtain access to certain documents which have been filed with the court, or at least confers a wide discretion on the court to afford such access.
    - In contrast, this Tribunal is subject to a very different legal regime, in particular by rule 7 of the Rules. For example, rule 7(11) provides that, subject to para. (12), the Tribunal may not, without the consent of the complainant, disclose to any person other than Counsel to the Tribunal – "(a) any information or document disclosed or provided to the Tribunal by or on behalf of the complainant or the fact that any such information or document has been disclosed or provided; …"

In the *Various Claimants* (Vetting) judgment the Tribunal acknowledged that there might be circumstances in which it could grant access to certain information or documents to a non-party on application, exercising its general power under section 68(1) of RIPA to determine its own procedure in accordance with the principles enunciated in *Dring*, and subject always to the overriding duty to secure that information is not disclosed to an extent or in a manner that is

contrary to the public interest (see rule 7(1) of the Rules). In the ordinary course, however, the names of those who have complained to the Tribunal would not be made public.

- It also drew attention to the differing position of the Tribunal as compared with most courts and tribunals, where unless the proceedings are withdrawn or settled, there will at some point be a public hearing followed by a public judgment or decision.
- In this Tribunal, many complaints and claims (in fact the vast majority) are determined without any public hearing. Rule 15 of the Rules imposes duties and confers powers to provide determinations, or summaries, together with reasons in certain cases. But the Tribunal does not publish every such determination.
- Most of the judgments and decisions published are rulings on preliminary issues of law decided after OPEN hearings or after considering OPEN submissions.
- It follows that a person considering bringing a complaint or filing a claim in the Tribunal would not necessarily expect their identity to become public as a matter of course. The reasonable expectation of litigants seemed to the Tribunal to be an important consideration, though not determinative.

With regards to the particular issues in the *Various Claimants* (Vetting) case the Tribunal determined that it was not right to determine the issue of anonymity on the basis of generic considerations alone and therefore undertook a balancing exercise of the kind the Supreme Court in *Dring* considered might be required if an application for disclosure of particular information were made.

There were three particular features in this case in favour of anonymity:

- First, the fact that the decision being made in this judgment did not determine any particular individual complaint, instead it dealt with generic issues of law.
- Secondly, the topic of vetting itself raises particular sensitivities. Some of the individuals whose cases we have considered have held security clearances for some time. To reveal publicly that an individual has held security clearance could expose that individual to approaches from malign actors, thereby prejudicing national security and/or the efficient discharge by the intelligence services of their functions.
- Thirdly, and more generally, to reveal that a particular individual has been refused security clearance is capable of causing real reputational damage. Whilst such damage would not ordinarily be sufficient to outweigh the public interest in open justice, the position is different in the current context. The ability to complain to this Tribunal forms an important part of the system for scrutinising vetting decisions and, thus, for maintaining the integrity of the vetting process. There is a strong public interest in ensuring that those subject to negative decisions are not disincentivised from accessing the Tribunal by the fear that their identities might become public.

For those reasons, the Tribunal decided that in the particular context, the public interests in favour of anonymity outweighed the public interest in favour of open justice and directed that the complainants should be anonymised in any public version of our judgment.

As the Tribunal had not heard any detailed argument on this issue at the hearing, there was a period of time after the judgment was published to allow any representation to be made on the issue of anonymity by representatives of the media, for example the Press Association. As no such representations were received the Tribunal decided that the parties should remain anonymous.

Third party access to documents

Lee & Wilkes v Security Service [2023] UKIPTrib 10 (*Lee & Wilkes*)

In this particular case the Tribunal refused the Claimants' application to permit disclosure to third parties except to a limited extent. In coming to this decision, the Tribunal expanded further on when it was appropriate, in the particular circumstances of its proceedings, for documents to be disclosed to third parties involved in separate proceedings.

In this judgment the Tribunal set out their analysis of the open justice principle and its interaction with the Rules, in particular rule 7. The Tribunal also endorsed a three-stage approach to be applied to questions of what principles should be applied to applications at each stage.

This hearing concerned a Claimant's application for the Tribunal's permission to disclose certain documents to Special Advocates in separate proceedings, brought by two applicants known as C17 and C18, which were taking place before the Special Immigration Appeals Commission (SIAC). The documents sought had been provided to parties in an agreed bundle for an OPEN hearing of the Tribunal in *Lee* and *Wilkes* on a procedural issue which took place on 11 July 2023, and included the Respondent's Preliminary Open Response (POR); the Claimants' response to that document; and correspondence between the parties and the Tribunal. The Claimants submitted that there was a public interest in disclosure so that the Claimant can vindicate herself before this Tribunal.

The POR document at issue was under the direction of the Tribunal President that its "disclosure….is only for the purposes of the proceedings in the Tribunal unless permission for another purpose is sought and granted by the Tribunal."

Prior Notice of this hearing was given to the Press Association's subscribing media organisations as the Tribunal recognised the issues might affect the media's rights under Article 10 of the ECHR.

The balancing act required by *Dring* was discussed in more detail in this judgment and how it should be applied to the principle that the public should be allowed access, not only to the parties' written submissions and arguments, but also to the documents which have been placed before the court and referred to during the hearing. As per *Dring*, this should not be limited to those which the judge has been asked to read or has said that he has read. Lady Hale explained, by reference to earlier authority, that the court has to carry out "a fact-specific balancing exercise". On the one hand will be "the purpose of the open justice principle" and "the potential value of the information in question in advancing that purpose". But, as she continued at para 46, on the other hand will be "any risk of harm which its disclosure may cause to the maintenance of an effective judicial process or to the legitimate interests of others". There may be very good reasons for denying access: one of "the most obvious ones" that Lady Hale mentioned is national security. This is of particular relevance to this Tribunal.

With regard the specific request in *Lee & Wilkes* three stages were examined and the correct procedure that should be applied set out for each stage as follows:

> (1) Where a complaint has been issued and the Respondent has disclosed and/or provided the Tribunal with information and/or documents pursuant to section 68(6) of RIPA, the Respondent may refuse to consent to the disclosure of documents or information to a complainant or a third party. A refusal to consent to disclosure to the complainant may result in procedural consequences following the exercise of the Tribunal's discretion in rule 7(4) – (7). A refusal to consent to disclosure to a third party, however, would not have those consequences (paras 27 & 33).
>
> (2) Where the Respondent has consented to disclosure of such information and/or documents to the complainant, it is for the Tribunal to determine any application by the complainant for collateral use, or an application by a third party for access, taking into account any submissions from the Respondent, as well as the Complainant, and mindful of the Tribunal's duty in rule 7(1). At this second stage, the Respondent has no entitlement or 'veto' to refuse to consent to disclosure under rule 7 (paras 28 – 30, 34, 35).
>
> (3) Where an OPEN hearing has taken place at which there has been relevant reference to information and/or documents, the Tribunal must conduct a "fact-specific" exercise in accordance with the principles of open justice set out by the Supreme Court in *Dring*. In applying those principles to the specific context of the Tribunal, the Tribunal must comply with the provisions of rule 7(1) in particular, but must also seek to implement the principle of open justice so far as it is possible to do so (paras 31, 35, 56).

The Tribunal discussed an important distinction which may need to be drawn between two principles which often overlap but are not identical – open justice and procedural fairness, in particular fairness to the complainant, who may otherwise be in the dark about the case against them. Often the two principles coincide but this will not always be so. There may be situations in which a respondent is willing (in the interests of fairness) to disclose certain documents or information to the complainant and their representatives, but where it would not be appropriate for those matters to be disseminated more widely or made public. The Tribunal has ample, flexible powers to regulate its own procedure to ensure that justice is done while balancing those various interests.

The Tribunal rejected any analogy with CPR 31.22, pointing out that civil proceedings are very different from the cases which come before the Tribunal and the legal framework which applies is fundamentally different. In discussion of the legal framework in which the Tribunal operates, the Tribunal noted that rule 7 contains not only the fundamental duty in para (1) but also the detailed code of provisions in the rest of that rule. It is clear from that code that the Tribunal is subject to severe constraints as to what it can disclose even to another party to the case before it, let alone to third parties.

Chapter 3 – Case Outcomes and Statistics

As noted at Chapter 2, the amount of cases received by the Tribunal in 2023 was more than double the number received in 2017. This chapter breaks down the cases received in the years 2021, 2022 and 2023 to provide more statistical information.

Across all years covered in this report, most complaints are against Law Enforcement Agencies, closely followed by Security and Intelligence Agencies.

A breakdown of the cases received and determined during these years is presented in the figures below. The cases are also broken down into which respondents have been the subject of complaints. To note, one case can refer to several organisations, and can also cover both conduct and surveillance.

It is important to note when reading these figures that these statistics only include figures for cases that have been determined i.e. the legal process through the Tribunal has been fully completed. There remain a significant number of cases received by the Tribunal in the period between 2021 – 2023 that are ongoing, which are not reflected in these figures. Future reports will include figures for determinations of cases that are currently ongoing at the Tribunal.

The figures show that the majority of cases each year are determined as either frivolous or vexatious[8]. Section 67(4) RIPA provides that the Tribunal is under no obligation to consider a complaint which is vexatious or frivolous. A complaint is regarded as frivolous/unsustainable if it is lacking in foundation as to justify this description. A complaint is regarded as vexatious if it is a repetition, or repeated repetition, of an earlier obviously unsustainable complaint by the same person. In those circumstances the Tribunal will dismiss the claim under Rule 15(5)(a).

These statistics should be read alongside the judgments handed down by the Tribunal in 2022 and 2023 in the cases of *Wilson*; *Pendlebury*[9]; *Hill*[10] *and Liberty and Privacy International*[11] where, after hearings held at least wholly or in part in public, the Tribunal held that public authorities (respectively Police Scotland, Greater Manchester Police, Surrey Police, MI5 and the Home Secretary) had acted unlawfully. These cases are discussed in more detail at the end of the chapter. Further detail on these judgments, as well as other Tribunal judgments can be found on the Tribunal website. These were all cases that had been received by the Tribunal pre-2021.

[8] More information can be found about the different types of determination used by the Tribunal here (Possible complaint outcomes - The Investigatory Powers Tribunal)

[9] *Richard Pendlebury v Greater Manchester Police* [2023] UKIPTrib 2

[10] *Damian Hill v Metropolitan Police Service & Independent Office for Police Conduct* [2022] UKIPTrib 6

[11] *Liberty & Privacy International v Security Service and Secretary of State for the Home Department* [2023] UKIPTrib 1

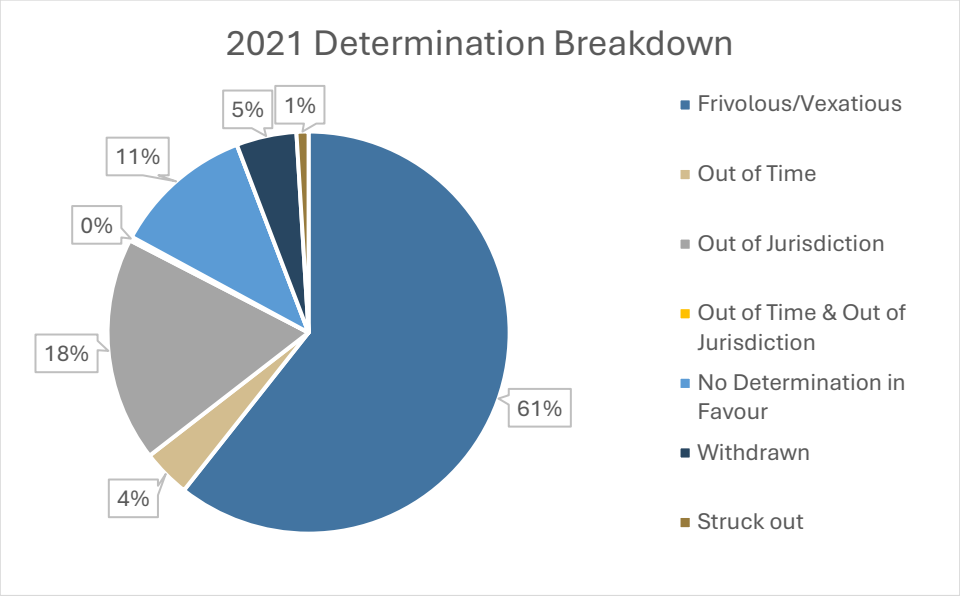

Fig 3: Chart showing the breakdown by determination of cases received in 2021

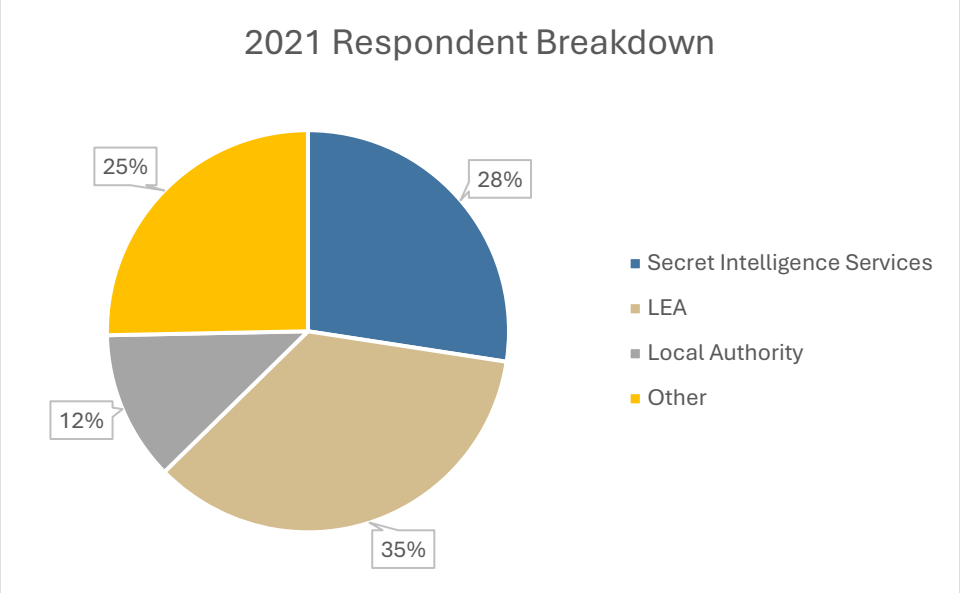

Fig 4 : Breakdown from cases received in 2021 to show which organisations were complained about[12]

[12] Please note any difference in 2021 figures from the previous Report is due to the fact that the more recent statistics use the cases received within a particular year to produce figures, as opposed to the previous method which used cases determined within a particular year. This new methodology should allow easier comparison of cases received each year.

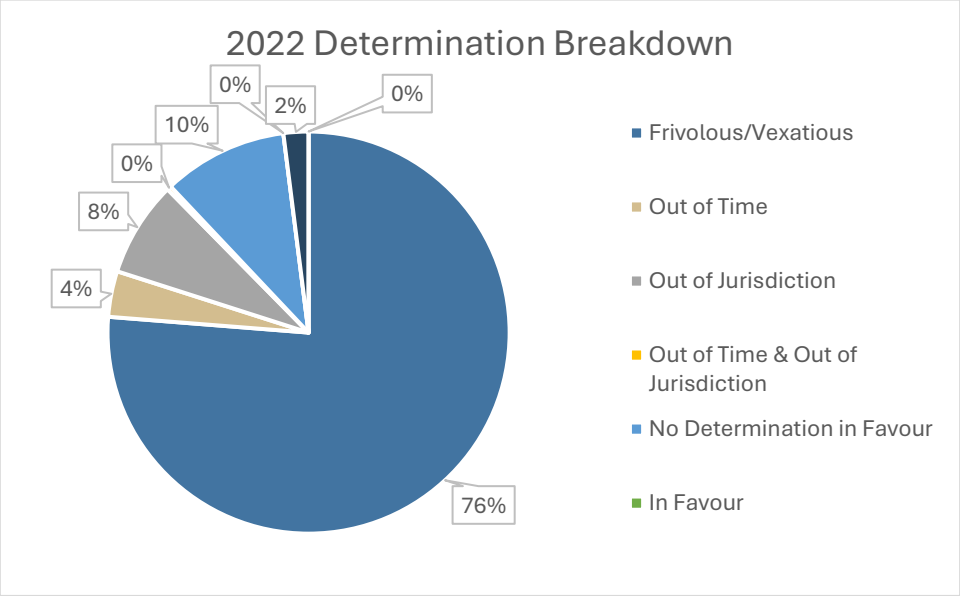

Fig 5: Chart showing the breakdown by determination of cases received in 2022

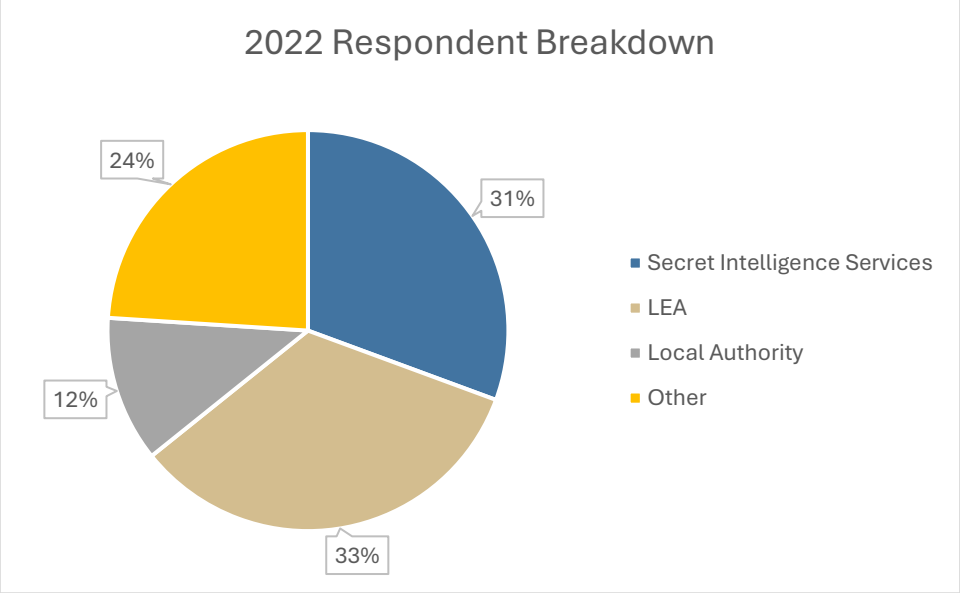

Fig 6: Breakdown from cases received in 2022 to show which organisations were complained about

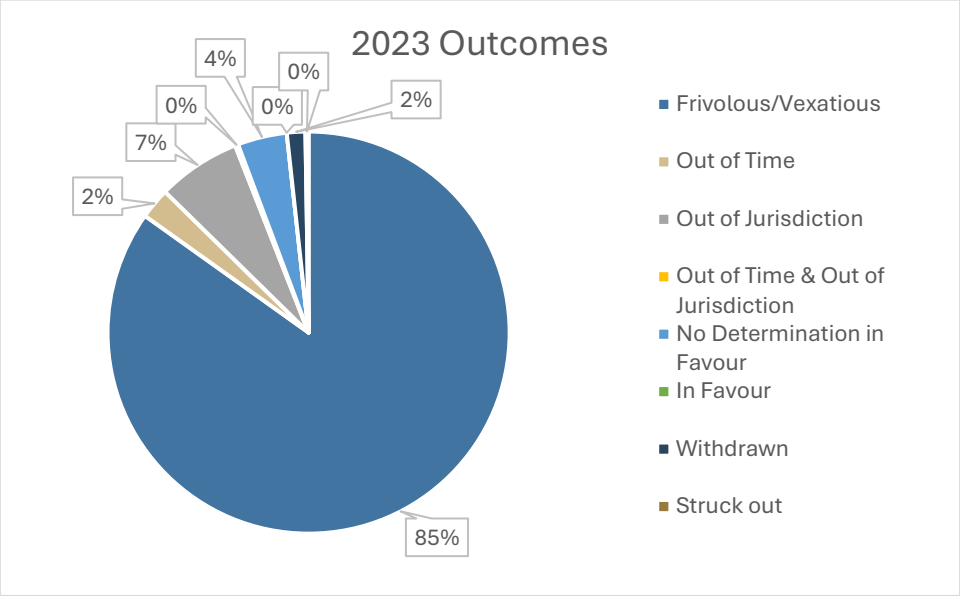

Fig 7: Chart showing the breakdown by determination of cases received in 2023

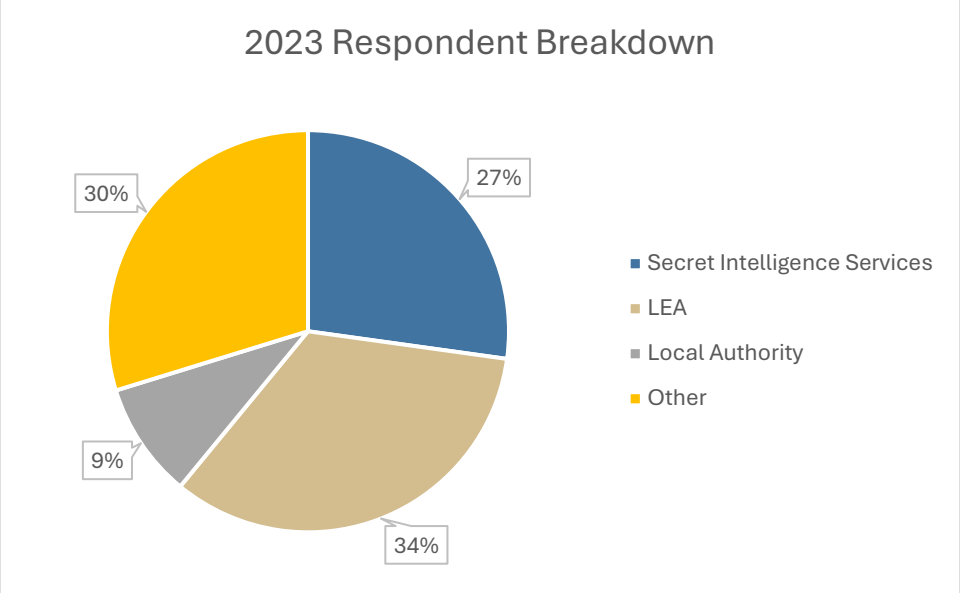

Fig 8: Breakdown from cases received in 2023 to show which organisations were complained about

Pendlebury v Greater Manchester Police [2023] UKIPTrib 2

The Claimant submitted a claim under section 7 of the Human Rights Act and a complaint under section 65(5) RIPA against the respondent, Greater Manchester Police (GMP). This arose from the authorisation by a designated officer of GMP of an application for the recovery of communications data (CD). At the time of the CD application, the Claimant was a serving police officer with GMP and investigating officers suspected that there was an attempt by the claimant and others, including other police officers, to pervert the course of justice. The CD application was said by the respondent to be related to a "conspiracy to pervert the course of justice investigation which has come to light following an arrest of a serving police officer for theft".

The Tribunal found in favour of the Claimant and held that the Claimant's article 8 rights were infringed by the scope of the CD application. Although the CD authorisation was necessary for the purpose of preventing or detecting crime, the scope went beyond what was necessary and proportionate for two reasons. The time period over which CD was sought, being over five months commencing a month prior to the alleged shoplifting offence was excessive. The Tribunal considered that less intrusive measures could have been taken. The Tribunal also held that inadequate consideration was given to the degree of collateral intrusion.

The Tribunal also held that the Chief Superintendent (CS) who acted as the designated officer for the CD application acted unlawfully. This was because, while the Tribunal was satisfied that the CS acted in good faith and in the mistaken belief that he was entitled to act as the designated person, the Tribunal was satisfied that as Gold Commander he was directly involved in the investigation and should not have acted as designated person. There was no justification on the face of the Application for the individual acting as designated person.

By way of remedy, the Tribunal made a declaration that the authorisation was in breach of the Claimant's Article 8 rights and unlawful and ordered the destruction of material recovered by the respondent under the authorisation.

Hill v Metropolitan Police Service & Independent Office For Police Conduct [2022] UKIPTrib 6

The Claimant submitted a complaint and a human rights claim brought by Detective Sergeant Hill against the Metropolitan Police Service (MPS) and the Independent Office for Police Conduct (IOPC). The Claimant complained that his data was unlawfully obtained by the MPS and IOPC in two ways: first they obtained communications data relating to his use of a mobile, and secondly, they subsequently downloaded its content purportedly exercising powers under the Police and Criminal Evidence Act 1984 (PACE). He alleges that by doing so those bodies breached his right under Article 8 of the European Convention on Human Rights (ECHR) to a private life.

With regards the first claim regarding the communications data, the Tribunal concluded that any reasonable decision maker given all the information which he should have had would probably have decided to refuse to authorise the request and that the authorisation might well have been refused if there had been proper disclosure. The Tribunal ruled that the communications data claim succeeded against the IOPC (para 20 & 21) and the authorisation was quashed. The Tribunal

subsequently declared the authorisation granted by the IOPC, with a view to obtaining the Claimant's communications data was unlawful and that the actions of the IOPC in relation to the obtaining of the Claimant's communications data were not necessary or proportionate and amounted to a violation of his right to respect for his private and family life under Article 8 of the ECHR. The IOPC were ordered to pay the Claimant £12,000 by way of just satisfaction for the breaches identified in the Judgment. Any copies of communications data relating to the Claimant which were still in the possession of either the MPS or IOPC were ordered to be destroyed.

The second claim regarding the phone download issue, was described by the Tribunal as an "extremely difficult" issue of whether it had jurisdiction in respect of the downloading of the Claimant's phone. The IOPC and the MPS, while accepting it was an unlawful act, submitted that the Tribunal did not have jurisdiction to grant a remedy and the Claimant must seek redress through the civil courts. The Tribunal certainly has jurisdiction (in summary of very complex statutory provisions) if the download required a warrant under Part 5 of the Investigatory Powers Act 2016. This depends on whether the download was an "interception" as defined by section 4 of IPA 2016 (para 22).

The Tribunal concluded that the Claimant's handset "was not part of a telecommunications system for the purposes of the IPA 2016 at the time when it was downloaded by MPS at the request of the IOPC. This is because at that time it was not connected to the public telecommunications system of which it had formerly been a part. We do not need to decide whether that was a public or a private system, although it was almost certainly the former. That means that the basis on which it is suggested by Sergeant Hill that the Tribunal has jurisdiction over this claim is not made out. Warrantry authorising interceptions as defined in section 4 of the IPA 2016 is not required where no such interception is to take place. On our finding that the handset was not part of the telecommunications system at the time of the download, the download was not an interception as defined" (para 26). Paragraphs 29-68 set out the Tribunal's full reasoning for this conclusion.

The Tribunal concluded it had no jurisdiction in respect of the unlawful downloading of the data from the Claimant's mobile phone handset stored on the handset (para 70).

Liberty & Privacy International v Security Service and Secretary of State for the Home Department [2023] UKIPTrib 1

Liberty and Privacy International brought a claim against the Security Service (MI5) and the Secretary of State for the Home Department (the Home Secretary). The Tribunal found in favour of the Claimants. In its judgment the Tribunal made findings of serious failings by MI5 and also by the Home Secretary and identified widespread corporate failure in both organisations (para 194).

The Tribunal held that the Security Service had failed to comply with the statutory safeguards required by the Regulation of Investigatory Powers Act 2000 and the Investigatory Powers Act 2016 concerning the acquisition and holding of personal data.

The Tribunal held there were "serious failings in compliance with the statutory obligations of MI5 from late 2014 onwards, and those failings ought to have been addressed urgently by the

Management Board" (para 79). The Security Service conceded that these failings constituted a breach of the Claimants' rights under Article 8 of the ECHR (para 139).

The Tribunal described MI5's failure to disclose the compliance failings to the Investigatory Powers Commissioner (or his predecessor) or to the Home Secretary as "a serious misjudgement" (para 82).

The Tribunal noted the error in the approach of the Home Office (paras 106 and 107) and concluded that the Home Secretary had breached the *Tameside* duty in "not making adequate enquiries as to whether the statutory safeguards were or were not being met. Given the reports of the long-standing non-compliance risks, it was irrational of the SoS to fail to make enquiries as to the scale and nature of the non-compliance" (para 125).

The Tribunal also held that MI5 had breached its duty of candour in failing to disclosure use made of Bulk Communications Data (BCD) in the proceedings brought in 2015 by Privacy International in respect of handling arrangements for bulk personal data and bulk communication data ("the BPD/BCD claim") which led to the Tribunal considering whether the BPD/BCD claim should be reopened. This issue was the subject of the Tribunal's judgment in February 2024 where the Tribunal ruled that, upon a test of "whether it is probable that the Tribunal in 2016 and 2018 would have reached different conclusions" if the material which has subsequently been disclosed, was disclosed at the time, they concluded "that test is not met" (para 51). The Tribunal also held that "as a matter of discretion we do not consider it to be proportionate to reopen the BCD/BPD claim. Most importantly, there is now an entirely new regime in respect of BCD, with a different structure in respect of oversight. The non-disclosed issue has since 2019 been under the scrutiny of IPCO, which is fully aware of the issues and has the capacity to ensure that matters of concern are raised and remedied" (para 57).

Wilson v Police Scotland [2022] UKIPTrib 5

The Claimant, Mr Wilson, a journalist, submitted a claim under section 65(2)(a) and a complaint under section 65(2)(b) of the Regulation of Investigatory Powers Act 2000 (RIPA) in relation to the conduct of the Police Service of Scotland (Police Scotland).

The Claimant had learnt from reports produced by the Chief Constable of Durham Constabulary, into the activities of Police Scotland's Counter Corruption Unit (CCU), that there had been an attempt to obtain call traffic from his personal mobile number. This related to a covert criminal investigation the CCU carried out into the unauthorised disclosure of the information that appeared in articles in the Sunday Mail. These articles related to the 2005 Strathclyde Police murder investigation into the death of Emma Caldwell. During April 2015, the Sunday Mail published articles revealing that a suspect had been identified. They also made significant criticisms of the police inquiry.

With regards the Claimant's complaint that Police Scotland had obtained his number unlawfully, the Tribunal dismissed his complaint, in the light of the Tribunal's findings on the evidence.

With regards the Claimant's claims that the conduct of Police Scotland, on the agreed facts, was incompatible with his Convention rights under Articles 8 and 10, the Tribunal dismissed the claim

under Article 8 and one of the bases of claim under Article 10. This was because the conduct at issue namely that of placing the Claimant's phone number in an application that was not proceeded with, did not fall under the Tribunal's jurisdiction as it was not in challengeable circumstances. This is explained at more length in paras 47-55.

The second basis of claim under Article 10 was that the Claimant's "Article 10 rights were contravened in relation to the applications that did proceed to authorisation and which resulted in the recovery of information, although no data relating to him were recovered, and the applications did not result in the discovery of his sources" (para 56). The respondents argued that that did not infringe the Claimant's Article 10 rights as he was not required to reveal journalistic sources. Police Scotland did not discover his sources. The Tribunal disagreed with this, saying "the Article 10 rights of a journalist include his rights to receive and impart news. He must be able to gather news" (para 59). The Tribunal also highlighted that "one aspect of the Article 10 rights of a journalist is his right not to disclose information identifying a source" (para 59).

The Tribunal noted that "the overarching policy which underlies the protection of a journalist from being required to reveal his sources is the need to preserve his access to sources in the public interest. It recognises the need to prevent sources from being deterred from cooperation" (para 61). It held that Police Scotland acted in a manner incompatible with the Claimant's rights under Article 10 as the Claimant's name and status as a journalist were expressly invoked in both the authorised applications creating a "real risk that conduct of that sort will have a chilling effect on his ability to obtain and disseminate information in the public interest" (para 61).

By way of remedy the Tribunal made a declaration that Police Scotland acted in a manner incompatible with the Claimant's Article 10 rights. As Police Scotland had apologised to the Claimant in their submissions, there was no requirement for an order requiring them to apologise. Police Scotland undertook to remove and delete the data they held on the Claimant, and in particular his mobile phone number.

Chapter 4 Changes to Tribunal Membership

Since the last report the following members have left the Tribunal - Lord Justice Edis; Charles Flint KC; Professor Graham Zellick KC and Christopher Symons KC.

The following new judicial members joined in 2023 – Mrs Justice Farbey and Mr Justice (Jeremy) Johnson.