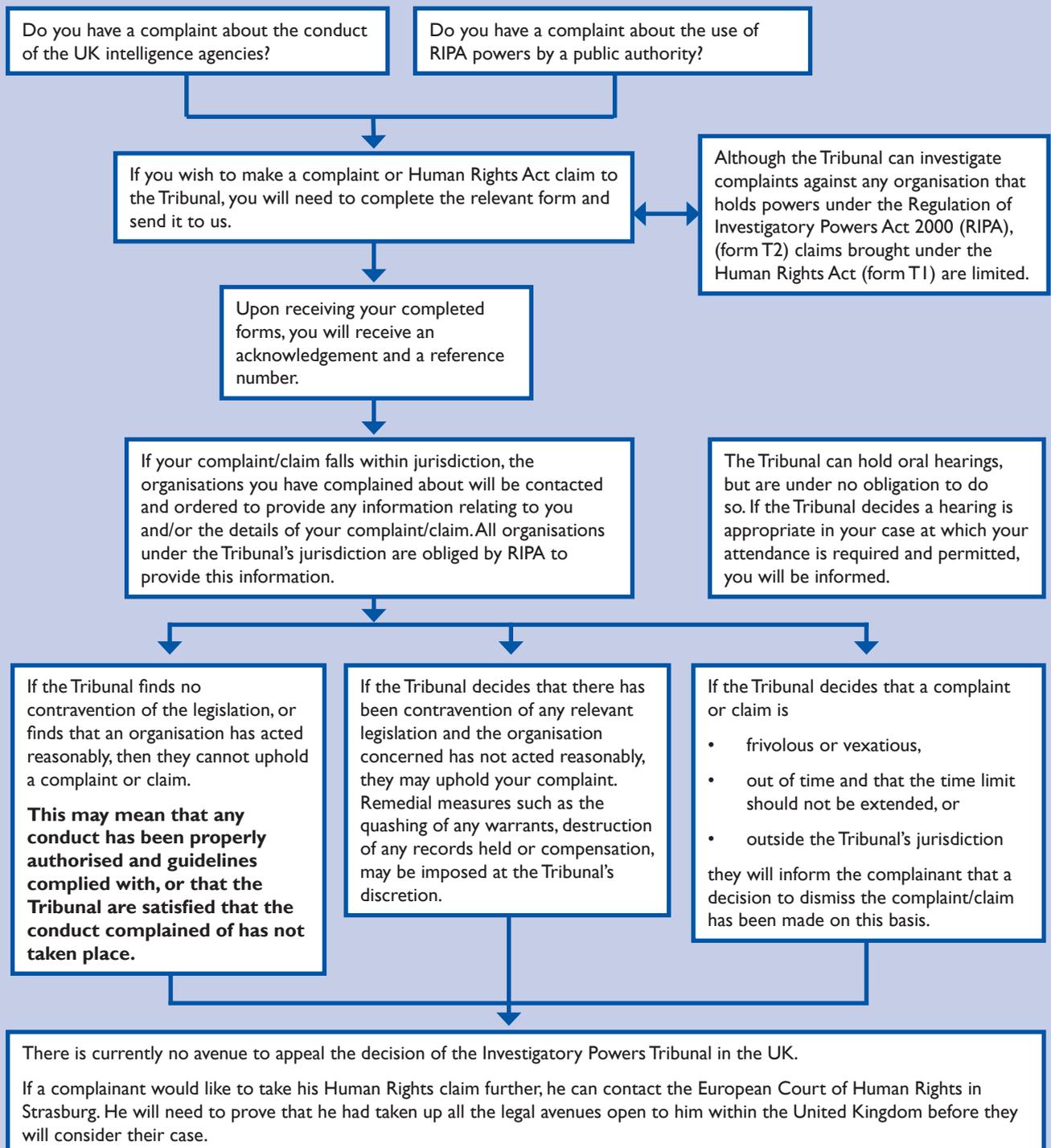


Investigatory Powers Tribunal



The Regulation of Investigatory Powers Act 2000 (RIPA) established an independent Tribunal, the Investigatory Powers Tribunal (IPT) to consider all complaints and Human Rights Act claims (hereafter complaints) which fall within its jurisdiction. In October 2000 the IPT replaced the Interception of Communications Tribunal, the Security Service Tribunal, the Intelligence Services Tribunal and the complaints provision of Part III of the Police Act 1997 (concerning police interference with property). All conduct that was covered by past legislation, as well as some that was not, can now be investigated under RIPA. The Tribunal is a statutory creation with limited jurisdiction and special procedures. Its jurisdiction and powers are entirely governed by RIPA and the subordinate legislation made under it. The Tribunal can only consider complaints that fall within its jurisdiction.

The relevant sections of the IPT Rules 2000 are summarised in Annex B of this report, and are available on the IPT website (www.ipt-uk.com) or in Statutory Instrument 2000 No.2665.

The legislative basis of the Tribunal within RIPA is detailed on pages 3-5 of this report. The main purpose of RIPA is to ensure that relevant investigatory powers, many of which represent significant intrusions into the private lives of citizens, are used in accordance with human rights laws. These powers are:

- the interception of communications
- the acquisition of communications data (eg billing data),
- intrusive surveillance (on residential premises / in private vehicles),
- covert surveillance in the course of specific operations and
- the use of covert human intelligence sources (agents, informants, undercover officers).

For each of these powers, the Act will ensure that the law clearly covers

- the purpose for which they may be used,
- which authorities can use the powers,
- who should authorise each use of the power;
- the use that can be made of the material gained,
- independent judicial oversight and
- a means of redress for the individual who has been subject to the use of the powers.

Complaints against public authorities with RIPA powers (extract from section 65 of the Regulation of Investigatory Powers Act 2000 establishing the IPT)

- (1) There shall, for the purpose of exercising the jurisdiction conferred on them by this section, be a Tribunal consisting of such number of members as Her Majesty may by Letters Patent appoint.
- (2) The jurisdiction of the Tribunal shall be--
 - a. to be the only appropriate Tribunal for the purposes of section 7 of the Human Rights Act 1998 in relation to any proceedings under subsection (1)(a) of that section (proceedings for actions incompatible with Convention rights) which fall within subsection (3) of this section;
 - b. to consider and determine any complaints made to them which, in accordance with subsection (4), are complaints for which the Tribunal is the appropriate forum;
- (3) Proceedings fall within this subsection if--
 - a. they are proceedings against any of the intelligence services;
 - b. they are proceedings against any other person in respect of any conduct, or proposed conduct, by or on behalf of any of those services;
 - c. they are proceedings brought by virtue of section 55(4); [or]
 - d. they are proceedings relating to the taking place in any challengeable circumstances of any conduct falling within subsection (5).
- (4) The Tribunal is the appropriate forum for any complaint if it is a complaint by a person who is aggrieved by any conduct falling within subsection (5) which he believes--
 - a. to have taken place in relation to him, to any of his property, to any communications sent by or to him, or intended for him, or to his use of any postal service, telecommunications service or telecommunication system; and
 - b. to have taken place in challengeable circumstances or to have been carried out by or on behalf of any of the intelligence services.
- (5) Subject to subsection (6), conduct falls within this subsection if (whenever it occurred) it is--
 - a. conduct by or on behalf of any of the intelligence services;
 - b. conduct for or in connection with the interception of communications in the course of their transmission by means of a postal service or telecommunication system;
 - c. conduct to which Chapter II of Part I applies;
 - (ca) the carrying out of surveillance by a foreign police or customs officer (within the meaning of section 76A);
 - d. other conduct to which Part II applies;
 - e. the giving of a notice under section 49 or any disclosure or use of a key to protected information;
 - f. any entry on or interference with property or any interference with wireless telegraphy.

- (6) For the purposes only of subsection (3), nothing mentioned in paragraph (d) or (f) of subsection (5) shall be treated as falling within that subsection unless it is conduct by or on behalf of a person holding any office, rank or position with--
- a. any of the intelligence services;
 - b. any of Her Majesty's forces;
 - c. (any police force;
 - d. the Serious Organised Crime Agency;
(da) the Scottish Crime and Drug Enforcement Agency; or
 - e. the Commissioners for Her Majesty's Revenue and Customs;
and section 48(5) applies for the purposes of this subsection as it applies for the purposes of Part II.
- (7) For the purposes of this section conduct takes place in challengeable circumstances if--
- a. it takes place with the authority, or purported authority, of anything falling within subsection (8); or
 - b. the circumstances are such that (whether or not there is such authority) it would not have been appropriate for the conduct to take place without it, or at least without proper consideration having been given to whether such authority should be sought; but conduct does not take place in challengeable circumstances to the extent that it is authorised by, or takes place with the permission of, a judicial authority.
- (7A) For the purposes of this section conduct also takes place in challengeable circumstances if it takes place, or purports to take place, under section 76A.
- (8) The following fall within this subsection--
- a. an interception warrant or a warrant under the Interception of Communications Act 1985;
 - b. an authorisation or notice under Chapter II of Part I of this Act;
 - c. an authorisation under Part II of this Act or under any enactment contained in or made under an Act of the Scottish Parliament which makes provision equivalent to that made by that Part;
 - d. a permission for the purposes of Schedule 2 to this Act;
 - e. a notice under section 49 of this Act; or
 - f. an authorisation under section 93 of the Police Act 1997.

- (9) Schedule 3 (which makes further provision in relation to the Tribunal) shall have effect.
- (10) In this section--
- a. references to a key and to protected information shall be construed in accordance with section 56;
 - b. references to the disclosure or use of a key to protected information taking place in relation to a person are references to such a disclosure or use taking place in a case in which that person has had possession of the key or of the protected information; and
 - c. references to the disclosure of a key to protected information include references to the making of any disclosure in an intelligible form (within the meaning of section 56) of protected information by a person who is or has been in possession of the key to that information; and the reference in paragraph (b) to a person's having possession of a key or of protected information shall be construed in accordance with section 56.
- (11) In this section "judicial authority" means--
- a. any judge of the High Court or of the Crown Court or any Circuit Judge;
 - b. any judge of the High Court of Justiciary or any sheriff;
 - c. any justice of the peace;
 - d. any county court judge or resident magistrate in Northern Ireland;
 - e. any person holding any such judicial office as entitles him to exercise the jurisdiction of a judge of the Crown Court or of a justice of the peace.

CONTENTS

Report of the Investigatory Powers Tribunal

1. Member Biographies	7
2. Overview	11
3. Statistics	13
4. How the Tribunal works	19
5. Key rulings	25
6. Response to Justice and Security Green Paper	34
Appendix A: Frequently Asked Questions	36
Appendix B: Summary of IPT Rules	38
Appendix C: IPT costs	39

I. MEMBER BIOGRAPHIES

The IPT has been privileged to have as Members throughout its history a succession of distinguished legal figures. Previous Tribunal Members have included Sir David Calcutt QC (Died in 2005), Sir John Pringle (Retired 2006), William Carmichael (Retired Feb 2008), Peter Scott QC (Retired April 2010) and Sir Richard Gaskell (Retired September 2011). Their contribution has been greatly appreciated.

The IPT currently comprises seven members, including the President Lord Justice Mummery and Vice-President Mr. Justice Burton. All members of the Tribunal are appointed by HM The Queen, and must be senior members of the legal profession. Both the President and Vice-President must hold or have held high judicial office. Appointments are made for terms of five years, after which members may stand down or declare themselves available for reappointment.

Sir John Mummery (President)

The Rt Hon Lord Justice Mummery was appointed a Lord Justice of Appeal in October 1996. He was born in Kent, educated at Dover County Grammar School, and Pembroke College, Oxford from 1959 - 63 (MA, BCL: Winter Williams Prize in Law ; Hon Fellow, 1989). He was called to the Bar at Gray's Inn (Atkin Scholar) in 1964. He was elected a Bencher in 1985 and Treasury Junior Counsel in Charity Matters, 1977 – 81, in Chancery 1981 – 89. He served as a Recorder in 1989.

Further he has been a member of the Senate of Inns of Court and Bar from 1979 to 1981. He was a Member of the Justice Committee on Privacy and the Law from 1967 – 70. Sir John has been a Judge of the High Court of Justice, Chancery Division from 1993 – 1996, President of the Employment Appeal Tribunal 1993-1996 and the President of the Investigatory Powers Tribunal since its inception in 2000.

Sir Michael Burton (Vice-President)

Mr Justice Burton was a Scholar at Eton College and then at Balliol College, Oxford, where he read Classics and then Law, obtaining his MA. He was a lecturer in law at Balliol from 1970 to 1973. He was called to the Bar in 1970, became a QC in 1984, and was appointed a High Court Judge in 1998. He had a busy commercial practice in the Queen's Bench Division, Chancery Division, Commercial Court and Employment Courts, in a wide variety of fields of Law. He was Head of Littleton Chambers from 1991 to 1998. He appeared as Counsel not only in the UK and Luxembourg, but also in Hong Kong, Singapore, Bermuda, Brunei and the United States. He sat for a number of years as a Deputy High Court Judge in the Queen's Bench and Chancery Divisions, and as an arbitrator and mediator. Since his appointment as a High Court Judge he has sat in Queen's Bench and Chancery Divisions, Commercial Court, Administrative Court, Family Division, Revenue List and the Employment Appeal Tribunal, of which he was President from October 2002 to December 2005, and remains a nominated judge. He is the Chairman of the Central Arbitration Committee pursuant to the Employment Relations Act 1999. He has been Vice-President of the IPT since 2000, and was previously President of the Interception of Communications Tribunal. Until January 2011 he was Chairman of the High Court Judges Association. He is Vice-Treasurer of Gray's Inn (Treasurer 2012) and a Bencher, as well as an Honorary Fellow of Goldsmith's College.

Robert Seabrook QC

Robert Seabrook QC was called to the Bar in 1964 and took silk in 1983. His wide-ranging experience crosses jurisdiction. In recent years he has concentrated on clinical negligence, medical disciplinary work and substantial matrimonial finance and property cases. He was educated at St. Georges College, Harare, Zimbabwe and University College, London (LL.B). He has been a Deputy High Court Judge and served as the Chairman of the Bar of England and Wales in 1994, Leader of South Eastern Circuit (1989-9) and a Member of the Criminal Justice Consultative Council (1995-2002). In addition he has served as a Recorder (1985-2007). Mr Seabrook was a Member of the Interception of Communications Tribunal (1996-1999) and has been a Member of the Investigatory Powers Tribunal (2000 -present).

Charles Flint QC

Charles Flint QC is a commercial barrister and mediator specialising in banking and financial services. He is rated by the independent legal directory Chambers UK 2011 as the leading QC in Financial Services. Charles has wide experience in general commercial law having practised in all divisions of the High Court. He now specialises in financial services regulation and acts as a mediator in banking and financial services disputes. He is recognised by Chambers UK 2011 as a leading mediator in financial services. He has been a member of the Tribunal since 2009.

Sir Anthony Holland

Sir Anthony was appointed to the IPT in July 2009. Sir Anthony was also appointed as the Financial Services Complaints Commissioner on 3rd September 2004. The position of Complaints Commissioner was created by the Financial Services and Markets Act 2000 to provide an independent means by which the regulated community could have an independent adjudication on complaints against the Financial Services Authority.

Sir Anthony has served as the Chairman of a Social Security Appeal Tribunal, President of the Law Society (1990-91), Governor of the College of Law (1991-97), on the Council of JUSTICE (British Section of the International Commission of Jurists, 1991), as Chairman of the Executive Board of JUSTICE (1996-99), member of the Council of the Howard League for Penal Reform (1992), member of the Criminal Injuries Compensation Appeals Panel (2000-2005), Chairman of the Northern Ireland Parades Commission (2000-2005) and Chair of the Northern Ireland Legal Services Commission (2004-2007). Sir Anthony has also been Chairman of the Standards Board for England (2001-2008). His appointments in the financial services industry include the Chairman of the Securities and Futures Authority (1993) and Principal Ombudsman to the Personal Investment Authority Ombudsman Bureau (1997-2000). He is a member of the Board of the Pension Protection Fund (appointed July 2010). In January 2011, he was appointed a lay member of the Speaker's Committee for the Independent Parliamentary Standards Authority.

Christopher Gardner QC

Mr Gardner has been a member of the IPT since 2009. He has practiced both as a Barrister (called 1968) and Queen's Counsel (1994) from Lamb Chambers, Temple (where he remains an Associate Member) in all forms of contractual and tortious dispute, professional negligence, sports injuries, product liability, insurance, health & safety, personal injury and clinical malpractice.

His Judicial/Arbitration/Mediation experience includes commercial and construction contracts, professional negligence, assessment of damages, employment, fundamental human rights, judicial review, legal & beneficial property interests, boundary disputes, planning, probate, trade marks, fishery rights, and interpretation of statutes. Christopher is a Fellow of the Chartered Institute of Arbitrators (1999), Fellow of the Society for Advanced Legal Studies (1999), Fellow of the Royal Society of Medicine (2000), Court Assistant to the Worshipful Company of Arbitrators (2008). Christopher was Appointed Chief Justice of the Turks and Caicos Islands, British West Indies (2004-2007) and is Chief Justice of the Falkland Islands, South Georgia, South Sandwich, British Antarctic Territory and British Indian Ocean Territory (2007).

Susan O'Brien QC

Susan O'Brien QC was appointed to the IPT in 2009. Before being called to the Scots Bar, she was a solicitor for 6 years. She took silk in 1998. She is rated by the independent legal directory "Chambers UK" 2012 as a Band 1 silk in Scotland for personal injury claims, in which she now specialises. She is instructed to act for the pursuer in a wide variety of cases where the injured person seeks damages, particularly for catastrophic brain injuries or psychiatric injury. She has extensive experience of industrial disease and abuse claims. She has also acted in many cerebral palsy claims for babies injured following mismanaged births. As standing junior counsel for the Home Office from 1992-1998, she conducted numerous judicial review hearings, mostly concerning immigration and asylum, and she continues to be instructed in public law cases as senior counsel. She has considerable experience of human rights law.

Ms O'Brien conducted an inquiry for Edinburgh and Lothian Child Protection Committee: she co-wrote the Caleb Ness Report, published 2003. She was a Reporter for the Scottish Legal Aid Board from 1999-2005. She was appointed by the Lord President to be a legal assessor for the General Teaching Council for Scotland, advising on disciplinary proceedings, from 2005-2010. The Minister for Public Health in Scotland appointed her as convenor for appeals relating to the Dentists' Vocational Training Board from 2008-2010. She was elected as Chairman of Faculty Services Ltd, which is a senior office bearer's post within the Faculty of Advocates, and served in that office from 2005-2007. She had judicial experience of criminal cases as a part-time Sheriff from 1995-1999, and she has been a part-time Employment Judge since 2000.

Sheriff Principal John McInnes QC LLD DL (An obituary)

Sheriff Principal John McInnes QC LLD DL, who died on 12 October 2011 after a short illness, was a member of the Investigatory Powers Tribunal from its inception 10 years ago. He brought to the varied and challenging work of the IPT invaluable knowledge and relevant experience previously acquired by him as a member and vice-president of the Security Services Tribunal and the Intelligence Services Tribunal, which were replaced by the IPT.

John's broad base of legal practice and judicial office in Scotland, his sense of fairness and his sound judgment made him a highly valued member of the IPT. He helped to make major improvements in its operation and administration by his careful attention to detail. He sat on the hearings of most of its leading cases and his contribution to its decisions and rulings was substantial.

All the members and staff of the IPT will greatly miss his wise advice, his unstinting support, his good sense and his congenial company. Their sympathy goes out to his widow, Elisabeth, and to their son and daughter.

2. OVERVIEW

Between 1st January and 31st December 2010 the IPT received 164 complaints. Whereas this is the first official IPT report, total numbers of complaints have been published previously in the respective annual reports of the Intelligence Services and Interception of Communications Commissioners. The 164 complaints received in 2010 represents a 4% increase on the 157 complaints received in 2009 and an 18% increase on the 136 complaints received in 2008. Individual complainants submit a significant number of overall complaints however between 5 and 10% of complaints are on average submitted by solicitors on behalf of complainants. It is important to note that the use of legal representation has no impact on the determination of a complaint.

The numbers of complaints received by the IPT has increased steadily from a total of 95 received during the first fifteen months of the Tribunal to December 2001. A number of reasons may be postulated for this increase, ranging from more public authorities and indeed members of the public becoming aware of the Tribunal as a legal recourse, to the enacting of Part II and Chapter I Part II of RIPA.

Background to the Tribunal

Section 65 of RIPA establishes a Tribunal which will investigate, subject to its jurisdiction and relevant procedures, complaints and Human Rights Act claims against any public authority with RIPA powers in England and RIP(S)A powers in Scotland. The Tribunal came into operation in October 2000 with the enactment of RIPA. The IPT Rules were published at the same time and are summarised in Annex B to this report. The IPT is reactive as opposed to proactive in that Tribunal Member's powers derive from receiving a complaint or claim. The Tribunal is a court making judicial decisions and as with any court it can only consider the complaints that are brought before it. Once a complaint is investigated, the Tribunal determines it by applying the same principles as a court on an application for judicial review

The Tribunal can only consider complaints/claims within legislation. In his 2001 Report of the Review of Tribunals, Sir Andrew Leggatt outlined some of the unique features of the IPT, stating:

- “3.11 There is one exception among citizen and state Tribunals. This Tribunal is different from all others in that its concern is with security. For this reason it must remain separate from the rest and ought not to have any relationship with other Tribunals. It is therefore wholly unsuitable both for inclusion in the Tribunals System and for administration by the Tribunals Service..... So although the chairman is a Lord Justice of Appeal and would be the senior judge in the Tribunals System, he would not be in a position to take charge of it. The Tribunal's powers are primarily investigatory, even though it does also have an adjudicative role. Parliament has provided that there should be no appeal from the Tribunal except as provided by the Secretary of State.
- 3.12 Subject to Tribunal rules made by the Secretary of State the Tribunal is entitled to determine its own procedure.
- 3.13 We have accordingly come to the conclusion that this Tribunal should continue to stand alone; but there should apply to it such of our other recommendations as are relevant and not inconsistent with the statutory provisions relating to it.”

3. STATISTICS

The table below shows the number of complaints received by the Tribunal during 2010. The volume of complaints received in 2010 increased to 164 as compared to 157 the previous year and 136 in 2008. The total number of complaints received in 2010 represents an increase of 4% and 18% respectively compared to the 2009 and 2008 totals. The volume of complaints received is evenly spread over the first three quarters of the year, however there is a noticeable upwards trend in the final quarter of the year, where the Tribunal received 54 complaints.

Table 1: Number Of Complaints Received Per Quarter 2010	
2010 Quarter	Number
Jan-Mar	39
Apr-Jun	36
Jul-Sep	35
Oct-Dec	54
Total	164

Chart 1: Number Of Complaints Received Per Quarter 2010

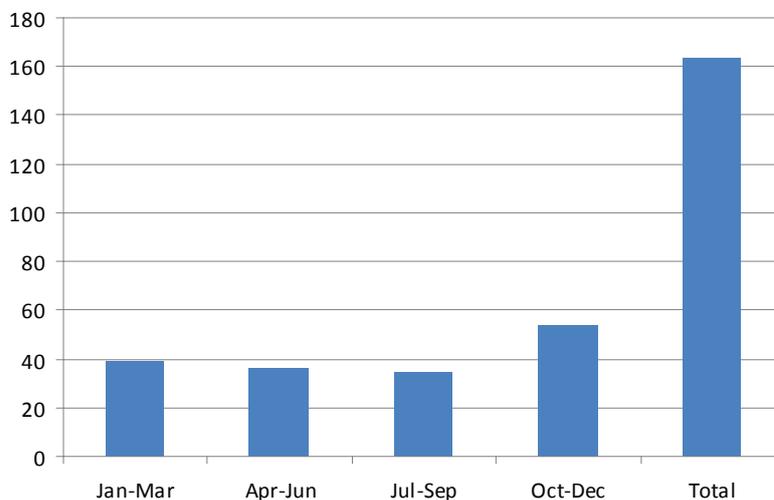
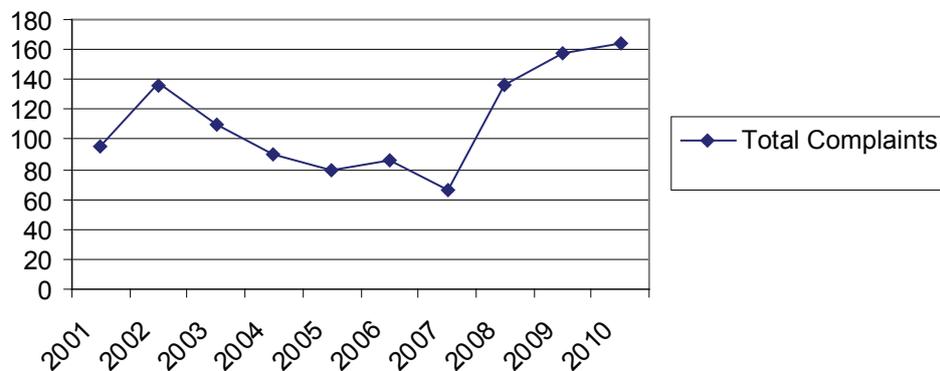


Table 2: Number Of Complaints Received Annually Since 2001

Calendar Year	Number Of Complaints
2001	95
2002	137
2003	110
2004	90
2005	80
2006	86
2007	66
2008	136
2009	157
2010	164

Chart 2: Annual Complaints Received since IPT Inception



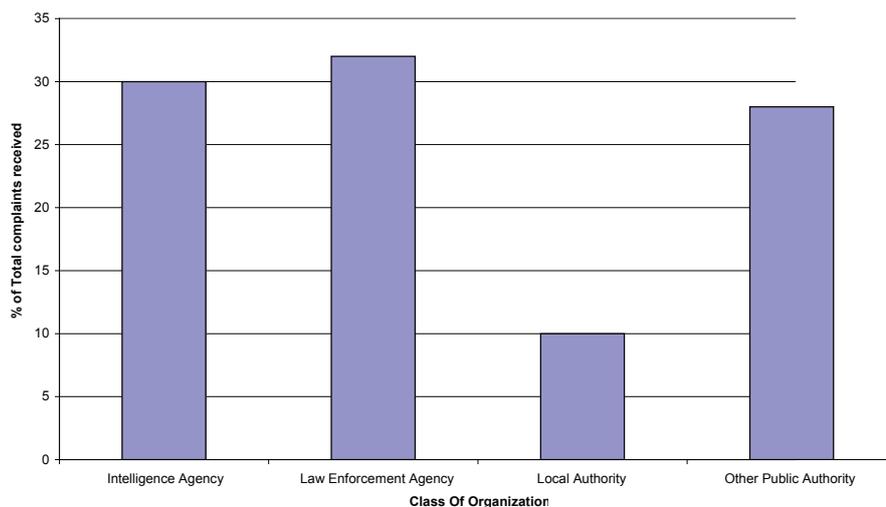
Both Table and Chart 2 provide an interesting historical illustration of the number of complaints received by the Tribunal since its inception in 2000. The maximum number of complaints received in a single year was in 2010, when 164 complaints, were received. Complaint numbers have been on an upward trajectory since an all-time low of 66 in 2007. The steepest increase in complaints was between 2007 and 2008, which represented an 105% increase in numbers from 66 to 136 complaints.

Organisations to which complaints related in 2010

The Table and Chart presented give information about the types of organisations that were the subject of complaints during the year. It is important to note that the IPT rules dictate any valid complaint received by the Tribunal i.e. one that is within jurisdiction, refers to conduct not longer than a year ago and is not deemed frivolous or vexatious must be investigated. An investigation or receipt of a complaint cannot be equated to any accusation of levels of wrongdoing on the part of a public authority unless the Tribunal makes a ruling in favour of the complainant.

Public Authority	Complaints Received (%)
Intelligence Agency (i.e SIS, GCHQ or Mi5)	30
Law Enforcement Agency (i.e. Police Force, SOCA)	32
Local Authority (i.e. Local Council)	10
Other Public Authority (i.e. DWP)	28

Chart 3: Organizations Subject To Complaints 2010



Notwithstanding the above caveat, it is interesting to see that out of the complaints investigated, there existed a relatively even spread across the kinds of organisations that were the subject of complaints. Local authorities received far fewer complaints than intelligence agencies, law enforcement agencies and miscellaneous public authorities. In practice, there is a tendency on the part of complainants who may suspect they are subject to intrusive powers, but are unsure about the public authority involved, to allege unlawful conduct against all public authorities with RIPA powers. The Tribunal has procedures to handle such cases. However the decrease compared to previous years of complaints received against local authorities is interesting. Much of the negative media coverage around the advancement of the ‘surveillance state’ and misrepresentations of RIPA has referred to local authority use of RIPA powers, with reference made to the IPT finding in favour of a complainant in the ‘Poole’ Judgment. There appear, however, to be far fewer complaints against local authorities in 2010 compared to previous years. This may be due to improvements in RIPA authorisation practices in local authorities or less appetite in the press for negative media reporting of RIPA.

A number of complainants continue to approach the IPT to investigate complaints that commonly do not fall within its jurisdiction. The IPT in such cases advises the complainant that organisations such as the Independent Police Complaints Commission, where possible The Information Commissioner's Office, the Adjudicator's Office, the Police Ombudsman for Northern Ireland and the ordinary courts may be the correct place to take their complaint but in relation to the IPT it is out of jurisdiction.

Subject matter of complaints in 2010

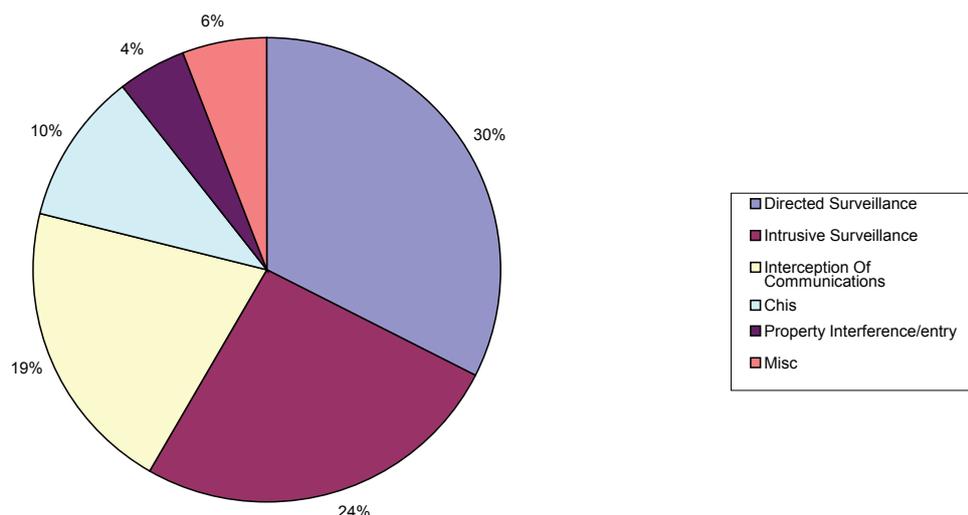
The Table and Chart below provide information on the subject matter of complaints reviewed by the Tribunal during 2010. Once again, it is important for the reader to note that the IPT rules dictate any valid complaint received by the Tribunal must be investigated. Therefore, in a similar fashion to the wide range of organisations against whom a claim could be made, it is wholly plausible (and indeed often the case) that a complainant may allege a wide range of intrusive conduct, ranging from directed surveillance to property interference against a public authority. This in no way reflects the amount, if any, of conduct, lawful or unlawful, that may be occurring.

Table 4: Type Of Conduct Alleged In 2010 Complaints

Type Of Alleged Conduct	Number Of Complaints
Directed Surveillance	49
Intrusive Surveillance	39
Interception Of Communications	31
Covert Human Intelligence Source (CHIS)	16
Property Interference/Entry	7
Misc	9

A total of 13 complaints received in the year were not able to be classified

Chart 4: Conduct Forming Basis Of Complaints In 2010



Once again, it is noteworthy that the majority of complaints received by the Tribunal refer to allegations of improper conduct in relation to directed surveillance, intrusive surveillance and to a slightly lesser extent the interception of communications. There were far fewer complaints at 10%, 4% and 6% respectively in relation to the recruitment or use by public authorities of Covert Human Intelligence Sources (CHIS), entry on or interference with property, or miscellaneous conduct.

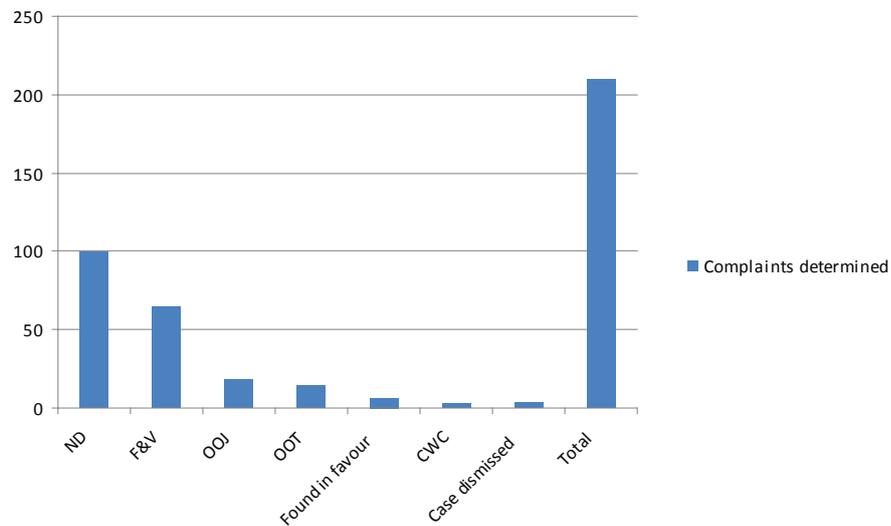
4 Rulings and outcomes 2010

Outcome Of Claim	Number
No Determination ¹	99
Out Of Jurisdiction ²	18
Out Of Time ³	15
Frivolous or Vexatious ⁴	65
Case Dismissed ⁵	4
Cwc ⁶	3
Found in Favour ⁷	6
Total	210

The Tribunal determined 210 complaints in 2010 which incorporated a number carried over from previous years.

Notes	
1	No determination in favour of the complainant: If no determination is made in favour of the complainant that may mean that there has been no conduct in relation to the complainant by any relevant body which falls within the jurisdiction of the Tribunal, or that there has been some official activity which is not in contravention of the Act. The provisions of the Act do not allow the Tribunal to disclose whether or not the complainant are, or have been, of interest to the security, intelligence or law enforcement agencies. Nor is the Tribunal permitted to disclose what evidence it has taken into account in considering the complaint.
2	Out of Jurisdiction: This ruling means that after careful consideration by at least two Members the Tribunal has ruled that under Rule 13(3)(c) of the Investigatory Powers Tribunal Rules 2000, the Tribunal has no power to investigate the complaint
3	Out of Time: In such cases after careful consideration by at least two Members the Tribunal rules that under Rule 13(3)(b) of the Investigatory Powers Tribunal Rules 2000, the complaint is out of time and the time limit should not be extended.
4	Frivolous or vexatious: the Tribunal concludes in such cases that the complaint is obviously unsustainable and/or that it is vexatious, usually in the sense that it is a repetition of an earlier complaint or complaints previously dealt with, and thus falls within the provisions of Rule 13(3) (a), such that, pursuant to s67(4) of RIPA, the Tribunal has resolved to dismiss the claim.
5	Case dismissed: The Tribunal has resolved to dismiss the complaint (due to a defect such as the failure by a complainant to sign the form)
6	CWC: Complainant withdrew the complaint.
7	The Tribunal has ruled in favour of the complainant

Chart 5 Complaints Determined in 2010



A breakdown of the 210 complaints determined in 2010 is presented above. It shows that in 99 cases (47%) the Tribunal made a ruling of no determination in favour of the complainant. In essence, as detailed in the glossary provided, this meant that if any RIPA conduct was occurring, this was correctly authorised or that no such conduct was occurring. The next highest category of outcome, at 31%, were those claims the Tribunal determined were frivolous or vexatious, followed by claims deemed out of jurisdiction (9%) and out of time (7%). The Tribunal has robust procedures for determining whether complaints are frivolous and vexatious, out of jurisdiction and out of time, as dictated by the rules and procedures it has established over its ten-year history. The justification and history of these policies and procedures is considered in depth in the 'How the Tribunal Works' section that follows. Decisions on whether a claim is out of time, jurisdiction or frivolous or vexatious are only made if two or more Members are in agreement as to the reasons for determining such an outcome.

4. HOW THE TRIBUNAL WORKS

A. Procedures to enhance open justice

Part one of the Government Justice and Security Green Paper proposes a range of options to address the current lack of a robust procedure for handling sensitive material in civil cases where the Government may need to rely on sensitive material to justify an executive action. As a judicial body handling similarly sensitive material, the IPT's policies and procedures have evolved throughout its history to balance the principles of open justice for the complainant with a need to protect sensitive material.

Open Inter Partes Hearings:

For example, during the course of investigating a complaint which could theoretically involve undisclosed sensitive material the Tribunal may decide to hold an oral hearing to consider points of law such as occurred in *Vincent Frank-Steiner v. The Data Controller of SIS (IPT/06/81)*. Such hearings are ordinarily held on the basis of assumed (or agreed) facts.

This was something of a departure from the original Investigatory Powers Tribunal Rules 2000 (No.2665), which provide that:

- Rule 9 of which stated that, although the Tribunal “shall be under no duty to hold oral hearings....they may do so in accordance with this rule”.
- Rule 9(6) of which was clear and unqualified in this context, and outlined that ‘The Tribunal’s proceedings, including any oral hearings, shall be conducted in private.’
- Rule 6(2)(a) of which went even further to say that the Tribunal may not even disclose to the Complainant or to any other person the fact that the Tribunal have held, or propose to hold, a separate oral hearing under rule 9(4). The fact of an oral hearing was to be kept private, even from the other party. The Tribunal were originally given very little discretion in the matter.

However, in *IPT/01/62* and *IPT/01/77*, the complainants asked the Tribunal to hold the hearing in public and the Tribunal considered this point as a preliminary issue. The Tribunal concluded that the public, as well as the parties to the complaint, has a right to know that there is a dispute about the interpretation and validity of the law.

The Tribunal therefore decided that, subject to the general duty imposed by Rule 6 (1) to prevent the disclosure of sensitive information, it can exercise discretion.

The Tribunal recognises the potential conflict between, on the one hand, the interests of the complainants in securing maximum information and openness and, on the other hand, the interests of national security and other public interests. A proper balance must be struck between them. It remains within the power of the Tribunal to hold separate and closed hearings should the sensitive material require it to do so.

Commitment to Open Rulings:

Following this commitment to hold hearings in open, the Tribunal has gone further and published some of its rulings on its website, this despite the original rules stating that no document or information, nor the fact that any document or information has been provided, can be disclosed. In the case of **IPT/01/62** and **IPT/01/77** the Tribunal decided that the Rules do not, subject to the general duty imposed by Rule 6(1), prevent the Tribunal from notifying and publishing their rulings of law on a complaint. That procedure runs no risk of disclosure of any information to any extent, or in any manner, that is contrary to or prejudicial to the matters referred to in section 69(6)(b) of RIPA and rule 6(1) or to the NCND policy.

Both of these procedures, and in fact all Tribunal procedures, have been accepted by the European Court of Human Rights as ECHR-compliant in the case of *Kennedy v The United Kingdom* (Application No 26839/05) (**IPT/01/62**).

Confidentiality

At this point in time, the limitations placed on the Tribunal regarding disclosure make it difficult to provide insight into its work but it is this same limitation that enables the Tribunal to consider highly sensitive material within a necessary ring of secrecy. There are stringent confidentiality restrictions laid out in section 69(6)(b) of RIPA which precludes disclosure by the IPT of sensitive information. Express restrictions on the disclosure of information to any third party are also contained in Rule 6.

The Tribunal is therefore restricted in what it can disclose during the course of its investigations. The rules state that no information or documents provided to the Tribunal, or the fact that they have been provided, can be disclosed. This is an essential component of the protection of the most secret of Government material. The Tribunal is therefore limited to only assuring complainants that an investigation is still ongoing.

To balance this, however, the same confidentiality restrictions also extend to complainants. During its inquiries, the Tribunal can only disclose the complainant's name, address, and date of birth to the organisation they are complaining about. It needs to disclose this information to enable record searches to be made to see if any information is held. The Tribunal needs the complainant's permission to disclose any further details regarding their complaint. The complainant can give this permission by ticking the relevant confidentiality box on the IPT complaints forms. Although complainants do not have to give this permission, the Tribunal may not be able to conduct as thorough an investigation if they do not consent to these details being disclosed.

Subject to this general duty, the Tribunal's commitment to open justice has been set out previously. Furthermore, where the Tribunal make a determination in favour of a complainant, they will (subject to the general duty imposed by Rule 6(1)) provide a summary of that determination including any findings of fact.

Neither Confirm nor Deny policy (NCND):

It has been the long-standing policy of successive Governments to give a "neither confirm nor deny" response to questions about matters that are sensitive on national security grounds (the "NCND policy"). This is the standard response given where it is not desired to disclose whether or not one of the intelligence agencies is in possession of any documents or knowledge. This NCND response, if appropriate, is well established and lawful. Its legitimate purpose and value has been ratified by the Courts, and re-iterated by this Tribunal in the cases of **IPT/01/77** and **IPT/06/81**.

If allegations of interception or surveillance are made, but not denied, then, in the absence of the NCND policy, it is likely to be inferred by a complainant that such acts are taking place. This is especially likely if other complainants are being told that they have no cause for complaint, because no such acts are, or have been, taking place in relation to them. If criminals and terrorists became aware, or could infer the possibility of covert activities, they are likely to adapt their behaviour accordingly. The likely outcome of this is that the all-important secrecy would be lost and with it the chance of obtaining valuable information needed in the public interest or in the interests of national security.

It is therefore not within the remit of the Tribunal to confirm or deny whether or not a warrant or authorisation has been issued against a member of the public. Its purpose is to ascertain whether legislation has been complied with and organisations have acted reasonably. If a complaint is upheld, the Tribunal may decide to disclose details of any conduct. If a complaint is not upheld, complainants will not be told if any conduct has been taken against them or not.

B. The effective investigation and administration of complaints

If a complaint falls within the jurisdiction of the Tribunal, then (subject to subsections 67(4) (frivolous or vexatious) and (5) (out of time)) it has a duty to investigate that complaint and, following that investigation, to determine it by applying the same principles as a court on an application for judicial review. In doing this, and uniquely to any court or Tribunal the IPT is empowered to develop its own practices and procedures and has done so based on the principles of open justice throughout its history.

A summary of how the Tribunal handles complaints is set out in the flow chart on the front page of this report. There is in principle no set process nor time limit for responding to a particular complaint. This is because all cases vary in scope and detail and each one is dealt with on its own merits. The amount of time taken can also depend on the responses received to the Tribunal's enquiries, which may lead to more information being sought from the applicant or the organisation which is the subject of the complaint. The Tribunal is aware that complainants want to receive the outcome of their complaint as quickly as possible and the small IPT secretariat strives to achieve the highest standards of efficiency and diligence in the administration of complaints.

Recent developments such as a revamped IPT website (www.ipt-uk.com) which gives much more information than ever before on the working procedures of the Tribunal, in addition to a facility to submit complaints online, will only add to these high standards.

The Tribunal regularly itself inspects confidential and secret files, and has the power, and has exercised it, to instruct (i) Special Counsel - an 'amicus curiae' - to advise the Tribunal (ii) a Special Investigator to enquire into detailed facts and allegations and report to the Tribunal.

To assist in its investigation of complaints, all organisations holding powers under RIPA are required by section 68(6) of the Act to provide all information requested by the Tribunal. Further to this, the Tribunal can demand clarification or explanation of any information provided. RIPA stipulates that all organisations and individuals concerned must provide the Tribunal with such assistance as it requires.

In practice, such are the strengths of impartial relationships between the Tribunal, the intelligence agencies, and public authorities with RIPA powers, that the Tribunal has always enjoyed full and frank disclosure of relevant, often sensitive material from all parties. This is in no small part due to the strength of the procedures developed by the Tribunal to protect this sensitive material.

In addition, the Interception of Communications Commissioner, the Intelligence Services Commissioner and all Surveillance Commissioners are required to give the Tribunal all such assistance as the Tribunal may require in investigating and determining complaints.¹

Limitations:

The Tribunal may investigate any claims that fall within its jurisdiction, as outlined in the relevant section of this report. It cannot, however, consider complaints against the public authorities outlined below, who are subject to other complaints mechanisms and oversight.

Conduct of the Police:

The Tribunal cannot consider complaints regarding the conduct of the Police or Serious Organised Crime Agency (SOCA) not relating to covert RIPA and Police Act activities. This would be for the Independent Police Complaints Commission (in England and Wales), Police Ombudsman for Northern Ireland or Police Complaints Commissioner for Scotland.

The Tribunal has no jurisdiction to investigate complaints about private individuals or companies unless the complainant believes they are acting on behalf of an intelligence agency, law enforcement body or other public authority covered by RIPA.

Employment Related Surveillance:

In the case of *C v The Police (IPT/03/32)* the Tribunal determined that employers investigating their staff suspected of misconduct does not fall for this Tribunal to consider even if that employer has RIPA powers. Although this means that the Tribunal cannot consider this type of complaint, it does not mean that covert surveillance activities by employers is unaffected by law. There are other ways this can be challenged if it engages Article 8 (right to respect for private or family life), or if it breaches some other specific statutory requirement, common law or contract, namely in the ordinary courts.

If, for instance, someone works in the private sector and believes that he or she has been subjected to surveillance by a private investigator at the instance of his or her employer, this is not something the Tribunal can consider. The special procedures of this Tribunal are not required to hear and determine such complaints.

Human Rights Act Claims:

Under RIPA claims brought to the Tribunal under the Human Rights Act are limited to the following organisations:

- any of the Intelligence Services
- any of her majesty's forces
- any UK police force
- Serious Organised Crime Agency (SOCA)
- The Scottish Crime and Drug Enforcement Agency
- The Commissioner for Her Majesty's Revenue and Customs

The Tribunal will consider if any of the above organisations has breached a complainant's human rights as a result of any conduct they may have carried out, which falls under the auspices of RIPA.

¹ As set out in RIPA s57(3) 59(3) and s107(5)(b) of the Police Act 1997

If a complainant's Human Rights Act claim relates to any other organisation, the Tribunal is not the appropriate place to take such a claim, and the complainant is advised to seek the appropriate legal advice.

Time Limit:

The Tribunal is not obliged to investigate conduct which occurred more than one year ago. If a complainant would like the Tribunal to consider a complaint of conduct which occurred outside these timescales, they must provide an explanation for the delay in submitting their complaint. The Tribunal can only consider such complaints if it considers it reasonable to do so. They will therefore consider the explanation along with the details of the complaint, and make a decision on whether it should be investigated.

Interception:

The Tribunal can consider complaints from anyone who thinks they may have been subject to interception by public authorities under RIPA.

The intentional interception of communications without lawful authority is a criminal offence and therefore a matter for the police and prosecuting authorities.

There is a new offence of unintentional unlawful interception and complaints about this can be referred to the Interception of Communications Commissioner.

Remedies:

The Tribunal has at its disposal a range of remedies, just as wide as those available to an ordinary court hearing and deciding an ordinary action for the infringement of private law rights. However, unlike Rule 10 of the Tribunal Procedure (First-Tier Tribunal) General Regulatory Chamber Rules 2009 (SI No.1976), there is no express power to award costs in s67(7) of RIPA nor in the Rules.

Regulation of Investigatory Powers Act 2000 (RIPA)

67(7) Subject to any provision made by rules under section 69, the Tribunal on determining any proceedings, complaint or reference shall have power to make any such award of compensation or other order as they think fit; and, without prejudice to the power to make rules under section 69(2)(h), the other orders that may be made by the Tribunal include--

- a. an order quashing or cancelling any warrant or authorisation; and
- b. an order requiring the destruction of any records of information which--
 - (i) has been obtained in exercise of any power conferred by a warrant or authorisation; or
 - (ii) is held by any public authority in relation to any person."

The Investigatory Powers Tribunal Rules 2000 (SI No 2665)

- 12 (1) Before exercising their power under section 67(7) of the Act, the Tribunal shall invite representations in accordance with this rule.
- (2) Where they propose to make an award of compensation, the Tribunal shall give the complainant and the person who would be required to pay the compensation an opportunity to make representations as to the amount of the award.

- (3) Where they propose to make any other order (including an interim order) affecting the public authority against whom the section 7 proceedings are brought, or the person whose conduct is the subject of the complaint, the Tribunal shall give that authority or person an opportunity to make representations on the proposed order.”

In its Ruling in relation to *W v Public Authority (IPT/09/134)* the Tribunal concluded that it had no power to award costs in favour of a respondent against a complainant who has withdrawn his complaint.

C. Validation of IPT procedures

The IPT was established to ensure that the UK meets article 13 of the European Convention on Human Rights (ECHR). Article 13 of the ECHR states:

“Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.”

In the case of *Kennedy v The United Kingdom* (application No 26839/05), the court held unanimously that there has been no violation of Article 13 of the Convention.

“Having regard to its conclusions in respect of Article 8 and Article 6 § 1 above, the Court considers that the IPT offered to the applicant an effective remedy insofar as his complaint was directed towards the alleged interception of his communications.”

Exclusive Jurisdiction:

In the case of *R (on the application of A) (Appellant) v B (Respondent) [2009] UKSC 12* the Supreme Court ruled that the IPT does hold exclusive jurisdiction in Human Rights Act claims against the Intelligence Agencies.

Independence:

No Government department, nor indeed any organisation, can intervene in a Tribunal investigation or influence its decisions. The IPT is empowered to develop its own practices and procedures and these do not have to be approved by anyone outside the Tribunal. The Tribunal President has ultimate responsibility for all decisions; he is not required to seek approval from anyone outside the IPT or from government ministers.

Judicial independence is now officially enshrined in law under the Constitutional Reform Act 2005

D. Does the Tribunal ever find in favour of complainants?

There is a common misconception in the media that the Tribunal is a ‘star chamber’ that both meets in secret and never rules in favour complainants. The assertion is thus that it does not provide an effective control on RIPA powers or an effective remedy to complainants. The purpose of the preceding section has been to outline how the Tribunal policies and procedures have developed to balance the need for transparency and open justice with the protection of sensitive material. In summary, the answer to the question posed above is that the Tribunal have on ten occasions upheld complaints against public authorities. You will in the section that follows find summaries of key cases ruled on by the Tribunal, some of which include rulings in favour of complainants. The remaining cases can be found on the IPT website www.ipt-uk.com.

5. KEY RULINGS

Vincent C Frank-Steiner v The Secret Intelligence Service (SIS) (IPT/06/81)

Mr Justice Burton, Peter Scott QC and Sir Richard Gaskell (26/02/08)

Introduction

This hearing took place in public to consider the lawfulness of the policy of SIS (MI6) to keep its records secret. The Complainant made a Human Rights Act claim under Article 8 and a complaint concerning conduct believed to have taken place “by or on behalf” of SIS.

If a complaint was made, the IPT had the power and duty to consider and supervise the conduct of SIS, in this case being its refusal to disclose whether there were any documents, and if there were any, to allow inspection of them. The IPT also had the right to inspect any files which SIS might have held in relation to this complaint.

The Case

Dr Vincent Frank-Steiner challenged the lawfulness of SIS’s refusal to release information to him about his uncle by marriage, Mr Rosbaud². The Complainant claimed that Mr Rosbaud² was a spy for Britain during the war.

SIS argued that if any records existed they would still not be released under s3(4) of the Public Records Act 1958 (PRA) and the Lord Chancellor’s blanket exemption.

The hearing was an appropriate case to be held in public because, for the purpose of the hearing, it was assumed that SIS did hold relevant documents, and arguments were made on that basis. This was a hypothetical assumption only and gave away no actual information, thus preserving the long standing policy of “neither confirm nor deny” (NCND). There was no challenge by the Complainant to the propriety of the NCND policy.

Summary

Although the Complainant did not challenge the NCND policy, he did argue that if documents did exist and ought to be disclosed it was unlawful for SIS to rely on this policy. Subject to certain caveats, the Intelligence Services Act (ISA) places on SIS a duty to disclose records under the PRA. ISA also sets out that SIS can only obtain or disclose information if it is necessary in the interests of national security or in relation to another purpose set out in ISA. It was therefore not arguable that SIS was in a position to disclose information unless it would be contrary to national security to do so.

For the purpose of this complaint it was reasonable to assume that if it could be shown that SIS ought to have disclosed the assumed papers under the PRA then they ought to be disclosed to the Complainant.

SIS referred to a statement by the Foreign Secretary on 12 February 1998 and emphasised the unshakeable commitment never to reveal the identity of people who cooperate with SIS indefinitely. “Not only would the trust be undermined but in many cases the risk of retribution can extend beyond a single generation.” Using hypothetical facts SIS were able to explain why they believe they have an obligation of secrecy towards an agent working for them and why this continues after the death of the agent.

² Mr Rosbaud’s wife was the sister of the Complainant’s father.

The judgment outlined the Tribunal's natural reluctance to accept blanket assertions. The terms of the blanket exemption were not in the public domain but the Tribunal challenged this during the hearing and SIS subsequently supplied them. One of exemptions stated:

"The Lord Chancellor, in exercise of the power conferred on him by the proviso to section 3(4) of the Public Records Act 1958, and having received the opinion of the persons responsible for the records and been informed of the facts, hereby approved the retention of the public records specified in the attached schedule (B), being security, intelligence and related records created between 1972 and 1981, until the end of the year 2022."

It was plain to the Tribunal that the exemptions are on the face of it absolute.

On examining the respective policies of Security Service and SIS regarding documents placed in the public domain, the Tribunal was satisfied that there was no inconsistency between the two services.

Outcome

The Article 8 complaint was dismissed. Article 8 guarantees the right to respect for private and family life. Amongst other things the IPT was persuaded by the argument that the family member in question was long dead and had never formed part of the complainant's household.

In regard to the complaint by way of judicial review, the Tribunal concluded that it would investigate if any relevant papers exist in SIS. If none exist then a "no determination" NCND would be appropriate. If papers do exist then the Tribunal would consider whether (a) it was reasonable for SIS to conclude that it did not have grounds to disclose the papers in the interest of national security or (b) it was reasonable for SIS not to transfer such documents to the National Archives. If the Tribunal was satisfied on both counts then a "no determination" NCND would again be appropriate.

In carrying out its inspection of any documents that might exist the Tribunal would bear in mind submissions from the Complainant and SIS.

On 4th April 2008 the Tribunal informed Dr Vincent Frank-Steiner that no determination had been made in favour of his complaint.

Ms Cherie Booth QC for the **Complainant. Mr Jonathan Crow QC** and **Mr Ben Hooper** for the **Respondent**

Note

This summary is provided to assist in understanding the Tribunal's ruling. It does not form part of the reasons for the decision. The full Ruling is the only authoritative document and is available at www.ipt-uk.com.

DETERMINATION IN THE MATTER OF (IPT/07/02) and (IPT/07/18)

Mr Justice Burton, Sheriff Principal McInnes, Robert Seabrook QC (02/12/2009)

Liability Decision (2/12/09)

Telephone Billing Data

Both Complainants complained about the use of the telephone billings which the Tribunal had already concluded was lawfully obtained. The Tribunal concluded that disclosure, in the circumstances of disciplinary proceedings, was not conduct taking place in challengeable circumstances and accordingly, the Tribunal had no jurisdiction to entertain such complaints.

CCTV

The complaint in **IPT/07/18/CH** in respect of directed surveillance by the use of public CCTV.

The Tribunal was satisfied that this surveillance was authorised by the relevant officer in circumstances of some perceived urgency. However, there was a material mistaken belief on the part of both the officer seeking and the officer granting this authorisation, in that neither of them knew that shortly before the surveillance was authorised the Crown Prosecution Service (CPS) had taken the decision not to prosecute. The Tribunal judged this to be a material mistake, capable of invalidating the authorisation. There may be circumstances in which the degree of urgency is such that a material mistake will not invalidate an authorisation, but the Tribunal did not consider this to be such a case.

It was not submitted by the Respondent that the authorisation for surveillance would have been sought or granted if the officers in question had known of the CPS's decision.

The Outcome

There was accordingly an interference with the Complainant's privacy contrary to Article 8, not justifiable in law. The extent of such interference was that for a short period the public CCTV was directed at the Complainant. The Tribunal requested written submissions from both the Complainant and the Respondent as to the appropriate remedy in relation to this finding.

This is the decision on remedy following the Tribunal's decision to uphold the complaint in respect of directed surveillance by using existing public CCTV against the Complainant.

Remedy Decision (8/2/2010)

1. That the relevant CCTV recording be destroyed.
2. That there be a declaration that by virtue of such CCTV coverage of the Complainant there was a breach of his Article 8 right to respect for his private life.
3. That no further remedy was appropriate.

Reasons

1. The Complainant's privacy was only marginally infringed by directing existing CCTV towards him for a short period.
2. The CCTV coverage was authorised, albeit in the mistaken belief referred to in the determination of the complaint. Had that belief not been mistaken, then the surveillance would have been lawful and proportionate.
3. No case for compensation is made. The Tribunal was satisfied that none of the Complainant's injured feelings, nor the financial and other implications to which he referred, in any way flowed from or could be related to the CCTV.

Note

This summary is provided to assist in understanding the Tribunal's ruling. It does not form part of the reasons for the decision. The full Ruling is the only authoritative document and is available at www.ipt-uk.com.

Mrs Paton and others v Poole Borough Council (IPT/09/01, 02, 03, 04 and 05)

Lord Justice Mummery, Mr Justice Burton, Sheriff Principal McInnes QC and Mr Peter Scott QC (29th July 2010).

Introduction

This determination is in favour of the Complainants. The Council were unable to establish that the surveillance was necessary for the permitted purpose or was proportionate.

On 10 February 2009 the Tribunal received 5 almost identical complaints from 2 adults and 3 children of the same family. The children were aged between 3 and 10. The complaints were of unlawful directed surveillance between 10 February and 3 March 2008 carried out by Poole Council to identify the family place of residence on 11 January 2008 to determine if it was within a school catchment area. The school was popular and oversubscribed.

Findings of Facts

Following a complaint by members of the public that Mrs Paton had used a fraudulent address to obtain a school place for one of her children, the Council applied for directed surveillance authorisation on 8 February 2008. This was authorised by the Head of Legal and Democratic Services on 17 April 2008. It was applied for to help the council to establish the address of the youngest child because the parents owned two properties and one was outside the catchment area.

To qualify for a place at the school the child had to live in the catchment area as at 11 January 2008. The family moved between the two properties but returned to the catchment area in September 2007 moving out again in March 2008 before the school year started.

The Authorisation

The Tribunal found that there was a factual basis for the Council's concern about the accuracy of the application for a school place for one of the children and for further investigation by the Council of where the complainants were ordinarily resident at the relevant date (11 January 2008).

Before dealing with the issues relating to the grant of authorisation, the Tribunal noted four points about the application for such authorisation:

1. The application asserted that the information and documents supplied to the Council were "fraudulent" but the purpose of the surveillance was to discover whether or not that was the fact.
2. The application makes reference to the "permanent" home address but the test to be applied for schools admissions is "ordinary residence."
3. All five complainants were identified as targets of surveillance including three young children. Each individual was entitled to separate consideration. None of the children were believed to have committed or were threatening to commit any crime or disorder.
4. The relevant date to determine ordinary residence was 11 January 2008. The relevant date had passed before the authorisation was given. If proper consideration had been given to this fact alone then the application for authorisation might never have been granted.

The Surveillance

The surveillance was undertaken by an education officer starting on 10 February 2008 and then daily until 3 March 2008. Mostly this involved driving by the two residences but also following Mrs Patton and her children in her car and monitoring the property from a parked car. The education officer concluded that the family home was at the address outside the catchment area. However, the Council concluded that on balance at 11 January 2008 the Complainants lived within the catchment area.

Summary

The Tribunal asked themselves three questions relating to the authorisation of the directed surveillance:

1. For what purpose was the authorisation sought and granted?

In its application for surveillance the Council did not identify a crime to be prevented or detected but prior to authorisation there were discussions which concluded that this could be an offence under the Fraud Act 2006. The only sanction given for providing misinformation in a school application was denial of a place at the school. The purpose of the surveillance was therefore to detect if the family were living in the catchment area by obtaining evidence which could be put to the parents. The Tribunal concluded that the Council had not established that the surveillance was for the purpose of preventing or detecting crime. No determination was made by the Tribunal as to the possible relevance of the Fraud Act 2006 or other aspects of the criminal law in another case.

2. Did the person granting the surveillance believe it was necessary on the grounds of preventing or detecting crime?

The entire family was placed under surveillance but no separate consideration was given to the children. For the father and the three children there was clearly no actual or potential criminal offence. The tribunal concluded that consideration should have been given to this and to the use of other measures to obtain the information prior to authorisation.

3. Did the person granting the surveillance believe that it was proportionate to what was being sought to be achieved?

As children were targets of the surveillance and the relevant date had already passed, the Tribunal concluded that the surveillance was not proportionate and could not reasonably have been believed to be proportionate.

Article 8

The Tribunal concluded that the Council has acted in a way which is incompatible with the Complainants' Article 8 rights.

Remedy

As invited by the Complainants the Tribunal made the following order as to remedies:

(1) A declaration that

(a) the authorisation applied for and granted on 8 February 2008 and acted on by the Council did not comply with the requirements of RIPA and was invalid; and

(b) the Complainants have been unlawfully subjected to directed surveillance;

(2) That their findings and their determination be published.

(3) That their full findings and determination be sent to the Chief Surveillance Commissioner for information, the Office of Surveillance Commissioners having made an Inspection Report dated 26 June 2008 (Assistant Commissioner HH Lord Colville of Culross).

The Complainants did not ask the Tribunal to make any financial award in their favour.

Note

This summary is provided to assist in understanding the Tribunal's ruling. It does not form part of the reasons for the decision. The full Ruling is the only authoritative document and is available at www.ipt-uk.com

William & Alana Brown vs. Department for Social Development (DSD:Northern Ireland) (IPT/09/11/C)

Mr Justice Burton, Sheriff Principal John McInnes QC and Susan O' Brien QC (8/2/2010).

INTRODUCTION

This Judgment deals with the determination of the Tribunal, pursuant to s67 (7) of the Regulation of Investigatory Powers Act 2000 ("RIPA"), of the issue of remedy in relation to a previous finding in favour of the Complainants Mr and Mrs Brown, made by the Tribunal on 20th July 2010. This determination was made on the basis of written evidence and submissions.

The Tribunal had ruled that a specific authorisation of a 'test purchase operation', made within the context of a series of authorisations related to an investigation into allegedly overpaid social security benefits to the Complainants, did not in fact fall within the provisions of RIPA. The investigation by DSD (the Respondent) had eventually concluded that the Complainants had been overpaid benefits due to their misrepresentation of facts and that certain benefit payments and allowances would be disallowed, and further they would need to repay sums to DSD totalling £11,000.

THE CASE

The Tribunal had ruled that surveillance involving entry by officers of the Department for Social Development onto the Complainant's property between 1525 to 1600 on 23rd May 2006, was "not in accordance with the law" within Article 8(2) of the Human Rights Act 1998 (HRA) and so was not justified. The Tribunal therefore examined the issue of remedy in accordance with s.8 of the HRA.

The Tribunal received written submissions on remedies from both parties, and the respondent submitted copies of relevant authorities.

The Tribunal, in summary, made the following findings of fact:

- The Complainants were the joint owners of a house in Coleraine, Northern Ireland and for several years had been in receipt of social security benefits. At that time, the Second Complainant was receiving benefits on the basis that she was resident elsewhere as a single person. The Complainants had decided to sell the house and invited members of the public interested in purchasing the property to view it.
- The Respondent had legitimate powers to grant authorisations under s.28 of RIPA to enable its fraud investigation officers to conduct directed surveillance on individuals suspected of fraud. The Benefits Investigation Service (BIS) of DSD had suspected the Complainants of benefit fraud
- BIS organized surveillance of the First Complainant on 10 occasions prior to 23rd May 2006, for which the correct RIPA authorisations had been obtained. On 23rd May 2006, two officers from the Respondent's fraud unit had called on the Complainants' house posing as prospective purchasers and had been shown round the house by Mrs Brown.
- Soon after 23rd May 2006, a file review by the Respondent had led to a senior manager concluding that the two investigators had gained access to the house without lawful authorisation. The same manager subsequently advised police that the evidence obtained through this unlawful surveillance, which consisted of notes written by the fraud officers, could not be used as part of the ongoing investigation.

- The incorrect authorisation was based on the erroneous assumption by BIS officers that the Complainants' property was a "public place" on account of its being open to viewing by potential house purchasers. The correct procedures had been followed for applying for a directed surveillance authorisation in a 'public place'. The Tribunal had concluded that the fraud officers did not wish to breach RIPA provisions and the authorisation, although unlawful, was granted in error. Furthermore, BIS had reviewed its internal guidelines and practices after the incident and taken various measures to ensure such an error would be repeated.
- The Tribunal also found that the Complainants did not lose any benefits or suffer any financial loss through the unlawful surveillance. The visit lasted 35 minutes, and due to its arrangement as an inspection by a potential purchaser, the officers did not film the premises and were accompanied by Mrs Brown at all times.

THE ISSUE OF REMEDY

The Complainants' solicitors had sought, in addition to the quashing of warrants and authorisations, destruction of records and an apology, compensation which was suggested to be £100,000 for each of the Complainants. The Respondent's key submission was that, in accordance with s8(3) and (4) of the HRA, the Tribunal had to determine whether it was necessary in this case to award damages as 'full and fair satisfaction' to the Complainants, and if so, the quantum of damages, taking into account the approach of the European Court of Human Rights in such cases.

The Respondent contended that the guidance of the Court of Appeal per Lord Woolf LCJ in **Anufrijeva v Southwark LBC** [2004] QB 1124 at 52-53 established that the remedy of damages played a much less prominent role in actions based on breaches of the articles of the Convention, than in actions based on breaches of private law obligations, where often the only remedy claimed was damages. The concern, as per Lord Woolf LCJ, was '...to bring the infringement (of an individual's human rights to an end and any question of compensation will be of secondary if any importance...'.

Further, in **R (Greenfield) v Secretary of State for the Home Department** [2005] 1 WLR 673 by the House of Lords per Lord Bingham at 9, Paragraph 17, Lord Bingham pointed out that sums awarded as damages in civil cases for Article 6 violations were 'noteworthy for their modesty', and he reached the same conclusion as Lord Woolf LCJ, coupled with a clear indication that UK courts should look to Strasbourg and not to domestic precedents in relation to breaches of Article 8.

After having considered submissions on the issue of remedy the Tribunal concluded that, in summary:

- Although the invasion of privacy constituted entry into the Complainants' home, consented to by Mrs Brown as a result of deception that the Fraud Officers were potential house purchasers, it was a very limited invasion conducted under the supervision of the second Complainant.
- No pecuniary loss was suffered by the Complainants. At the material time the Complainants would have been willing to show the house to potential purchasers.
- BIS and by extension DSD were acting in the course of an otherwise appropriate investigation in which a number of authorisations for directed surveillance had been correctly obtained. The officers believed they had authorisation, and, had the authorisation been lawful, such conduct as inspecting a private property would have been reasonable and proportionate.
- There was no evidence of suffering of anxiety or stress by the Complainants. If such anxiety or stress did occur this related to their understandable concern at being the subject of a legitimate investigation which resulted in the disallowance of benefit and orders for repayment.

In reaching its decision the Tribunal referred to the guidance given by s8(3) and (4) of the HRA and **Anufrijeva** and **Greenfield**, in addition considering the Strasbourg authorities in respect of non-pecuniary loss when no evidence of distress and frustration had been provided. No award had been made for non-pecuniary loss

in violation of Article 8 cases such as **Heglaz v Czech Republic** [2009], where sustained surveillance of a claimant's mobile phone had occurred. Further, the Tribunal considered damages awarded in cases where distress had purported been caused by one-off intrusion in the claimant's home. In **Taner Kilic vs Turkey** ECtHR 70845/01, the violation of Article 8 consisted of a substantial search of the applicant's home and office and seizure or copy of documents. It was noted that the claim was for €20,000 and €2000 was awarded.

Outcome

The central issue for the Tribunal was to consider, in the context of this case, whether the finding of a breach of Article 8 was, in the absence of any accompanying compensation, sufficient to afford just satisfaction. The Tribunal ruled that as no pecuniary loss was suffered, and no evidence was submitted to support any case for distress in respect of the showing round for 35 mins by the Second Complainant of individuals she believed to be house purchasers, there should be no award in respect of the first Complainant, as he was not present at the material time. The Tribunal further concluded that, since the Article 8 violation was based upon the Second Complainant's occupation of the house, on the basis that she was claiming benefits in respect of her residence elsewhere as a single person, she was precluded from seeking compensation for distress for invasion of her privacy at "home", and no compensation was awarded.

The Tribunal considered two further issues; quashing the authorisation and an award of costs. On the first, the Tribunal concluded that it was appropriate to quash the authorisation of directed surveillance of 23rd May 2006 and to order the destruction of any notes made on the day, although no use had been made of them in the investigation. In relation to the award of costs, the Tribunal concluded that if it had had jurisdiction (referring to **W v Public Authority IPT/09/134**), it would not have awarded costs. The Complainants had sought and obtained, at a stage when little cost had been incurred, a finding in their favour, and had then proceeded, in a process which had caused the Respondent to expend substantial costs, and obtained no further relief. The Tribunal was satisfied that this was not an appropriate case to exercise jurisdiction vis a vis costs and thus none were awarded.

Messrs Kevin R Winters & Co of Belfast for the **Complainants**. **Mr Jason Coppel** of Counsel for the **Respondent**.

Note

This summary is provided to assist in understanding the Tribunal's ruling. It does not form part of the reasons for the decision. The full Ruling is the only authoritative document and is available at www.ipt-uk.com.

6. RESPONSE TO JUSTICE AND SECURITY GREEN PAPER

The Tribunal welcomes the Government's recently-published Justice and Security Green Paper. The challenges it seeks to address are not new; whereas in the past the production of a PII Certificate by the Executive would be sufficient simply to exclude sensitive material from public disclosure in a court, the situation has changed significantly in recent years. There has been a significant increase in the number of civil claims where Government has had to withdraw, often at significant cost in financial settlements, from actions due to the lack of a robust mechanism for handling sensitive material in court. In these situations cases cannot be contested fairly on both sides, Judges are having to deliver judgments without full access to key information and the public is left without clear, independent rulings based on the full facts of a case.

The report outlines the procedures developed by the Tribunal throughout its history to overcome the dual challenge of handling sensitive material whilst balancing open justice. Furthermore, the Tribunal has sought where possible, in line with the principle of using 'tried and tested techniques' advocated by Government in the Green Paper, to share its learning in handling sensitive material. This is what the Tribunal feels best qualified to do, and this response is limited to the consideration of the 'enhancing procedural fairness' and 'safeguarding material' sections, rather than 'strengthening intelligence oversight'.

In summary, the Tribunal is a judicial body established to hear and determine ECHR and HRA based claims against the conduct of the Agencies and Public Authorities with RIPA powers. It is important to note that the Tribunal is a judicial body which works in many ways as an extension of the mainstream court system, rather than a Government Department or part of the Agencies. In addition to its exclusive jurisdiction over such claims against the Agencies is its role in considering complaints by individuals against Public Authorities with RIPA powers. The Tribunal thus forms a central component of intelligence oversight in the UK. The Tribunal does not expect either primary function of the Tribunal outlined above to change as a result of the proposals outlined in the Green Paper.

Throughout its history the Tribunal has sought to balance demands for open justice with the necessary protection of sensitive material. The Tribunal's Rules enable it to adjudicate on ECHR based proceedings without breaching the 'Neither Confirm Nor Deny' policy principle or revealing sensitive techniques and capabilities that would prejudice national security. That said, the Tribunal has been sufficiently flexible in its interpretation of its Rules (in particular Rule 9) to hold open hearings. For example, in the cases of **IPT/01/77** and **IPT/06/81** open hearings were held as the Tribunal concluded that the public, as well as parties, had the right to know that there was a dispute about the interpretation and validity of a point of law. Such hearings, if they could theoretically involve disclosure or discussion of sensitive material, are held on the basis of assumed facts, and regularly involve adversarial argument by legal representatives, where appropriate. Furthermore the Tribunal has sought where possible, and with the agreement of Parties, to publish some of its judgments. In such cases, the Tribunal has concluded that the publications of rulings of law on a complaint neither discloses information that may be prejudicial to national security nor contravenes the 'Neither Confirm nor Deny' policy. Clearly a balance does need to be struck between the interests of open justice for complainants and protecting sensitive information. It therefore remains within the power of the Tribunal to hold *ex parte* hearings should the need to protect sensitive information arise. Procedures to protect sensitive information are strengthened by the restrictions laid out in s.69 of RIPA, which preclude disclosure by the Tribunal of any information or documents, or the fact that they have been provided, to any third party.

The Government proposes in the Green Paper to expand the jurisdiction of the ordinary courts to enact closed material procedures (CMPs) for all civil cases that may require the disclosure of sensitive material. If this approach is to be adopted in place of an expansion of the Tribunal's remit, consideration will need to be given to the cases in which the Government is a defendant in a claim of tort brought by an individual. In criminal proceedings or in a SIAC case, the Government may in the event not be permitted by a court to rely

on information unless it is prepared to disclose it: but if it is not prepared to disclose such information, it may still be able to pursue the prosecution or complaint without it, or may have to abandon the prosecution or complaint. In civil proceedings, however, where the Government is a defendant, there is no such option.

Although the Green Paper quite rightly addresses the need to strengthen the Special Advocate system, both in terms of numbers and intelligence analysis training, further thought must be given to the legal support that will be required by Special Advocates over and above the provision of Junior Counsel. A civil claim in which the Government is a defendant requires a very different approach from a criminal prosecution or a SIAC complaint in which the Government is the complainant. Situations will arise where Special Advocates, by their very nature only qualified to advocate for the defendant in court, will not be equipped with the knowledge or experience required to investigate or establish, or pursue perceived deficiencies in, the quantum of sensitive information held or disclosed by the relevant Agency or Government Department that is relevant to the case. In such situations, there will be a need for security cleared, experienced and, most importantly, trusted individuals to investigate what sensitive information is being held by the Agency and whether this needs to be disclosed in the closed proceedings. This would typically be the role of a solicitor or investigator in the majority of civil cases. However, the costs, procedural and national security issues around engaging such a large group of security-cleared investigators would be significant.

A potential solution to this significant issue could, however, be for the Tribunal to undertake this fact-finding role. The Tribunal envisages that, as part of the case management stage discussed in the Green Paper, Judges in a civil court could refer factual issues for determination by the Tribunal or could request the Tribunal to investigate and report on factual issues. This would not be a particularly new arrangement; the Tribunal's members regularly inspect secret material and have previously exercised their power to both instruct Special Counsel (an *amicus curiae*) to advise the Tribunal and an investigator to inquire into the facts surrounding the complaint.

The use of the Tribunal in this role would have a number of advantages

- The Tribunal Members and Secretariat have considerable background knowledge in relation to the working of the intelligence agencies, and experience of investigating complaints about the exercise Agencies' intrusive powers.
- The use of the resources of the Tribunal would not require further individuals to be security cleared to review classified documents.
- The Tribunal already possesses all the statutory powers necessary to investigate complaints against the intelligence agencies effectively.
- As a judicial body, to whom the intelligence agencies are already answerable under RIPA, the Tribunal is likely to have greater moral authority than special advocates or security cleared solicitors to secure speedy cooperation by the agencies in disclosing relevant documents.
- The Tribunal has the trust and confidence of the Agencies.

The Tribunal suggests that the answer to the question at para 2.71 of the Green Paper is that there is scope for considering a change to the existing role of the IPT, by expanding its powers in order to enable it to accept requests for assistance with the handling of sensitive material, where these have been made by a court at a case management stage.

Furthermore, the Tribunal is likely to be a less costly means of dealing with the review of sensitive material held by the Agencies. The part time members of the Tribunal are only called upon as and when required, and the salaries of the judicial members are already funded by Ministry of Justice. The resources of the Tribunal Secretariat would naturally need to be increased if a substantial volume of casework were to be remitted to the Tribunal in the fashion proposed.

APPENDIX A: FREQUENTLY ASKED QUESTIONS

Can I complain on someone's behalf?

Any complaint or claim must be brought by the person concerned (including any organisation and association or combination of persons). They may receive help in completing the form and it can be submitted by a representative, but the form and any additional statements must be signed by the complainant/claimant.

Although the Tribunal Rules require the forms to be signed by the complainant, a form signed by a parent or guardian in respect of a complaint by a child or vulnerable adult is acceptable.

The Tribunal cannot accept single applications on behalf of more than one person because the Tribunal is required to make a determination in relation to each complaint falling within its jurisdiction*. Each case is investigated separately and conduct may be found to relate to one complainant but not others who are linked to that complaint and the final determination may be different. For this reason the Tribunal finds it necessary to keep a separate file in relation to each application which is made to it.

*Which is not out of time and which is neither frivolous nor vexatious.

Will the Tribunal tell me if my phone has been intercepted?

It is not the Tribunal's function to tell complainants whether their telephones have been tapped, or if they have been the subject of other activity. Its purpose is to ascertain whether legislation has been complied with and organisations have acted reasonably. If your complaint is upheld, the Tribunal may decide to disclose details of any conduct. If your complaint is not upheld, you will not be told if any conduct has been taken against you or not.

Will making a complaint or claim to the Tribunal cost me anything?

No. The Tribunal's investigation of complaints and claims is free of charge and it does not have the power to award costs against a complainant who has withdrawn his complaint. The government has an obligation to provide all the resources required by the Tribunal to enable it to carry out its functions. However, if you decide to submit your complaint and claim through a solicitor or other representative, the Tribunal cannot refund any costs you may incur as a result.

How long will I have to wait before the Tribunal makes its decision?

The Tribunal has no set time limit for responding to complaints or claims. This is because all cases vary in scope and detail and each one is dealt with on its own merits. The amount of time taken can also depend on the responses received to the Tribunal's enquiries, which may lead to more information being sought from the applicant or the organisation complained about.

Will I be contacted by the organisation that is the subject of my complaint or claim?

All complaints and claims are dealt with through the Tribunal. The organisations that are the subject of a claim or complaint make all their responses to the Tribunal for its consideration. You will not be contacted directly without your consent by any organisation in relation to your complaint or claim.

Will I receive information about the progress of my complaint/claim?

The Tribunal is restricted in what it can disclose during the investigation of a complaint or claim. The Tribunal Rules state that no information or documents provided to the Tribunal, nor the fact that any have been provided, can be disclosed. The Tribunal can therefore only assure you that an investigation is still ongoing.

Is the Tribunal independent of government?

Yes. No government department can intervene in a Tribunal investigation or influence its decisions. The Tribunal makes its determinations based entirely on the evidence before it and on the same principles as judicial review.

How do I know the agency will provide all information requested of it?

All organisations holding powers under RIPA are required by section 68(6) of the Act to provide all information requested by the Tribunal. Further to this, the Tribunal can demand clarification or explanation of any information provided, order an individual to give evidence in person, inspect an organisation's files, or take any other action it sees fit. RIPA stipulates that all organisations and individuals concerned must provide the Tribunal with such assistance as it requires.

APPENDIX B: SUMMARY OF IPT RULES

A full version of the Investigatory Powers Tribunal Rules 2000, made under s.69 of RIPA, appear in Statutory Instrument No. 2665. Readers are encouraged to refer to this version rather than the summary of key points below. The full Rules are available on the IPT website www.ipt-uk.com under the 'links section'.

Rule	Summary
Part I	
1	Citation and commencement 2nd October 2000
2	Interpretation
3	Application of Rules The Rules apply to Complaints and claims
4	Exercise of Tribunal's jurisdiction Jurisdiction may be exercised within the UK by any two or more members
5	Functions exercisable by single member A list of the limited decisions which can be taken by only one member
6	Disclosure of Information The confidentiality restrictions placed on the Tribunal. The Tribunal is required by rule 6(1) to carry out their functions in such a way as to secure that information is not disclosed to an extent, or in a manner, that is contrary to the public interest or prejudicial to national security, the prevention or detection of serious crime, the economic well-being of the United Kingdom or the continued discharge of the functions of any of the intelligence services.
Part II	
7	Bringing section 7 proceedings How to make a Human Rights Act claim (T1 form)
8	Making a complaint How to make a complaint (T2 form)
9	Forms of hearing and consideration If the Tribunal decide to hold a hearing this must be in private. This rule was examined in the case of IPT/01/62 and IPT/01/77 and the Tribunal determined that it was ultra vires (beyond the power) of section 69 of RIPA. The Tribunal have therefore decided that, subject to the general duty imposed by Rule 6(1) to prevent the disclosure of sensitive information, the Tribunal can exercise discretion and hold open inter partes hearings.
10	Representation If someone is invited to make representation at an oral hearing they can do this themselves or they can be represented by a lawyer who falls within the categories given. Alternatively they can be represented by someone else if the Tribunal gives permission.
11	Evidence Uniquely the Tribunal can receive evidence in any form including evidence that would not be admissible in a court of law. Witnesses can be required to give evidence on oath but no one can be compelled to give evidence at an oral hearing.
12	Remedies This Rule regarding remedies should be read with s67(7) of the Act. Remedies available to the Tribunal are summarised in page 23 of this report.
13	Notification to the complainant This section allows the Tribunal to provide information to a complainant when a determination is made in their favour subject to rule 6(1).

APPENDIX C: IPT COSTS

The total amount of fees claimed by Members of the Tribunal in 2010 was £63,078. The Tribunal claimed a total of £5983.00 in expenses in 2010

Members' terms and conditions state that their appointment is non-salaried and non-pensionable. A member of the Tribunal who is not a salaried judicial-holder will receive a daily fee of £785.00. The daily fee is equivalent to that paid to a Deputy High Court Judge and is reviewed annually in line with the recommendations of the Senior Salaries Review Body for the Judiciary. Additional payment(s) can also be made for attendance at full Tribunal meetings, attendance at oral hearings and file review visits to those agencies and authorities empowered under the legislation against whom complaints are lodged.

Both the President and Vice President are serving High Court Judges and therefore receive no additional payment for their work on the Tribunal.

