



# INVESTIGATORY POWERS TRIBUNAL

REPORT

2016-2021



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# Report of the Investigatory Powers Tribunal

This Report covers the period from January 2017 to December 2021 plus reports from key decisions in 2016

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## Foreword

The Investigatory Powers Tribunal occupies a unique position in our legal system. It is in substance a court. It is independent of the Government, the intelligence agencies, other public authorities such as the police and everyone else. Its members sit as judges, although some of us are full-time serving judges who sit in other parts of the legal system and some are part-time judges.

The jurisdiction of the Tribunal is unusual in that it extends to the whole of the United Kingdom. When appropriate, we sit in Scotland and Northern Ireland as well as in England and Wales. Much of the work of the Tribunal is done on the papers without the need for a hearing but, when a hearing is necessary, we hold it in open when we can and only sit in closed when we must. The nature of the work of the Tribunal is such that we must sit in closed when, for example, we consider material which should not be disclosed in the interests of national security.

The Tribunal has been described as providing “an effective remedy” for compliance with the rights in the European Convention on Human Rights by the Grand Chamber of the European Court of Human Rights in *Big Brother Watch v United Kingdom* (judgment of 25 May 2021), para. 271.

As this Report makes clear, the work of the Tribunal concerns not only the intelligence agencies but also other public authorities such as the police. The work of the Tribunal is both varied and important. As well as sitting as an independent court, the Tribunal has an investigatory function: it has powers available to it to look into matters which might not otherwise be known to members of the public. But it differs from other parts of the supervisory system over activities such as secret surveillance because it provides an adjudicatory mechanism and in that it functions like a court. It is different in

particular from the Office of the Investigatory Powers Commissioner, which has a role to play in the warrant system and inspection of facilities.

The last report of this kind about the work of the Tribunal was published in 2016. The last few years have been challenging for all of us, including this Tribunal. The effect of the Covid-19 pandemic was in part to delay the preparation and publication of this Report. Nevertheless, I hope that those who are interested in the subject, including members of the public, will find it helpful to have this Report now.

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

**The Rt. Hon. Lord Justice Singh**  
**President, Investigatory Powers Tribunal**

## Chapter 1: Overview and Background to the Tribunal

The Investigatory Powers Tribunal (the Tribunal) is an independent judicial body established under section 65 of the Regulation of Investigatory Powers Act 2000 (RIPA) as amended by the Investigatory Powers Act 2016. The jurisdiction of the Tribunal is set out in that section.

Briefly the Tribunal considers complaints of unlawful intrusion or surveillance and claims under section 7 of the Human Rights Act 1998 (HRA) in relation to unlawful intrusion by public bodies, including the intelligence services, the police and local authorities. It also considers complaints and claims about any conduct by or on behalf of the intelligence services. The intelligence services are defined as the Security Service (also known as MI5), the Secret Intelligence Service (SIS or MI6) and the Government Communications Headquarters (GCHQ).

The Tribunal's jurisdiction is UK wide. The Tribunal's membership includes two judges from Scotland, including the Vice-President, and a member from Northern Ireland. The Tribunal has sat in Edinburgh, most recently in June 2022, and will be sitting in Belfast in December 2022.

Separate legislation enacted in the Scottish Parliament, the Regulation of Investigatory Powers (Scotland) Act 2000 (RIPSA), regulates the issuing of some warrants in Scotland. The Tribunal has jurisdiction to consider complaints arising from the exercise of power under that Act.

The Tribunal 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). It came into operation in October 2000, at the same time as the Human Rights Act 1998.

As a judicial body the Tribunal can only consider complaints that are brought before it by a person in relation to themselves, their property or communications. "Person" is defined in RIPA to include any organisation and any association or combination of persons. The Tribunal determines complaints applying the same principles as a court on an application for judicial review.

There are, however, significant differences between the Tribunal and other judicial bodies. These are outlined in chapter 5. Briefly, unlike a court the Tribunal has an investigative as well as an adjudicatory function. Moreover the Tribunal has a duty to carry out its functions in such a way as to secure that information is not disclosed 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.

That is a duty which the Tribunal takes extremely seriously. It permeates the way in which the Tribunal operates. While the Tribunal adheres to the principle of open justice wherever possible it is also mindful of the obligation not to disclose information that ought not to be in the public domain. The role of counsel to the Tribunal, and the adoption in some cases of both open and closed hearings, is designed to meet both of these objectives.

The legislation that forms the basis of the Tribunal and the rules by which it operates are listed in Appendix A. Subject to the legislation and Rules made under it, the Tribunal is entitled to determine its own procedures.

The Tribunal has two main purposes:

- to ensure that relevant investigatory powers, many of which represent significant intrusions into the private lives of citizens, are used in accordance with the law.
- to provide an avenue of complaint about any conduct by or on behalf of the intelligence services whether or not it involves the use of an investigatory power.

There are five pieces of legislation that regulate the use of investigatory powers by public bodies to intrude upon the privacy of members of the public:

- The Regulation of Investigatory Powers Act 2000 (RIPA)
- The Regulation of Investigatory Powers (Scotland) Act 2000 (RIPSA)
- The Investigatory Powers Act 2016 (IPA)
- The Intelligence Services Act 1994 (ISA)
- Part III of the Police Act 1997 (the Police Act)

RIPA, as amended, provides an avenue of complaint through the IPT in relation to all of these investigatory powers when unlawful conduct is known or is believed to have taken place. For convenience, in this Report complaints and claims will be referred to as 'complaints'.

Investigatory powers may be summarised as follows:

- (i) Interception of communications. Your communications by post or your telecommunications (including email) have been intercepted, or you wish to

challenge the issue or maintenance of a warrant for such interception, or authorisations to examine intercepted content or protected material.

- (ii) Communications data and secondary data. Conduct for or in connection with the obtaining of secondary data or communications data from postal or telecommunication systems, the retention of such data (excluding any conduct which is subject to review by the Investigatory Powers Commissioner), the giving or varying of a retention notice or the issue or maintenance of warrants relating to such data.
- (iii) Bulk powers. This can relate to the issue, modification, or maintenance of a bulk interception warrant, bulk equipment interference warrant or bulk communications data warrant; or bulk personal dataset warrant.
- (iv) Interference with property and equipment. There has been entry onto or interference with your property or with your equipment (which includes traditional computers or computer-like devices such as tablets, smart phones, and static storage devices) or you wish to challenge the issue or maintenance of a warrant or authorisation for such interference.
- (v) Covert surveillance. Surveillance by a public authority under RIPA (or by a foreign police or customs officer operating in the UK) in relation to anything taking place on any residential premises or in any private vehicle; and/ or surveillance by a public authority (or by a foreign police or customs officer operating in the UK) which may have resulted in private information about you being obtained.
- (vi) Covert human intelligence sources. Covert human intelligence has been used in relation to you, e.g. a public authority has used, or is using, a personal or other relationship for the purpose of getting information about you or you have been tasked as a covert human intelligence source by a public authority for covert purposes.
- (vii) Encryption. You have been given a notice under section 49 of RIPA, relating to investigation of electronic data protected by encryption.



(viii) Technical Capability and/or National Security Notice and/or Data Retention Notice.

The giving and/or varying of a national security and/or technical capability and/or a data retention notice to a telecommunications and/or postal operator as well as conduct under a notice.

The Tribunal forms a key part of the multiple layers of executive, judicial and legislative oversight that form the basis of the investigatory powers regime in the UK.

### **The Investigatory Powers Commissioner**

Legislation provides for oversight of these intrusive powers through the Investigatory Powers Commissioner (IPC) who provides independent oversight of the use of investigatory powers, as outlined in the Investigatory Powers Act 2016. This oversight includes the inspection and authorisation by the judicial commissioners of the use of these powers by over 600 public authorities. The IPC is also obliged to make an annual report to the Prime Minister on the use of investigatory powers under the IPA. This report must be published and laid before Parliament.

### **Relationship between Tribunal and IPC**

The Tribunal has powers under section 68 RIPA and section 232 of the Investigatory Powers Act 2016 to require the IPC to provide assistance to the Tribunal and to furnish the Tribunal with all documents and information as the Tribunal may require for the investigation of a matter or for its determination of a case before it. The relationship between the Tribunal and IPCO, and the exercise of the Tribunal's powers was examined by the Tribunal in *Privacy International & ors v Secretary of State for Foreign and Commonwealth Affairs* [2021] UKIPTrib IPT 17 86 CH (see the brief report in chapter 4 page 31-32.)

An example of the Tribunal requesting the assistance of IPCO can be found at paragraph 35 of the judgment in that case. The Tribunal sought IPCO's assistance in verifying a police force's assertion that, following searches carried out by it, it did not hold relevant information. IPCO's inspectors attended the police force's offices, interviewed staff and reviewed the force's records before providing a report to the Tribunal.

Additionally, under section 68(3)(a) RIPA the Tribunal is required to ensure that the IPC is kept aware of all proceedings and complaints made to the Tribunal and the determination, award or decision made in every case. Systems are in place to ensure that the Tribunal fulfils that function without placing a disproportionate burden on either the Tribunal or IPCO.

### **The Intelligence and Security Committee of Parliament**

The Intelligence and Security Committee of Parliament is a statutory Committee (ISC) (see Part 1 of the Justice and Security Act 2013) comprising Parliamentarians who have responsibility for the oversight of the expenditure, administration, policy and operations of the intelligence services and other activities of HMG in relation to intelligence or security matters. Oversight of operational matters by the ISC is defined by a memorandum of understanding.

## Chapter 2: Review of the period since the last Report

### Workload

We set out the detailed statistics in the next chapter. The headline figure is that there has been a 75% increase in the number of complaints received by the Tribunal between 2017 and 2021. In 2017 the Tribunal received 202 complaints. That number held steady in 2018 followed by an increase to 288 in 2019. The number fell back in 2020 before a large increase to 353 in 2021.

The reasons for the large increase in numbers of complaints are not clear. It may be that the publicity given to some cases such as the *'Third Direction'* case and *Wilson v Metropolitan Police*<sup>1</sup> has increased public awareness in the existence of the Tribunal and confidence in its independence. It is also possible that the pandemic artificially reduced some of the complaints in 2020, which were then made in 2021.

The large increase in the number of cases, together with some of the changes detailed below, including a backlog inevitably created due to changes in ways of working necessitated by the pandemic, has led to complaints taking longer to deal with than was previously the case. To address this, a number of measures have been brought in - the effectiveness of which will be monitored by the new leadership structure put in place at the Tribunal Secretariat.

### Pandemic

Like all institutions the Tribunal had to adapt to new ways of working during the lockdown imposed by the Covid-19 pandemic. Staff were unable to get into the office and so new ways of working had to be found. Fortunately the Tribunal was able to switch a large number of cases to electronic case files which allowed staff to work on these cases remotely. Members of the Tribunal were also able to deal with a large number of cases in soft copy. This meant that with only a brief hiatus the Tribunal was able to deal with a large number of cases through lockdown.

We were also able to hold a number of hearings during much of the period covered by restrictions using socially distanced courts in the Royal Courts of Justice. One example was the seven day hearing in the case of *Wilson v Metropolitan Police*, which was held in April 2021.

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<sup>1</sup> Brief summaries of these cases can be found in chapter 4

There were, however, periods when the decision was taken to close the office to protect the health of our staff and members. That had an impact on the Tribunal's ability to progress some casework, particularly where some of the documents involved were closed for security reasons. This backlog has created added pressure on the Tribunal, at a time when case numbers were already rising.

## Changes to the Law affecting the operation of the Tribunal

### Right of appeal

The Investigatory Powers Act 2016 amended RIPA by adding a new section 67A. For the first time this provided for a right of appeal from decisions of the Tribunal on a point of law. An application has to be made to the Tribunal for leave to appeal. If that is refused the applicant may seek leave from the relevant appellate court. Leave can only be granted if the appeal raises an important point of law or principle or there is another compelling reason for granting leave.

The relevant appellate court is either the Court of Appeal in England and Wales or the Court of Session in Scotland. There is provision for the Secretary of State, with the consent of the Northern Ireland Assembly, to add the Court of Appeal in Northern Ireland as a relevant appellate court. To date the power has not been exercised and the Tribunal has certified the relevant appellate court for cases from Northern Ireland to be the Court of Appeal in England and Wales. In giving its determination in a case, the Tribunal must certify which court is the relevant court for the purposes of any appeal.

The provision came into effect on 31 December 2018. The Tribunal has allowed leave to appeal in two cases, one of which, the '*Third Direction*' case, was heard in the Court of Appeal, and dismissed.

### The 2018 Rules<sup>2</sup>

The Investigatory Powers Tribunal Rules 2018 came into effect on 31 December 2018. They replaced the Investigatory Powers Tribunal Rules 2000. Apart from providing rules giving effect to the new right of appeal, they also brought in some other significant changes. The new Rules recognise what had already been established by the Tribunal's case law, that hearings should be

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<sup>2</sup> The 2018 Rules can be found at [The Investigatory Powers Tribunal Rules 2018 \(legislation.gov.uk\)](https://www.legislation.gov.uk)

held in public unless there is good reason not to do so. The Rules make provision for both open and closed sessions (rule 10).

The role of counsel to the Tribunal (CTT) was one which had evolved since the Tribunal's inception without any formal recognition in the Rules. Rule 12 now makes provision for the appointment of CTT and for the role they are to adopt. CTT assists the Tribunal with identifying documents or parts of documents that ought to be disclosed to the claimant and can make submissions to the Tribunal in support of such disclosure. CTT must also seek to identify any arguable error of law in relation to any decision or determination made by the Tribunal consequent upon a hearing held in whole or in part in closed.

For the first time, the Rules (rule 15) provide for the provision of reasons to the complainant where the Tribunal's determination is not in their favour. That is subject to the general duty imposed on the Tribunal by Rule 7 not to disclose information that is contrary to the public interest.

### **Judicial Review**

Section 67(8) RIPA provides, in effect, that decisions of the Tribunal are final and are not liable to be questioned in any court. The question arose as to whether it precluded judicial review of decisions of the Tribunal. The Supreme Court in the case of *R (on the application of Privacy International) v Investigatory Powers Tribunal* [2019] UKSC 22 held that section 67(8) does not exclude the judicial review jurisdiction of the High Court in relation to decisions of the Tribunal.

### **Effect of the changes on the work of the Tribunal**

These changes have increased the workload for both staff and members of the Tribunal. The threshold for leave to appeal is a high one and, consequently, most applications for leave to appeal are refused. Nevertheless, applications for leave to appeal require to be carefully considered, and, if refused, properly reasoned.

## Membership of the Tribunal

### The Tribunal members

Lord Justice Singh replaced Sir Michael Burton as President of the Tribunal in September 2018, following Sir Michael Burton's retirement.

Lord Boyd of Duncansby was appointed Vice-President in 2019 in succession to Sir John Mitting. Sir John is now Chairman of the Undercover Policing Inquiry.

The other retirements from the Tribunal include Susan O'Brien KC, Sir Richard McLaughlin, and Desmond Browne KC.

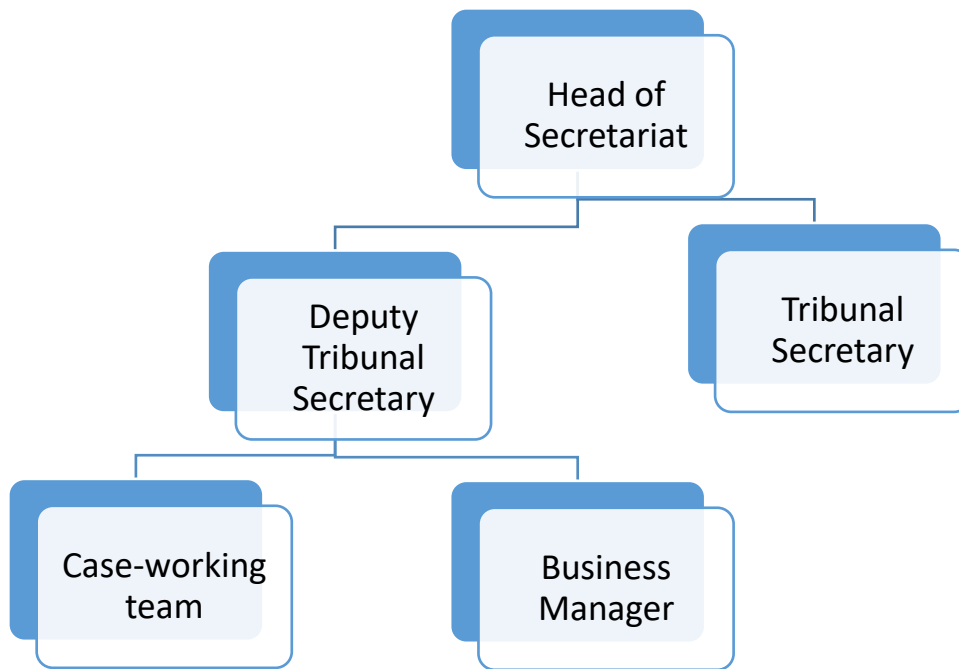
Mrs Justice Lieven, Lady Carmichael and Mr Justice Chamberlain have all joined the Tribunal since 2016.

In August 2022 four new Legal Members were appointed to replace members who have recently retired or are retiring in the next year. The new members are Judge Rupert Jones, Stephen Shaw KC, Annabel Darlow KC and Francesca Del Mese.

Biographies of present members can be found at chapter 7.

### Staff

A new structure has been put in place with the intention of stream-lining processes around case management. For the first time the Tribunal has appointed a Head of Secretariat, who will be responsible for the effective and efficient management of processes.



*Fig 1: breakdown of Secretariat structure*

### **Going Forward**

The challenge for the Tribunal is to build on its success so far while dealing with the increasing workload in an efficient and effective manner.

During the pandemic the staff, led by the Secretary, were able to move much of the workload onto soft copy. The Tribunal will continue to use softcopy where it is appropriate to do so as it allows staff and members alike to work on cases remotely.

As noted above we have appointed a new Head of Secretariat who will be responsible for the management and efficient running of the Tribunal, ensuring that processes are in place to monitor the progress of cases and that members and case workers have the right resources for the task. We will be reviewing our working methods and office processes. We will put in place ways of more effectively measuring our performance against targets. In doing so we will not compromise on the independence of the members of the Tribunal as judges.

## Chapter 3: Outcomes and Statistics

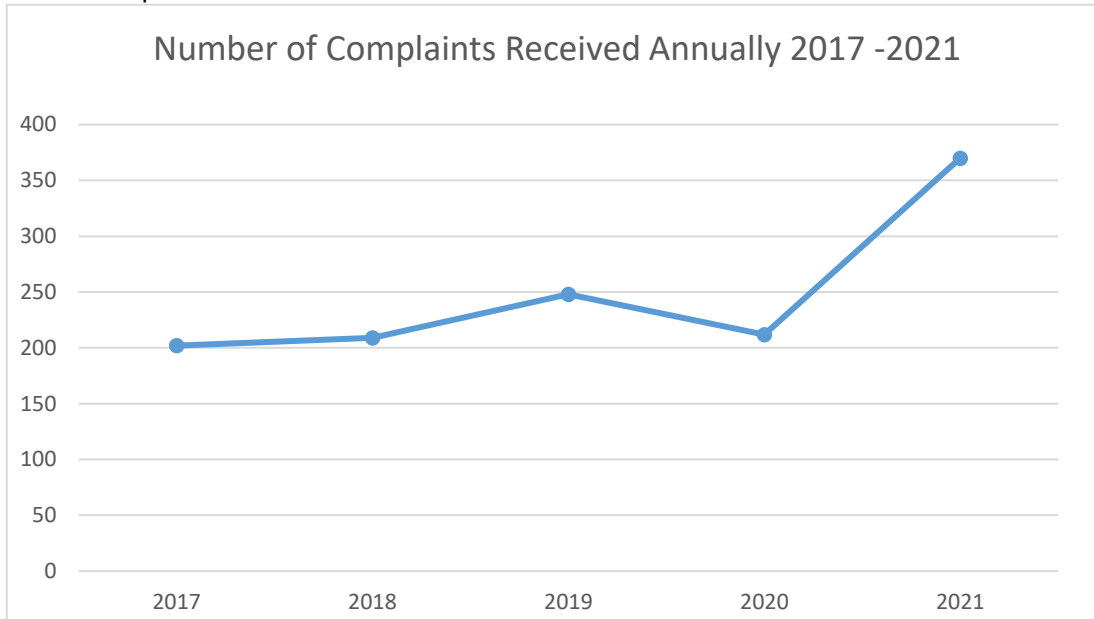
When a complaint has been made to the Tribunal there are seven possible outcomes:

<b>Decision Outcome</b>	<b>Explanation</b>
<b>No Determination</b>	<b>Either</b> the Tribunal is satisfied that there has been no conduct in relation to the complainant by any relevant body which falls within the jurisdiction of the Tribunal, <b>or</b> that there has been some official activity which is not in contravention of the Act.
<b>Out of Jurisdiction</b>	Under Rule 15(5)(d) of the Investigatory Powers Tribunal Rules 2018 (the Rules), the Tribunal has no power to investigate the complaint.
<b>Out of Time</b>	Under Rule 15(5)(b) or (c) of the Rules, the complaint is out of time and the time limit should not be extended.
<b>Frivolous and/or Vexatious</b>	Section 67(4) RIPA provides that the Tribunal is under no obligation to consider a complaint which is vexatious or frivolous. A complaint is regarded as frivolous/unsustainable if it is lacking in foundation as to justify this description. A complaint is regarded as vexatious if it is a repetition, or repeated repetition, of an earlier obviously unsustainable complaint by the same person. In those circumstances the Tribunal will dismiss the claim under Rule 15(5)(a).
<b>Dismissed/Struck Out</b>	The Tribunal cannot consider the complaint, for example, due to a defect such as the failure by a complainant to sign the form or comply with a request for information (after due warning).
<b>Withdrawn</b>	Complainant withdrew the complaint.
<b>In Favour</b>	The Tribunal have ruled in favour of the complainant.

*Fig 2: Possible Outcomes. To note, more details on the Rules can be found here: [The Investigatory Powers Tribunal Rules 2018 \(legislation.gov.uk\)](https://legislation.gov.uk)*

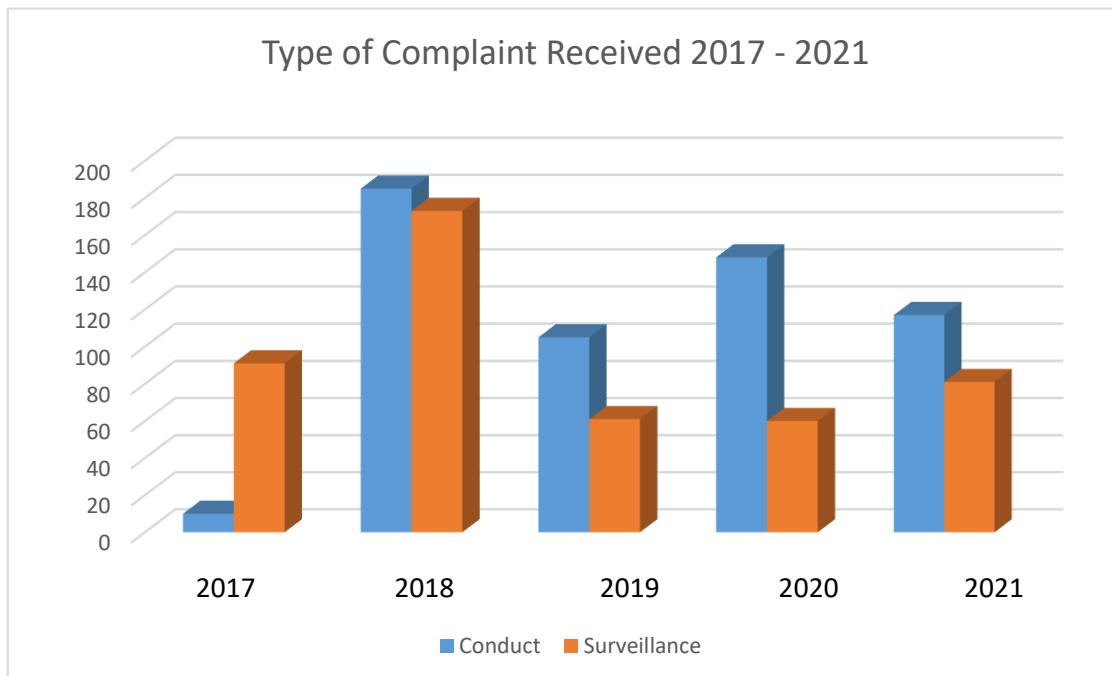


The numbers of complaints received annually by the Tribunal has increased steadily since its inception, but has almost doubled from 2020 to 2021, with possible reasons outlined in the previous chapter.



*Fig 3: Graph showing the number of complaints received annually from 2017- 2021, showing a 75% increase.*

The type of complaints received since 2018 onwards have included complaints both against conduct and surveillance (with most complaints about both); however since 2018, there have been more complaints against conduct of investigatory authorities rather than surveillance.



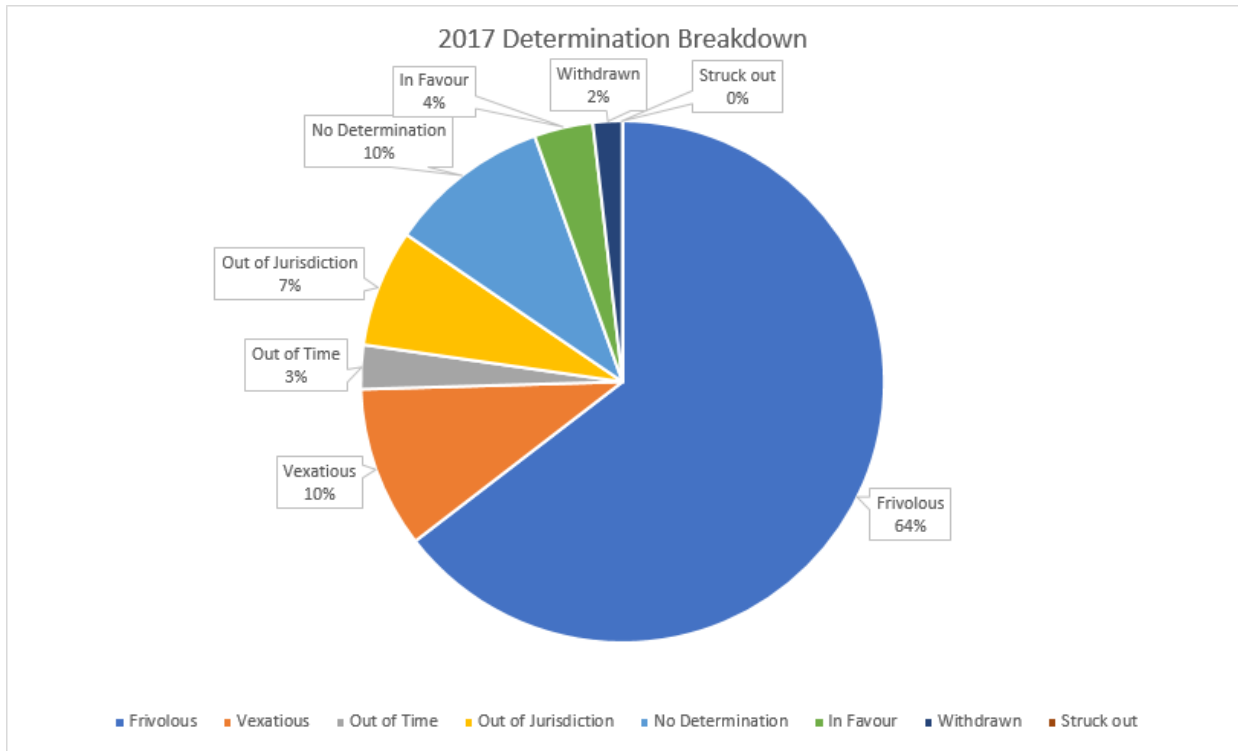
*Fig 4: Graph showing the breakdown of type of complaint received each year. To note that the same complaint can be against conduct and surveillance, so these do not equate to total number of complaints per year.*

## **Breakdown of Complaints Determined**

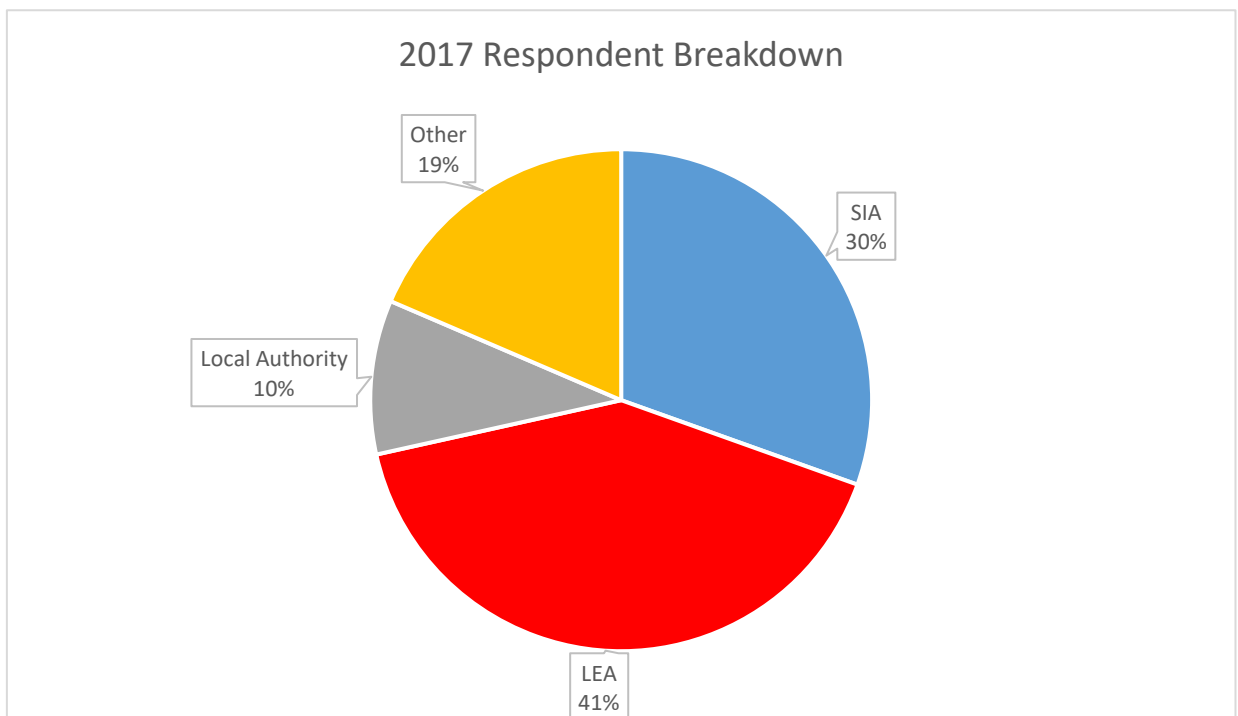
A breakdown of the complaints determined during the period of this report is presented in the figures below.

The cases determined per year are also broken down into which respondents have been the subject of complaints. To note, one complaint can refer to several organisations, and can also cover both conduct and surveillance.

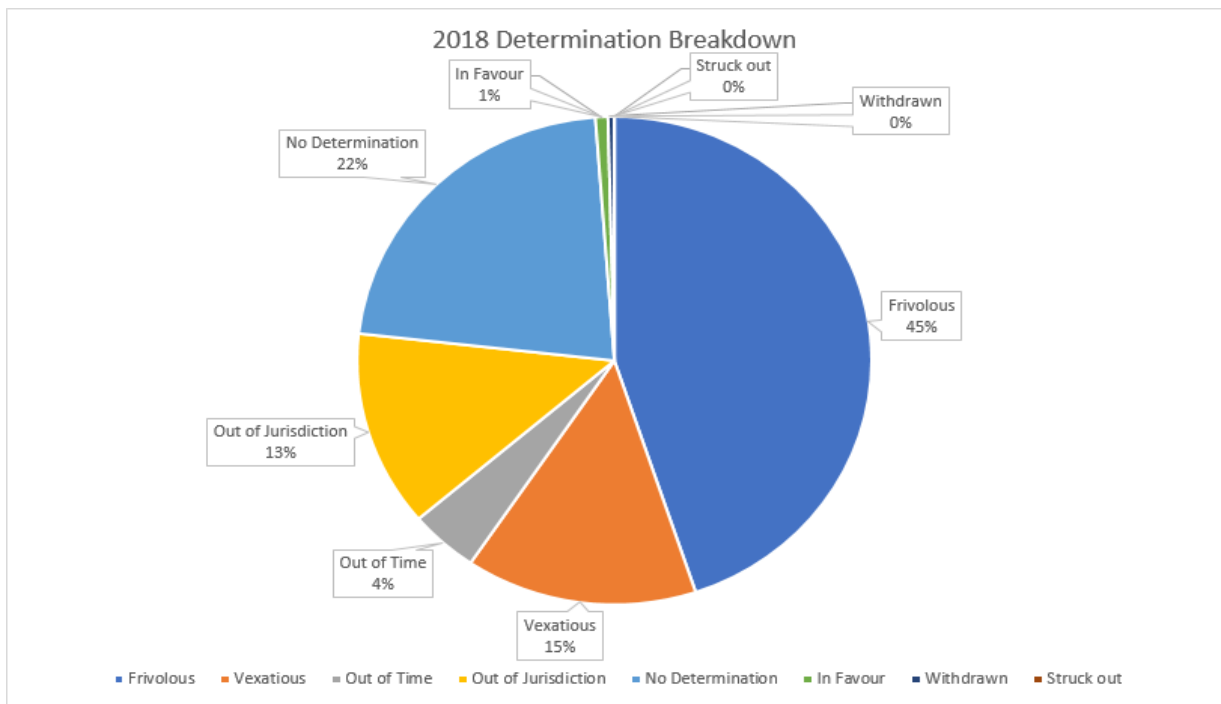
Please note: Any differences between the below statistics and those published in previous years are the result of corrections that have now been made.



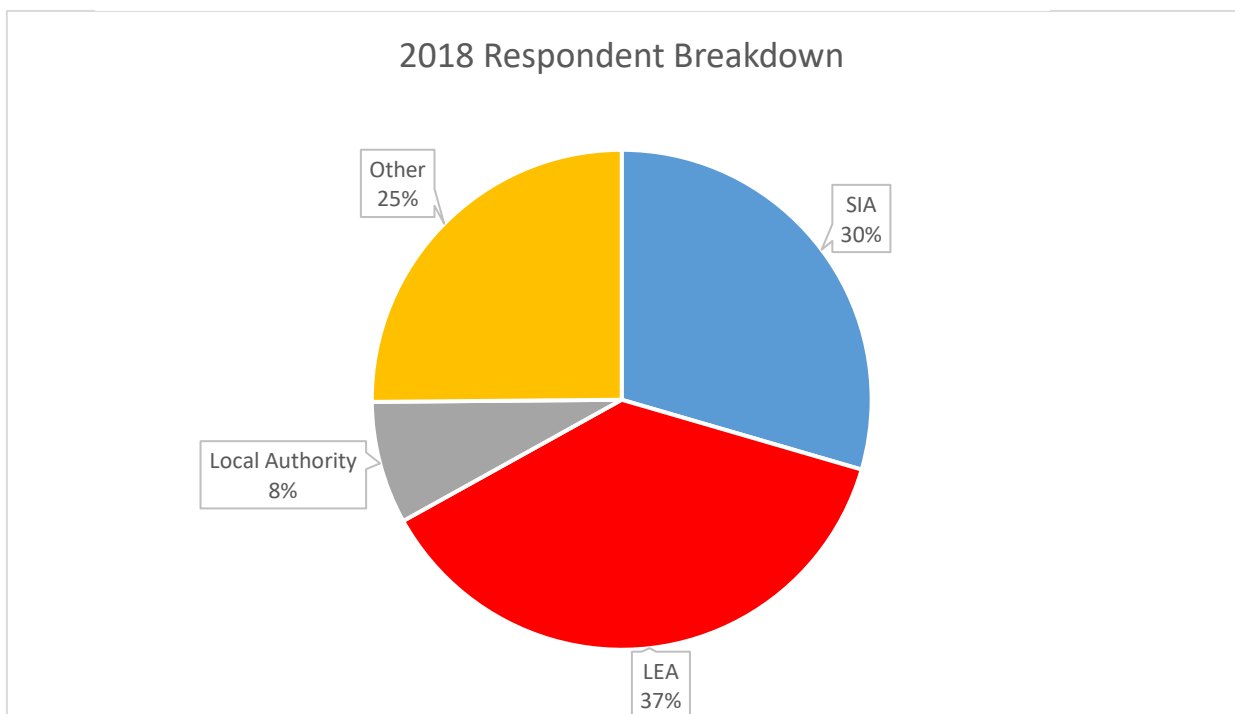
*Fig 5: Breakdown of case determinations in 2017*



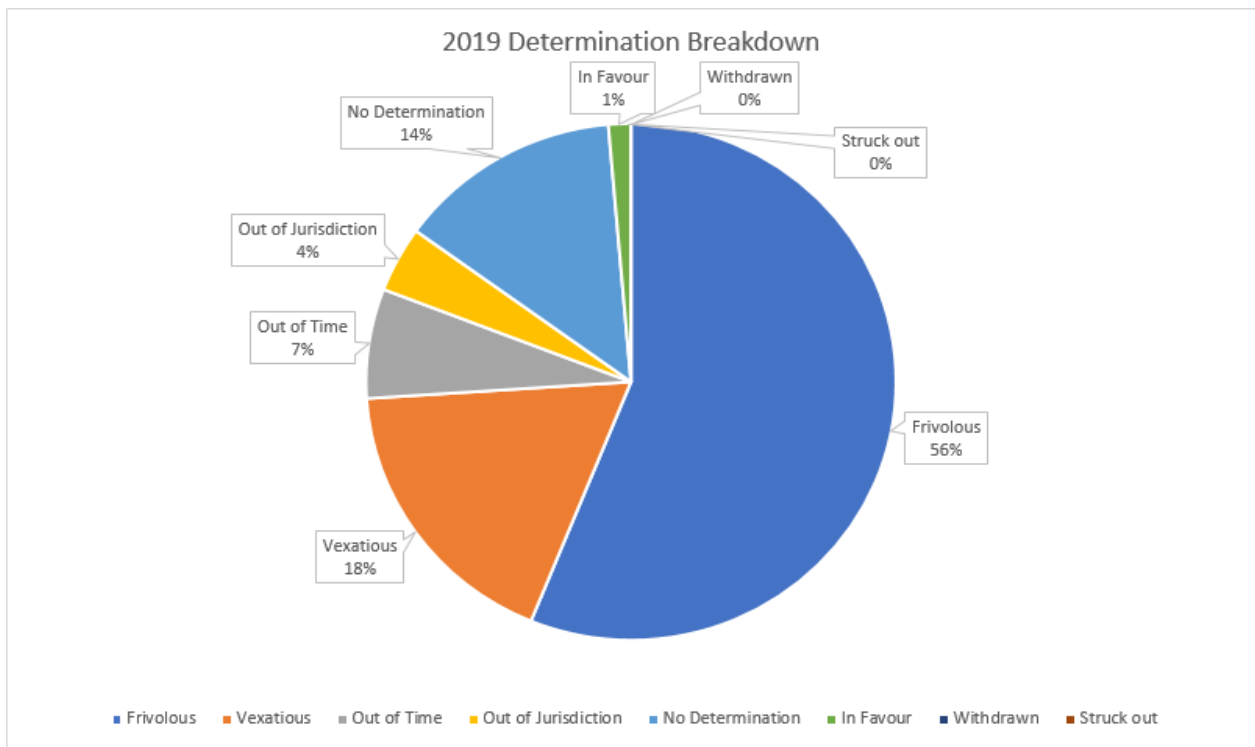
*Fig 6: Breakdown from cases determined to show against what organisations complaints were received in 2017*



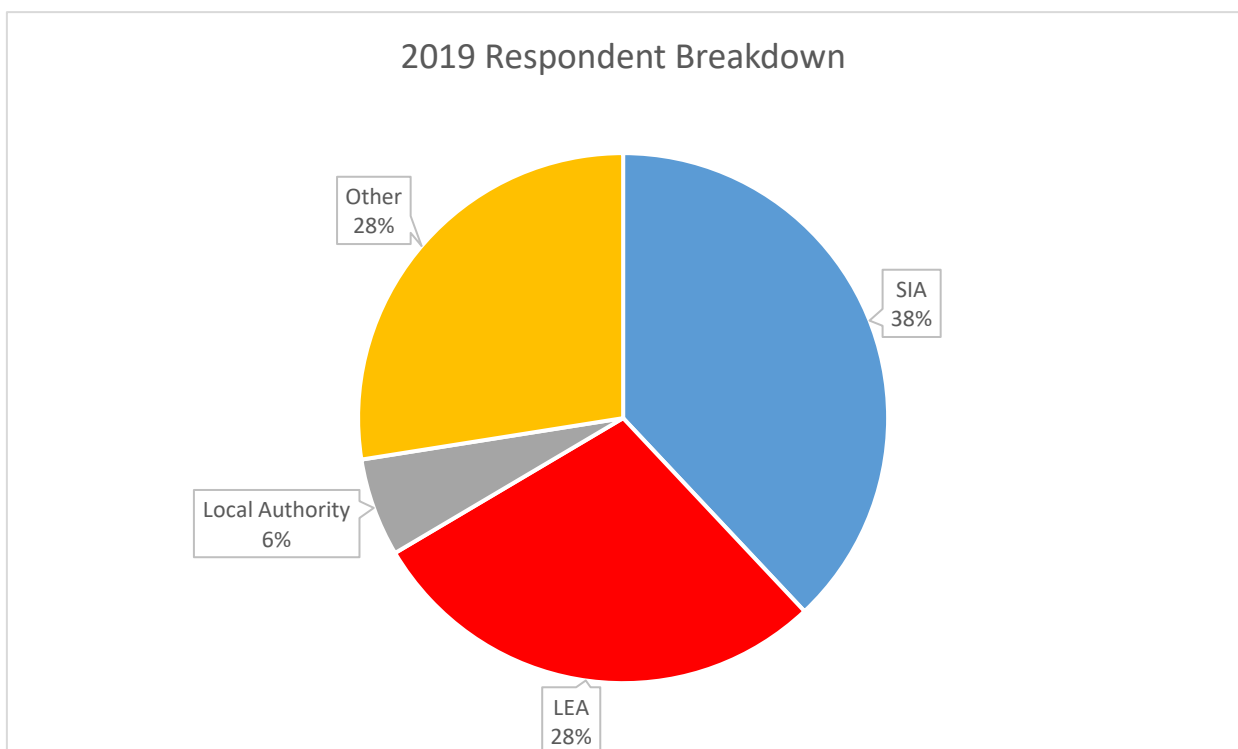
*Fig 7: Breakdown of case determinations in 2018*



*Fig 8: Breakdown from cases determined to show against what organisations complaints were received in 2018*



*Fig 9: Breakdown of case determinations in 2019*



*Fig 10: Breakdown from cases determined to show against what organisations complaints were received in 2019*

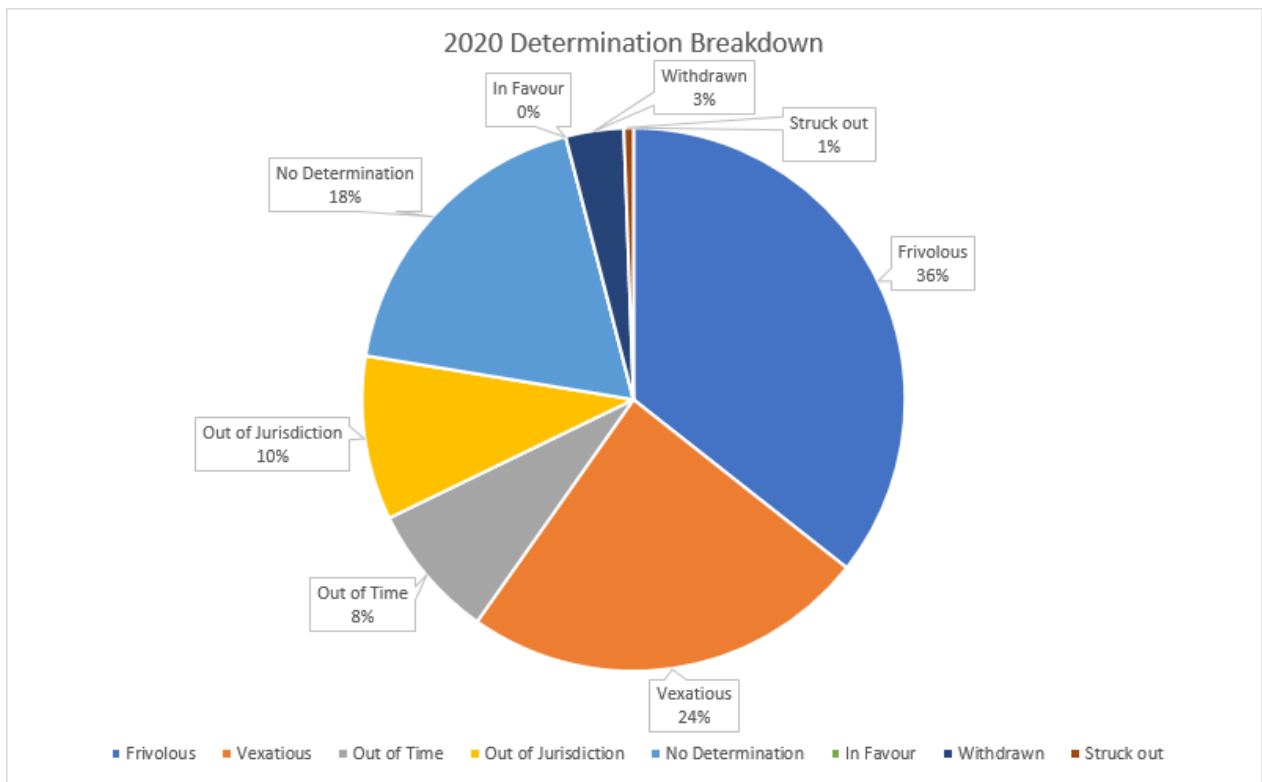


Fig 11: Breakdown of case determinations in 2020

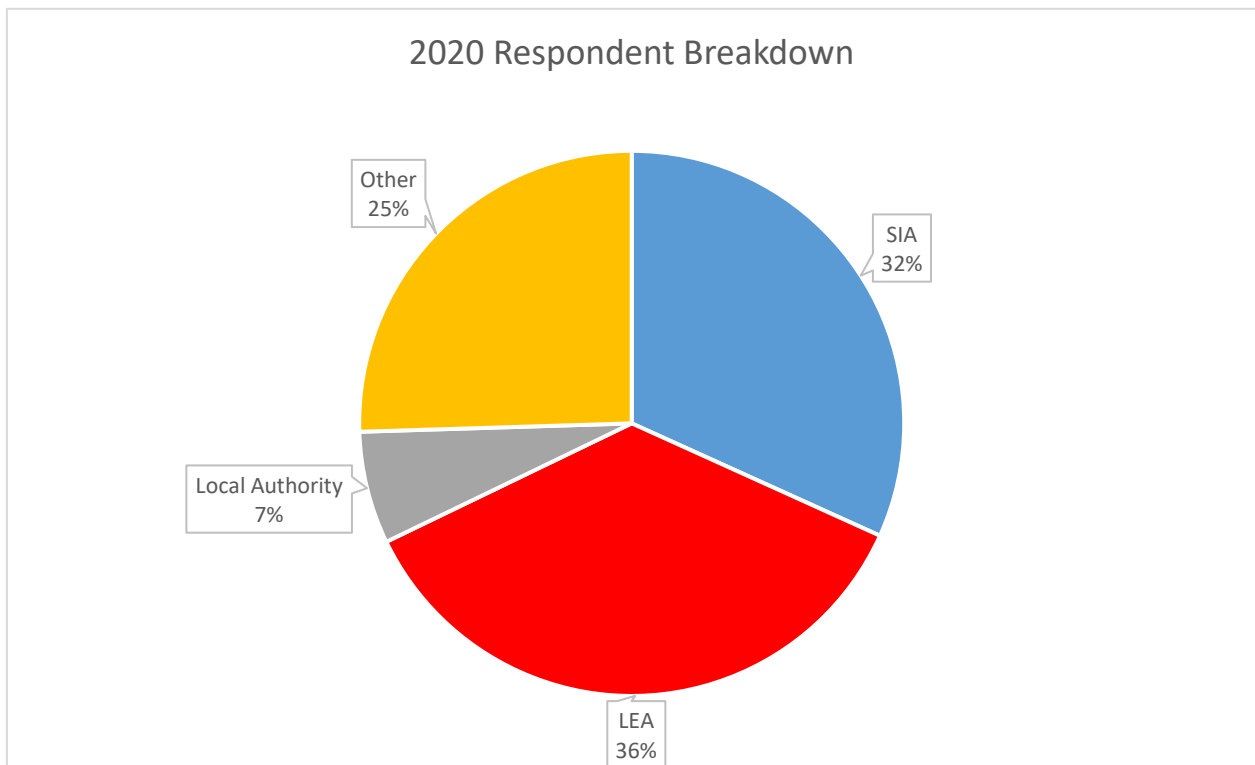
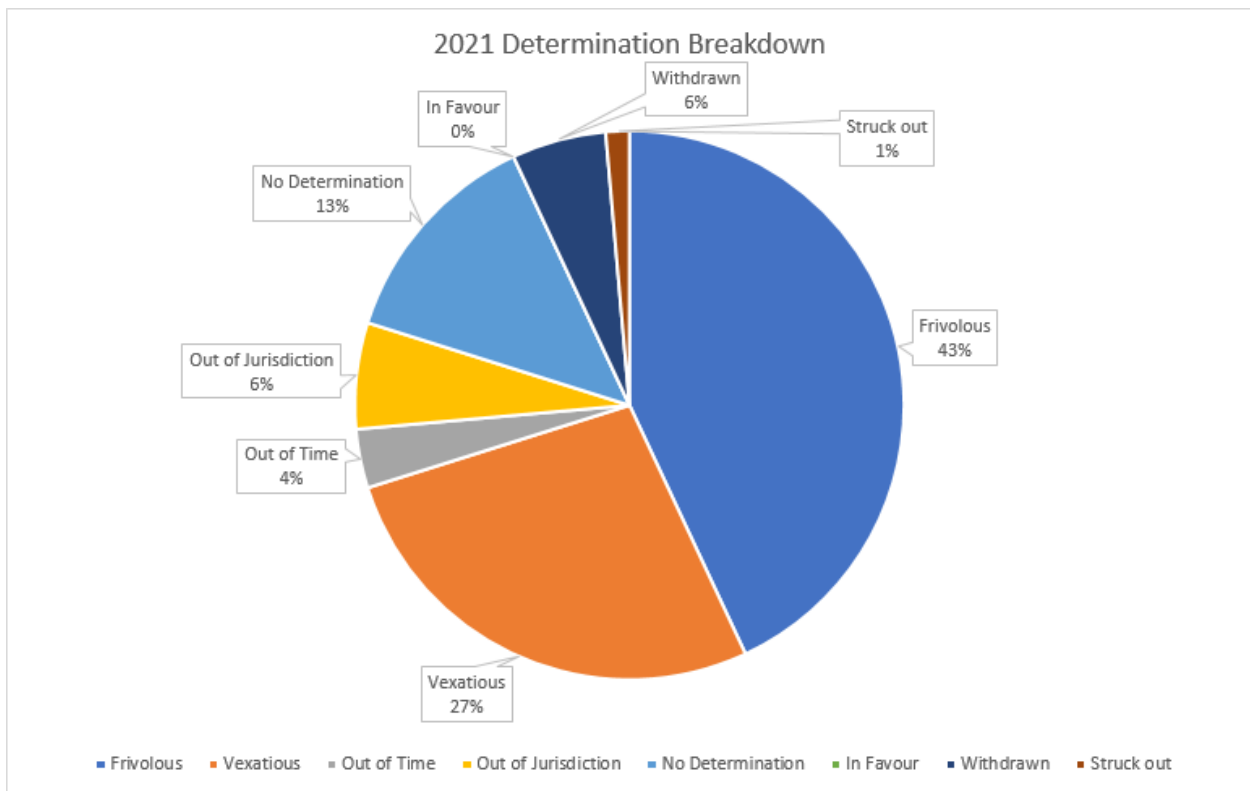
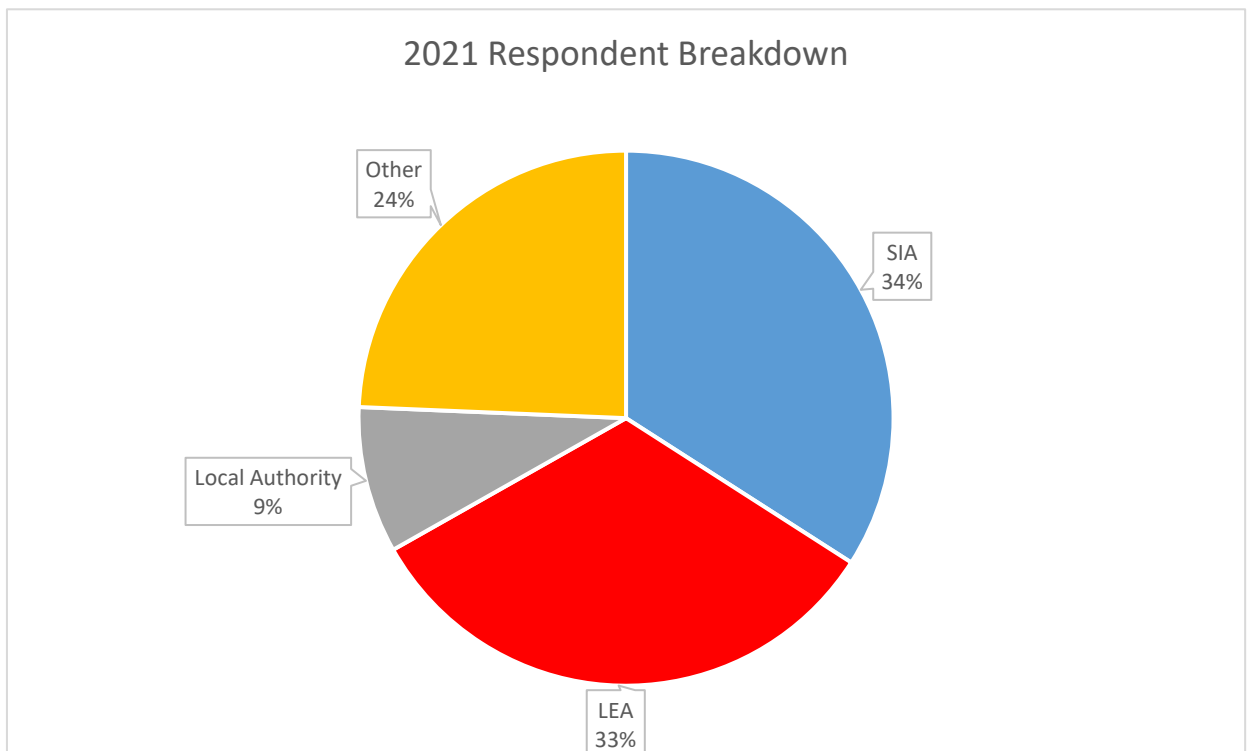


Fig 12: Breakdown from cases determined to show against what organisations complaints were received in 2020



*Fig 13: Breakdown of case determinations in 2021*



*Fig 14: Breakdown from cases determined to show against what organisations complaints were received in 2021*

In all years, less than 4% of cases were found in favour, meaning that in 96% of complaints it is determined there is either no activity at all occurring or such activity as did occur was lawfully authorised.

Across all years covered in this report, most complaints are against Law Enforcement Agencies, closely followed by Secret Intelligence Agencies (except in 2019 when this is reversed and in 2021 when it was almost equal).

*It is important to note when reading these figures that these statistics only include figures for cases that have been determined i.e. completed. There remain a significant number of cases that are ongoing, which are necessarily not reflected in these figures. This will be addressed in future IPT reports, which will include figures for determinations of cases that are currently ongoing at the IPT and are completed by then.*



## Chapter 4: Key Decisions from 2016

The summaries below represent key decisions of the Tribunal since the last Report was published in 2016. These are provided to assist in understanding the Tribunal's rulings, and are not authoritative. Full copies of the judgments referred to are available on the Tribunal's website at [www.ipt-uk.com](http://www.ipt-uk.com)

*Human Rights Watch Inc and Ors v the Secretary of State for the Foreign and Commonwealth Office and Ors* ([2016] UKIPTrib15\_165-CH), judgment dated 16 May 2016, reported in [2016] 5 WLUK 352.

### 'BULK INTERCEPTION OF COMMUNICATIONS'

The Tribunal considered whether it should investigate the complaints of 663 parties who had expressed a belief that their communications had been intercepted by the UK Intelligence Services and that they may have been subject to the sharing of intelligence between the US and UK authorities. These complaints arose out of a worldwide campaign by Privacy International who provided a standard application form on their website. The Tribunal listed the first ten applications received for a hearing.

There were two issues. First, whether the complainers were "victims" for the purposes of section 7 of the HRA. They could not show that they had been the victim of conduct by or behalf of the intelligence services but they asserted a belief that they had been. The Tribunal considered that the appropriate test was to be found in the ECtHR case of *Zakharov v Russia*<sup>3</sup>. The Court held that an "individual may claim to be a victim of a violation occasioned by the mere existence of secret measures or legislation permitting secret measures only if he is able to show that due to his personal situation, he is potentially at risk of being subjected to such measures". The Tribunal found that the test was met in respect of six out of the ten cases before it.

The Tribunal also ruled that it could not entertain the human rights complaints of those parties who had not, at any material time, been resident in the UK. The Tribunal noted that a contracting state owes no obligation under Article 8 of the European Convention on Human Rights ("ECHR") to persons who are situated outside its territory in respect of electronic communications

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<sup>3</sup> (47143/06) (2016) 63 E.H.R.R. 17, [2015] 12 WLUK 174 at 171)

between them which pass through that state. Furthermore, under Article 1 of the ECHR the UK was under no obligation to persons who did not enjoy a private life in the UK.

*Dias and Matthews v the Chief Constable of Cleveland Police*: ([2017] UKIPTrib15\_586-CH), judgment dated 31 January 2017, reported in [2017] 1 WLUK 698 and [2017] Info. T.L.R. 83.

The Tribunal ruled on claims brought by two former police officers in the Cleveland Police Force alleging that the acquisition of their communications data had been unlawful. These arose from Applications for Communications Data (“CDAs”) based on the Chief Constable’s belief that there had been leaks to the press by police officers in April 2012. The CDAs were made by reference to s. 22(2)(b) of the Regulation of Investigatory Powers Act 2000 (“RIPA”) for the purpose of “preventing or detecting crime or of preventing disorder”. The crimes relied on against the Claimants were misconduct in public office and unlawfully obtaining personal data contrary to the Data Protection Act 1998 (“DPA”).

The Tribunal held that the CDAs were unlawful. Whatever the subjective belief of the Chief Constable there was no lawful basis for obtaining the CDAs against the Claimants by reference to a case that either had committed a criminal offence. There was no arguable analysis of the offence of misconduct in public office, or of s.55 of DPA on the facts as known as at 17 May 2012 and no legal advice was taken at the time. Furthermore, there was no consideration of the impact of Article 10 of the European Convention of Human Rights by way of targeting communications with journalists, or of legal and professional privilege in relation to the involvement of a solicitor. In addition, other steps, such as interviewing the Claimants or witnesses, could have been taken but were not considered prior to any CDA being made.

*AB v Hampshire Constabulary* ([2019] UKIPTrib\_17\_191\_C), judgment dated 5 February 2019.

The issue in this case was whether or not a video recording made by a police officer on a body worn camera in the Claimant’s home amounted to surveillance for the purposes of Part II RPIA. The recording was made in the complainer’s home after police officers attended to advise him that they did not intend to investigate a report of a burglary which he had made to the police. The officers did not tell the Claimant that the body camera was switched on. The Tribunal held that the police conduct amounted to surveillance. The Tribunal noted that the recording was a

video recording and not audio, it took place in the Claimant's home which gave rise to considerations of Article 8 ECHR and it was not a voluntary declared interview.<sup>4</sup>

*Privacy International v Secretary of State for Foreign and Commonwealth Affairs, Secretary of State for the Home Department, Government Communications Headquarters, Security Service, Secret Intelligence Service (Three Judgments)*

'BULK DATA'

Judgment of 17 October 2016 ([2016] UKIPTrib 15\_110-CH), reported in [2017] 3 All E.R. 647, [2016] 10 WLUK 324, [2016] H.R.L.R. 21 and [2017] C.L.Y. 25.

This case relates to the acquisition and use of bulk data by UK security and intelligence agencies. Proceedings were first brought on 5 June 2015 relating to the agencies' acquisition, use, retention, disclosure, storage and deletion of bulk personal datasets ("BPD"). In March 2015, the existence of BPD was publicly acknowledged by the Respondents. In September 2015, the proceedings were amended to add claims related to the use of s.94 of the Telecommunications Act 1984 by the Home and Foreign Secretaries of State to issue directions to telecommunications and internet service providers to transfer bulk communications data ("BCD") to GCHQ and the Security Service. In November 2015, the existence of directions pursuant to s. 94 and BCD was publicly acknowledged by the Respondents.

The Tribunal upheld the Claimant's claim in part. It was lawful under domestic law for Home and Foreign Secretaries of State to issue directions under s.94 of the Telecommunications Act 1984 to service providers to supply BCD to the Security Service and to GCHQ. Despite the legality of the powers under s.94, however, the BPD and BCD regimes did not meet the requirements of Article 8 of the ECHR prior to their avowal in 2015. The Tribunal noted that there was insufficient oversight over the regimes and their use was unforeseeable to the public. Following avowal in 2015, however, the introduction of various measures of oversight and the publication of materials brought the regimes into "accordance with law" for the purposes of Article 8. The outstanding issues of proportionality, arrangements as to transfer of data to third parties and compatibility with EU law were adjourned until a later date.

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<sup>4</sup> The Tribunal distinguished the facts from *Re a Complaint of Surveillance* [2014] 2 All ER 576 in which the covert recording of a "voluntary declared interview" was found not to amount to surveillance

Judgment of 8 September 2017 with a postscript of 11 September 2017 ([2017] UKIPTrib IPT\_15\_110\_CH), reported in [2018] 2 All E.R. 166, [2017] 9 WLUK 110 and [2018] C.L.Y. 30.

Following their judgment of 17 October 2016, the Tribunal considered whether the BCD regime was within the scope of EU law, and, if so, whether it complied with this law. The Tribunal noted the necessity of the BCD regime for the protection of the national security of the UK. Further, it held that the imposition of the requirements specified in case law of the European Court of Justice<sup>5</sup> would frustrate measures taken to safeguard national security, in particular the BCD regime. This would put the national security of the UK at risk.

The Tribunal decided to refer questions relating to the BCD regime to the European Court of Justice<sup>6</sup>.

Following the judgment of the European Court on 6 December 2020<sup>7</sup> the Tribunal made a declaration to the effect that section 94 of the Telecommunications Act 1984 was incompatible with EU law; [2021] UKIPTrib IPT 15 110 CH.

Judgment of 23 July 2018 ([2018] UKIPTrib IPT\_15\_110\_CH), reported in [2018] 4 All E.R. 275, [2018] 7 WLUK 490 and [2018] C.L.Y. 29.

Following its judgments of 17 October 2016 and 8 September 2017, the Tribunal addressed a number of outstanding issues relating to the BCD and BPD regimes.

The Tribunal considered directions issued by the Foreign Secretary pursuant to s.94 of the Telecommunications Act 1984 which required communications service providers to provide BCD to GCHQ. It was held that a number of directions issued prior to October 2016 were unlawful,

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<sup>5</sup> See paragraphs 119-125 of the judgment of the European Court of Justice (“CJEU”) in joined cases C-203/15 and C-698/15, *Tele2 Sverige AB v Post-och telestyrelsen* and *Secretary of State for the Home Department v Watson and Others* (“the Watson Requirements”),

<sup>6</sup> In the light of, among other things, Article 4(2) of the Treaty on European Union, the CJEU was asked whether the activities of the SIAs in relation to the acquisition and use of BCD for the purposes of national security: (i) are to any extent governed by EU law; (ii) are subject to the requirements of Article 15(1) of the E Privacy Directive 2002/58; (iii) are subject to the Watson Requirements.

<sup>7</sup> (C/623/17)

but that no further order would be made by the Tribunal. With regard to the sharing of BCD/BPD, by a majority, the Tribunal held that subject to safeguards and oversight, the regime in respect of sharing with foreign agencies was compliant with Article 8 of the ECHR. The sharing of BCD/BPD with law enforcement agencies, for the purposes of prevention or detection of serious crime, was also compliant with Article 8 ECHR and UK domestic law. Similarly, the sharing of BCD/BPD with industry partners complied with Article 8 ECHR. On the issue of proportionality, the Tribunal noted that the steps taken by way of collection, retention and use of BCD/BPD by the SIAs complied with the necessary requirements pursuant to Article 8 ECHR and EU law.

The Tribunal unanimously dismissed an application by the Claimant to set aside its conclusions in its judgment of 17 October 2016 (save in the respect of that consequent on the determination that directions made prior to October 2016 by the Foreign Secretary had not been in accordance with the law).

*Privacy International and Ors v Secretary of State for Foreign and Commonwealth Affairs, Secretary of State for the Home Department, Government Communications Headquarters, Security Service, Secret Intelligence Service* ([2019] UKIPTrib IPT\_17\_186\_CH), judgment dated 18 December 2019, reported in [2019] 12 WLUK 420.

#### THE “THIRD DIRECTION”

In this case the Tribunal ruled on one of the most profound issues which can face a democratic society governed by the rule of law. The Claimants challenged a policy which was publicly acknowledged to exist by the then Prime Minister on 1 March 2018, which they submitted purports to “authorise” the commission of criminal offences by officials and agents of the Security Service (“MIS’s CHIS Participation in Criminality”). The Claimants submitted that the policy is unlawful, both as a matter of domestic public law and as being contrary to the rights in the European Convention on Human Rights (“ECHR”), as set out in Schedule 1 to the Human Rights Act 1998.

The Security Service was placed on a statutory basis by the Security Service Act 1989 (“the 1989 Act”). The majority judgment (Charles Flint KC and Professor Graham Zellick KC dissenting) concluded that there is an implied power in the 1989 Act for the Security Service to engage in the activities which are the subject of the policy under challenge, noting that it is important to appreciate that this does not mean that it has any power to confer immunity from liability under

either the criminal law or the civil law, on either its own officers or on agents handled by them. With regard to the alleged breach of ECHR rights, the majority judgment highlighted the fundamental difficulty of determining whether there had been a breach in the abstract, rather than after the event on the concrete facts of a particular case. In the majority judgment the Tribunal dismissed the claim.

Note: The Court of Appeal of England and Wales dismissed the appeal against the decision of the Tribunal; [2021 EWCA Civ 330. The Supreme Court has refused leave to appeal against the decision of the Court of Appeal.

*Privacy International v Secretary of State for the Foreign and Commonwealth Office* [2020] UKIPTrib 17 86 CH

In March 2019 the Tribunal Secretary received two telephone calls from officers of the Secret Intelligence Service (SIS). They asserted that reports of inspections carried out by the Investigatory Powers Commissioner's Office (IPCO) which had been provided to the Tribunal by IPCO should not be provided to the President, members of the Tribunal or the Counsel to the Tribunal (CTT). The Secretary responded explaining that the inspection reports had been provided to the Tribunal under section 232 of the Investigatory Powers Act 2016. The request had been made in the course of the Tribunal's consideration of the 'Third Direction' case. SIS were a party to that case. Any concerns they might have should be addressed through the Government Legal Department (GLD).

Following discussion with the President the Secretary wrote to SIS referring to the two telephone calls and advising them that it was inappropriate for members of SIS staff to seek to intervene in ongoing legal proceedings. She reminded SIS that the Tribunal was an independent judicial body and it was of the utmost importance that it was not the subject of inappropriate interference by any public authority.

In response, SIS sought to assure the Tribunal that the sole purpose of the telephone calls was to understand the nature of the SIS information referenced in the emails to GLD. They recognised that the only appropriate channel to raise any concerns was through GLD. They apologised for any misunderstanding. The President of the Tribunal, through the Secretary, thanked SIS for the response and considered it helpful that it had been clarified that the only appropriate channel to raise concerns was through GLD.

In the context of the 'IPCO issue' (see below) the Claimants made an application for disclosure and other information arising out of the contact with the Tribunal by SIS. The Claimants submitted that the issue was relevant to the disposal of the issue in the case. In any event there needed to be an adequate investigation into whether there had been an improper and unfair attempt to subvert the fairness of the procedures before the Tribunal.

The Tribunal held that it was not necessary to grant the applications in order to adjudicate on the IPCO issue. The Tribunal had all the facts before it. It had to have regard to its own finite resources; this would be satellite litigation which was unnecessary and disproportionate.

The Tribunal however went on to reiterate certain fundamental principles;

- The Tribunal is in substance a court which is completely independent of government, the intelligence agencies and anyone else. It sits in a judicial capacity.
- The Tribunal Secretary is also independent – as was demonstrated by the facts of this case.
- The Tribunal has the benefit of the assistance of counsel to the Tribunal, whose functions are set out in Rule 12 of the Investigatory Powers Tribunal Rules 2018.

The respondents are subject to their acknowledged duty of candour on a continuing basis. They are represented by solicitors and barristers, who are both subject to their own professional duties.

It was recognised that the communication that took place with the Tribunal in March 2019 was inappropriate. An apology had been given and it was recognised that something like this should not happen again.

*Privacy International v Secretary of State for the Foreign and Commonwealth Office* [2021]  
UKIPTrib 17 86 CH

'THE IPCO ISSUE'

In the course of the 'Third Direction' case (see above) an issue arose as to "the mechanisms that the Tribunal should use when it seeks statutory assistance from the Investigatory Powers Commissioner (IPC) under section 232(1) of the Investigatory Powers Act 2016 (IPA)". This became known as the IPCO issue.

The factual background is set out in paragraph 4 of the judgment. Briefly, on 18 December 2017 the Tribunal requested assistance from the Investigatory Powers Commissioner's Office (IPCO) and asked for copies of all reports and inspections by the Commissioner relevant to the 'Third Direction'. In response IPCO provided confidential annexes to the Intelligence Service Commissioners' Annual Reports for 2011 -2016 and inspection reports for 2014 – 2107. It also indicated that there were a number of other documents held by them. These were subsequently handed over.

This process gave rise to questions about the mechanism to be used by the Tribunal when exercising its statutory powers to seek the IPC's assistance. Parties agreed that it would be of assistance if the Tribunal gave some guidance on the way in which the Tribunal proposed to carry out its functions under section 68(2) and (3) RIPA and section 232 IPA in the future.

The Tribunal declined to give general guidance on the issue. It recognised however that there was a substantial issue about material held by the IPC which may attract Legal Professional Privilege (LPP), where the privilege was that of the respondents. That issue is dealt with at paragraphs 52 to 62. The procedure envisaged by the Tribunal is summarised at paragraph 62 although the Tribunal made it clear that it was not intended to constrain case management powers in individual cases. In summary:

- (1) The Tribunal makes its request to the IPC.*
- (2) IPCO collates the material that is covered by the request.*
- (3) IPCO flags up any material that is arguably subject to the Respondents' LPP.*
- (4) IPCO discloses the unflagged material to the Tribunal but asks the Tribunal for its directions in relation to the flagged material.*
- (5) The Tribunal asks IPCO to provide the flagged material to the Respondents to check for LPP.*
- (6) If the Respondents do assert LPP in relation to any material, it will not be disclosed to the Tribunal but the Respondents must explain in writing on what grounds the claim to LPP is made.*
- (7) If there remains a dispute about LPP, the Tribunal will adjudicate on it, if necessary*



*with a different panel constituted to consider the issue of LPP. To the extent that this adjudication can take place in OPEN, it will be. To the extent that it cannot be, it will be conducted in CLOSED, with the assistance, as appropriate, of CTT.*

*Wilson v Commissioner of Police for the Metropolis and another [2021] UKIPTrib IPT\_11\_167\_H*

This case arose out of a police operation between 2003 and 2009 to collect intelligence about public disorder by political activists. The focus was on public disorder that amounted to or involved criminal acts but inevitably also collected intelligence concerning legitimate and lawful public protest. It was decided that a police officer should infiltrate the Sumac Centre in Nottingham which was a known meeting place for a number of campaigning and activist groups.

The officer deployed undercover for this purpose was Mark Kennedy, who served in this capacity throughout this period. His immediate superior, the principal cover officer, to whom he reported regularly also served in that capacity throughout the period. Within months of starting his deployment, Kennedy (a married man with children) had entered into an intimate sexual relationship with Kate Wilson, the Claimant, which lasted until 2005. Ms Wilson was active in campaigning circles and attended the Sumac Centre. Kennedy realised early on that Ms Wilson would be of help to him in successfully infiltrating the activities of those in the Centre so as to facilitate his gathering of the intelligence he was deployed to collect. During the relationship he insinuated himself into every aspect of her private and family life. Thereafter Kennedy entered into sexual relationships with other women under surveillance, as did a number of other undercover police officers engaged in similar work.

When, many years later, Kennedy's true role became public, Ms Wilson claimed that a number of her rights under the ECHR had been violated. Ms Wilson claimed that her treatment by Kennedy violated Article 3 (freedom from inhuman or degrading treatment); that her right to respect for private and family life under Article 8 had been infringed; that she was also the victim of infringements of Article 10 (freedom of expression) and Article 11 (freedom of assembly and association). She also claimed a breach of Article 14 (Convention rights to be secured without discrimination on the ground, *inter alia*, of sex).

The Respondents admitted that her rights under Articles 3, 8 and 10 had been infringed, but denied violations of Articles 11 and 14. This issue for the Tribunal concerned the nature, extent

and severity of the infringements of those Convention rights, which the Respondents conceded and whether there had also been violations of Articles 11 and 14.

The police admitted that Kennedy's deception of the Claimant to enter into a long-term intimate and sexual relationship amounted to inhuman and degrading treatment contrary to Article 3; and this breach of Article 3 was aggravated by the knowledge of his principal cover officer. The sexual relationship also constituted a gross violation of her right to respect for private and family life under Article 8; and his use of the sexual relationship as a means of obtaining intelligence constituted interference with her right to freedom of expression under Article 10.

The Tribunal concluded that a number of factors established a breach of positive obligations arising under Articles 3 and 8 ECHR. These included the inadequacy of Kennedy's training with regard to sexual relationships; the inadequate supervision and oversight; allowing the same principal cover officer to remain in place throughout the operation; the failure of senior officers, who either knew of the sexual relationship, chose not to know or were incompetent and negligent in not following up on clear signs; and the failure to take steps to prevent a sexual relationship from developing.

The Tribunal concluded that the infringement of the Claimant's right to privacy under Article 8 went beyond what the Respondents had conceded. The Tribunal also found that Ms Wilson's rights to freedom of expression (Article 10) and freedom of assembly and association (Article 11) had also been violated. Details of her political activities over seven years were gathered, recorded, stored and transmitted amounting to a clear interference with her freedom "to hold opinions and to receive and impart information and ideas without interference by public authority" in the words of Article 8(1). As to Article 11, there was evidence that Kennedy had directly influenced both her political opinions and her movements and as such a breach of Article 11 was established. The impact on women of the failure to guard against the risk of undercover officers entering into sexual relationships with them also gave rise to a breach of Article 14.

Moreover, the Authorisations granted under RIPA were not in accordance with the law: their breadth and open-ended quality rendered them meaningless as a limit on the undercover officer's activities and as a protection and the reviews and renewals were perfunctory. The Tribunal however held that that the statutory regime in place at the time did comply with ECHR.

In its concluding remarks, the Tribunal noted the significance of the case. Five Articles of the ECHR had been violated: “This is a formidable list of Convention violations, the severity of which is underscored in particular by the violations of Arts 3 and 14. This is not just a case about a renegade police officer who took advantage of his undercover deployment to indulge his sexual proclivities . . . Our findings that the authorisations under RIPA were fatally flawed and the undercover operation could not be justified as ‘necessary in a democratic society’ . . . reveal disturbing and lamentable failings at the most fundamental levels.”

The Tribunal scheduled a remedies hearing to consider what remedies should flow from the judgment. In the event the parties agreed that the Respondents would pay the claimant the sum of £229,471.96 by way of just satisfaction arising from the breaches under articles 3, 8, 10, 11 and 14 ECHR and made a number of declarations relating to the breaches of ECHR.

*CLS v The Commissioner of Police for the Metropolis* [2021] UKIPTrib IPT 20 89 CH

The Tribunal, consisting of the President and Vice-President, held that the Tribunal had jurisdiction to consider a complaint, and a claim under the Human Rights Act, against the making of a notice under section 49 RIPA requiring the claimant to supply his PIN number to his mobile phone. The Tribunal held that the case fell within the Tribunal’s jurisdiction within section 65(7ZB) RIPA.

*Bartram & Howe v Chief constable of British Transport Police* [2022] UKIPTrib 2 IPT/19/181/CH IPT/20/31/CH

The Tribunal held that surveillance carried out by a police force in the course of misconduct investigation was not directed surveillance for the purposes of section 26 RIPA. Accordingly the Tribunal did not have jurisdiction to entertain complaints about such surveillance. In reaching its determination the Tribunal re-affirmed and applied the principle in *C v The Police* (2005) IPT/03/23/CH.

## Chapter 5: How the Tribunal Works

Although the Tribunal operates as an independent judicial body it has a number of characteristics that distinguish it from other courts and tribunals. The jurisdiction of the Tribunal involves techniques that are, by definition, covert so this Tribunal has been provided so that a complainant does not have to evidence their complaint. Instead the complainant is required to set out what has happened to the best of their knowledge or belief. The Tribunal then is able to investigate a complaint. RIPA (section 68(6)) imposes a duty on the intelligence services and a wider range of public authorities to disclose and provide documents and information which are required by the Tribunal in the exercise of its jurisdiction.

### **Other unique characteristics of the Tribunal**

The Tribunal can review material that may not otherwise be obtained by an applicant acting alone. It can look at highly classified and sensitive operational material disclosed to it by the intelligence services.

The Tribunal can order, receive and consider evidence in a variety of forms, even if the evidence may be inadmissible in an ordinary court.

There are no costs associated with making a complaint and the complainant does not have to hire a lawyer.

The Tribunal can protect the identities of other people if harm is likely to be caused for example by giving anonymity to witnesses. Complainants wishing to do so should make representation to the Tribunal to this effect citing their reasons for requesting restrictions.

The Tribunal has wide powers to make remedial orders and awards of compensation. For instance, it can stop activity, quash authorisations, order material to be destroyed and grant compensation to the extent necessary to give due satisfaction.

Since the Tribunal is generally required to keep from disclosure sensitive operational material given by the intelligence services, police and other public authorities, the complainant may not be aware of what the Tribunal has seen. However, the Tribunal will, subject to the Tribunal Rules relating to disclosure of information, provide the complainant with reasons, finding of facts, a summary determination or a determination depending on the outcome of the complaint.

### **Counsel to the Tribunal**

The new Tribunal Rules have regulated the appointment of Counsel to the Tribunal (CTT): rule 12.

The Tribunal may appoint CTT to assist the Tribunal's consideration of a complaint in any circumstances the Tribunal considers it appropriate to do so. This includes:

- where a complainant is not legally represented;
- where the respondent objects to the disclosure of evidence;
- where the Tribunal intends to hold a hearing, either in whole or in part, in the absence of the complainant.

The role of CTT is to perform any function that would assist the Tribunal including:

- to identify documents or parts of documents that may be disclosed to a complainant, including making a gist of the non-disclosed part;
- to make submissions to the Tribunal on what documents ought to be made available to the complainant and the general public in accordance with the principle of open justice; to cross examine witnesses;
- to ensure that all the relevant arguments are placed before the Tribunal.

Counsel must also identify any arguable error of law in relation to any decision or determination made by the Tribunal following a hearing held (in whole or in part) in the absence of the complainant.

### **Tribunal Members**

The Tribunal's decision-makers and those with the power to order investigations and the disclosure of information are its Members. At present there are thirteen Members. Biographies of the present members can be found in Chapter 7. The Members are assisted in their task by a Secretariat, who provide the administrative support for the Tribunal including the investigation of complaints as directed by a Tribunal Member.

## What the Tribunal Can Consider

### Complaints

The Tribunal is the appropriate forum to consider complaints by a person who knows or believes that he or she has been the victim of unlawful interference by public authorities using covert techniques regulated under any of the five statutes referred to in chapter 1.

A complaint can be about any interference which the complainant believes has taken place against him, his property or communications. This includes interception, surveillance and interference with property. The public authorities include the intelligence services, military and law enforcement agencies as well as a range of Government Departments, regulators and local authorities.

Complaints may also be made to the ordinary courts instead of the Tribunal, but the Tribunal has additional powers of investigation which a court does not have.

### Claims

The Tribunal has exclusive jurisdiction to consider Human Rights Act claims by a person who has been the victim of a human rights violation relating to the use of covert investigatory techniques.

### Conduct of the Intelligence Services

The Tribunal has exclusive jurisdiction to consider complaints and Human Rights Act claims about any conduct by or on behalf of the intelligence services.

### Consideration of Complaints/Claims

Each complaint is considered by a Member of the Tribunal who can decide whether or not to initiate an investigation. The Tribunal has a duty to investigate unless:

- It does not fall within the jurisdiction of the Tribunal.
- The complaint has been made more than a year after the taking place of the conduct to which the complaint refers. The Tribunal can allow a complaint to proceed after the expiry of a year if it considers that it is equitable to do so. It will normally look for an explanation as to why the complaint was made out of time.
- If the complaint is “frivolous” such as where the complaint has no possible prospect of success.
- If the complaint is “vexatious” including where the complaint is the same as one already disposed of by the Tribunal.

- Rule 6 of the Tribunal Rules sets out the decisions which can be taken by a single Member, which includes the powers to direct the secretariat to initiate an investigation. At least two Members must determine whether a complaint falls into one of the categories above.

To assist in the Tribunal in its investigation of complaints, RIPA stipulates that all organisations specified in the Act are under a duty (by Section 68(6)) to provide any information requested by the Tribunal and to certify their response:

#### **CERTIFICATE**

*I, the undersigned, confirm the following:*

- 1. I am duly authorised to make this return.*
- 2. I have carried out all appropriate and relevant investigations in accordance with the Tribunal's direction dated 2019.*
- 3. There is so far as I am aware no other relevant material or information beyond that attached or referred to.*
- 4. I have no reason to believe any of the material or information is incorrect or incomplete.*
- 5. I am unaware of the existence of any other relevant material or information held by any other organisation, beyond that attached or referred to.*

The Tribunal can demand clarification or explanation of the information provided and has at its disposal a number of ways to ensure a thorough investigation.

#### **Investigatory Powers Commissioner**

The Commissioner and the Judicial Commissioners are under a statutory obligation (Investigatory Powers Act section 232) to give the Tribunal all such documents, information and other assistance (including the Commissioner's opinion as to any issue falling to be determined by the Tribunal) as the Tribunal may require—

- (a) in connection with the investigation of any matter by the Tribunal, or
- (b) otherwise for the purposes of the Tribunal's consideration or determination of any matter.

#### **Hearings**

In most cases the Tribunal Members will decide on the basis of the papers before it. However, the Tribunal can hold a hearing at any stage of its proceedings and will do so when there are difficult issues of law to be decided. The Tribunal is under no duty to hold a hearing but when they do, they must endeavour to hold the hearing in public and in the presence of the

complainant. This is subject to the Tribunal rules relating to disclosure of information including national security considerations.

As a judicial body handling similarly sensitive material, the Tribunal's policies and procedures have developed to balance the principles of open justice with a need to protect sensitive material.

When the Tribunal was first established it sat in private. However, in 2003 the Tribunal decided that, in accordance with the principle of open justice it should, where possible, sit in public. That position is now enshrined in Rule 10 of the Tribunal Rules which allows for a hearing in public or in private, in whole or in part. The Rule specifies that so far as consistent with the general duty on disclosure of information in Rule 7 the Tribunal should sit in public and in the presence of the complainant. Where necessary in the interests of public safety or national security, the Tribunal sits in closed (private) hearings, with the assistance of Counsel to the Tribunal, to ensure that points of law or other matters advanced by the complainants are considered.

One of the approaches the Tribunal can take is to hear a case on the basis of assumed facts. This means that, without making any finding on the substance of the complaint, where points of law arise the Tribunal may be prepared to assume for the sake of argument that the facts asserted by the complainant are true; and then, acting upon that assumption, decide whether they would constitute lawful or unlawful conduct. This has enabled hearings to take place in public with full adversarial argument as to whether the conduct alleged, if it had taken place, would have been lawful and proportionate.

Often if the Tribunal is considering closed material (that is when there are documents and information which cannot for the reasons outlined below be disclosed to the complainant) it will sit both in open and in closed sessions. When it is in open then the parties may refer to any document which is before the Tribunal and has been disclosed to the complainant. When the Tribunal goes into closed session, the complainant and all members of the public and press are required to leave. The Tribunal will then consider submissions and arguments based on the closed material. During that process the Counsel to the Tribunal will make such arguments that the complainants would have made had they been aware of the material which cannot be disclosed to them. The Tribunal will strive to conduct as much of its proceedings in public consistent with its duties under RIPA and the Tribunal Rules.



### **Protecting the public interest**

Rule 7 of the Tribunal Procedure Rules requires the Tribunal to carry out its functions in such a way as to secure that information is not disclosed 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.

### **Protecting the Respondent's Information**

The Tribunal Rules (Rule 7) go further and state that that, in pursuance of the objective above, the Tribunal may not disclose to the complainant or any other person other than the Counsel to the Tribunal any information or document disclosed in the course of the Tribunal's investigation or in a hearing conducted in the absence of the complainant without the consent of the party that provided the information or document. Nor may it disclose any information, document or opinion received from a Commissioner without the Commissioner's consent or the consent of any party who provided the information or document to the Commissioner. The Tribunal must not disclose the identity of any witness at a hearing held in the absence of the complainant without the consent of the witness.

If the respondent refuses to consent to a disclosure of information or documents or to a gist or summary the Tribunal may direct the respondent to make representations to the Tribunal as to the reasons for withholding any document or information from the complainant. After considering the representations the Tribunal may direct the respondent either to disclose the documents or information or make a gist or summary of it for the complainant.

Where such a direction is made the respondent is not obliged to make the disclosure but if that is not done the Tribunal may, if they consider that such disclosure might adversely affect the respondent's case or support the complainant's case direct that the respondent is not to rely on such points in the respondent's case or make such concessions as the Tribunal may specify; and in any other case the respondent must not rely in the proceedings on anything required to be disclosed.

### **Protecting the Claimant's Information**

Other than limited information contained in the complaint form(s) the Tribunal may not, without the consent of the complainant, disclose to any person other than Counsel to the Tribunal any information or document provided to the Tribunal by the complainant, or the fact that such a

document has been disclosed or provided. Nor may it inform any other person of the identity of any witness called by the complainant without the complainant's consent. During its inquiries, the Tribunal can only disclose the complainant's name, address, and date of birth and 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 Members may not be able to conduct a full investigation of the complaint if the complainant does not consent to these details being disclosed.

### **Neither Confirm Nor Deny Policy (NCND)**

It has been the policy of successive UK Governments to neither confirm nor deny whether they are monitoring the activities of a particular group or individual, or hold information on a particular group or individual, or have had contact with a particular individual. Similarly, the long-standing policy of the UK Government is to neither confirm nor deny the truth of claims about the operational activities of the Intelligence Services, including their intelligence-gathering capabilities and techniques. This NCND response, where appropriate, is well established and lawful. Its legitimate purpose and value has been ratified by the Courts, and reiterated by this Tribunal in the cases of IPT/01/77 and IPT/06/81.

The justification for this policy is that 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 so 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, unless it is subsequently found to be unlawful. The purpose of the Tribunal is to ascertain whether legislation has been complied with and whether organisations have acted lawfully. 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 whether or not any action has been taken against them.

### **Remedies**

The Tribunal has at its disposal a range of possible remedies, as wide as those available to an ordinary court which is hearing and deciding an ordinary action for the infringement of private law rights.

Apart from compensation, other orders that may be made by the Tribunal include—

- \* An order quashing or cancelling any warrant or authorisation; and
- \* An order requiring the destruction of any records of information which (i) have been obtained in exercise of any power conferred by a warrant or authorisation; or (ii) are held by any public authority in relation to any person.

### **Notification of Tribunal Decisions to the Complainant**

Section 69(4) of RIPA provides that, subject to the Tribunal Rules, when the Tribunal makes a decision on a complaint the notice it gives to the complainant shall be confined to a statement either that they have made a determination in the complainant's favour or a statement that no determination has been in their favour.

However, Rule 15 of the Tribunal Rules provides that the Tribunal must provide information about the determination in accordance with that Rule. Where a determination is made in favour of the complainant the Tribunal must provide the complainant and the respondent with the determination including any findings of fact.

Where the determination is not in favour of the complainant the Tribunal must, if it considers it in the interests of justice to do so provide the complainant and respondent with a summary of the determination.

Where the Tribunal has made a decision on a preliminary issue (that is that the complaint is frivolous or vexatious, that it is out of time, or that the Tribunal does not have the jurisdiction to hear the complaint) the Tribunal must notify the complainant of that fact together with any reasoning they consider appropriate.

These Rules about the notification of determinations by the Tribunal are subject to the rules on disclosure of information contained in Rule 7. Accordingly there will be occasions in which the

Tribunal will not be able to tell the complainant the full reasoning behind a decision because it is based on information that cannot be disclosed.

### **Publication of Decisions**

The Tribunal publishes significant open judgments on its website. They are also reported by the British and Irish Legal Information Institute (Bailii) with official citations and, since April 2022, the National Archives. A number of judgments can also be found reported in the law reports. The Tribunal will endeavour to include as much information as possible within open judgments consistent with its obligations under RIPA and the Tribunal Rules. Any closed judgments will be shared only with the respondent and Counsel to the Tribunal.

### **Appeals**

Section 67A of RIPA (inserted by the Investigatory Powers Act) provides that a person may appeal a determination of the Tribunal of a kind mentioned in section 68(4) or section 68(4C). In reality that means any decision of the Tribunal except where the Tribunal has found it to be out of time, vexatious or frivolous. As the Tribunal has UK wide jurisdiction, the appeal is to the relevant appellate court.

Before making a decision which might be the subject of an appeal the Tribunal must certify which of either the Court of Appeal of England and Wales or the Court of Session in Scotland is the most appropriate to hear the appeal. It is anticipated that the Court of Appeal in Northern Ireland will in due course be added to the list.

An appeal can only be taken with the leave of the Tribunal or, if that is refused, the leave of the relevant appellate court. Leave may only be granted if it raises either (i) an important point of principle or practice, or (ii) there is another compelling reason for granting leave.

Applications for leave to appeal must be made in writing within 21 days of the date on which the Tribunal gave notice or, if later, the date on which the complainant received a summary of the decision. The Tribunal may accept the application filed after the 21 days in special circumstances where the Tribunal considers it would be unjust not to do so.

The application must conform to the requirements set out in Rule 16. It must set out the grounds of appeal identifying the alleged error or errors of law and also identify the important point of principle or practice or other compelling reason for granting leave.

Where Counsel to the Tribunal has been appointed he or she must seek to identify any arguable error of law in relation to any decision made by the Tribunal held, either in whole or in part, in the absence of the complainant. Where the Tribunal has been notified of such an error it must, subject to Rule 7 on confidentiality disclose the error of law to the complainant.

## Chapter 6: Frequently Asked Questions

### **Can I complain on someone's behalf?**

All complaints or claims must be brought by the person concerned; this includes any organisation or association or combination of people. The form can be submitted by a representative, but Tribunal Rules require that the forms and any additional statements must be signed by the complainant. The exception to this rule is if a complaint or claim is in respect of a child or vulnerable adult, in which case a parent or guardian's signature is needed.

The Tribunal cannot accept single applications on behalf of more than one person. This is because it is required to make a determination in relation to each complaint falling within its jurisdiction. It may find that conduct relates to one complainant but not others who are linked to that complaint and the final determination may be different.

### **Can I receive help completing my forms?**

You can ask someone to help complete your form(s) on your behalf, such as a friend or relative, or you could try the Library or Citizens Advice. However, the form(s) and any additional statements must be signed by the complainant.

The Tribunal and anyone associated with it cannot help to complete form(s) on your behalf as it could call the Tribunal's impartiality into question.

### **How can I complain about covert surveillance or phone interception when I have no evidence it is happening?**

You can bring a case to the Tribunal if you believe that covert activity has taken place against you. You do not need to have evidence in order to bring a case before the Tribunal, but it will help your case if you provide as much information as you can about the circumstances which lead you to believe that covert action has been taken against you. The way the Tribunal is set up and the powers it has mean it is able to investigate, obtain and protect evidence on behalf of all parties to the complaint.

### **Will the Tribunal tell me if I have been under surveillance or my phone has been intercepted?**

No. 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 covert activity. Its purpose is to ascertain whether the public authorities have complied with legislation and acted proportionately. If your complaint is upheld, the Tribunal will provide you and the respondent (the organisation you are

complaining about) with the determination and any finding of fact. If your complaint is not upheld, the Tribunal will provide you and the respondent with a summary of the determination if it is in the interests of justice to do so—it is important to be aware that the Tribunal has a duty to ensure information that is not in the public interest, or that may compromise national security, the prevention or detection of serious crime, the economic wellbeing of the UK, or that gives information about the functions of the security services, is not disclosed.

### **Can I complain about the activities of individuals, private investigators or companies?**

The Tribunal has no jurisdiction in these cases *unless* the individuals, investigators or companies are tasked by a public authority covered by the RIPA regime or are acting on behalf of the intelligence services. For instance, a local authority might contract out surveillance activities or ask individuals to carry out surveillance on its behalf. In such a case the Tribunal will have jurisdiction to hear complaints.

### **Is there a time limit?**

Yes. The Tribunal is not required to consider complaints made more than a year after the relevant activity took place. However, the Tribunal can exercise its discretion and extend this time if it is 'equitable', fair or reasonable to do so in all the circumstances of the case.

### **Who makes the decisions in a case?**

Decisions are made by at least two Tribunal Members, who are required to be legally qualified as set out in RIPA—essentially, they are current or former members of the judiciary. The conclusions they draw include decisions about whether applications are out of time, out of jurisdiction or frivolous or vexatious. Some decisions can be made by a single Member as set out in the Rules; for example, a single Member can require the respondent to disclose all the documents and information that relate to the complaint.

### **Does the Tribunal find in favour of complainants?**

Yes. The Tribunal has upheld complaints against public authorities.

Tribunal policies and procedures have been developed to balance the need for transparency and open justice with the protection of sensitive material. You can find lots of detail on our website about **what we do and how we do it**.

You can find details of key cases on which the Tribunal has ruled, a number of which include rulings in favour of complainants **here**.

### **How are cases heard?**

Within certain limits, the Tribunal can determine its own procedures. How it investigates and determines a complaint depends on the complaint before the Tribunal. All determinations are made by applying the principles of judicial review and most are made on paper without the need for oral hearings.

### **Is the Tribunal independent of Government?**

Yes. The Tribunal is a fully independent and impartial judicial body and this independence is enshrined in law under the Constitutional Reform Act 2005. No Government Department or public authority can intervene in a Tribunal investigation or influence its decisions. The Tribunal makes its determinations based entirely on the evidence before it and operates on the same principles as judicial review.

### **How do I know a public authority will provide all information requested of it?**

All public authorities investigated by the Tribunal are under a statutory obligation under RIPA Section 68(6) to provide the Tribunal with anything it requires in the course of its investigations. 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 the Tribunal sees fit to ensure it has all the information required. The Tribunal can also request the Investigatory Powers Commissioner to provide the Tribunal with any assistance it requires for an investigation.

### **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 we deal with each one individually. The amount of time we take can also depend on the responses we receive to our enquiries, which may lead us to seek more information from the complainant 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 directly to the Tribunal for the Tribunal's consideration unless they are ordered by the Tribunal to serve information on a complainant. You will not normally be contacted by any other organisation in relation to your complaint.



### **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 even the fact that any have been provided, can be disclosed unless the respondent gives consent, in accordance with Rule 7. Until final determination, therefore, the Tribunal can normally only inform you that an investigation is ongoing. If the conduct you are complaining of is found to have occurred, and to have been unlawful, the Tribunal will provide you and the respondent with the determination including any finding of fact. The Tribunal has a duty to ensure information that is not in the public interest, or that may compromise national security, the prevention or detection of serious crime, the economic wellbeing of the UK, or that gives information about the functions of the security services, is not disclosed.

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

No. Complaints and claims to the Tribunal are free of charge. You do not need to hire a lawyer but you are at liberty to do so. However, if you decide to submit your complaint through a solicitor or other representative, the Tribunal will not normally refund any costs you may incur as a result. Legal aid is not available to fund any representation in the Tribunal.

### **Can I appeal the Tribunal's decision or ask for it to be reconsidered?**

Yes. One of the changes the Investigatory Powers Act 2016 brought was the right to appeal decisions and determinations by the IPT on points of law that raise an important point of principle or practice, or if there is some other compelling reason for granting permission to appeal.

The right of appeal came into force on 31 December 2018 and includes a provision making clear that decisions/determinations made before this date cannot be appealed. The appeal route does not apply retrospectively.

### **Can claimants visit the Tribunal's Offices or deliver material to the Tribunal in person?**

No. For security reasons no such visits may take place, and all correspondence must be addressed to the Tribunal's P.O Box, 33220 London SW1H 9ZQ. NB: Correspondence received is signed for initially at this point and it can take up to six working days to then reach IPT.

## Chapter 7: Tribunal Members

### Legislative requirements for membership

All Members of the Tribunal are appointed by HM The King and must be senior members of the legal profession. This means:

- A person who has held high judicial office (within the meaning of Part 3 of the Constitutional Reform Act 2005) or is or has been a member of the Judicial Committee of the Privy Council; or
- A person who satisfied the judicial appointment eligibility condition on a seven year basis (under the Tribunals, Courts and Enforcement Act 2007); or
- An advocate or solicitor in Scotland of at least seven years' standing; or
- A member of the Bar of Northern Ireland or solicitor of the Supreme Court of Northern Ireland of at least seven years' standing.

The President of the Tribunal must satisfy the first of these criteria; he or she must hold or have held high judicial office. In the absence of the President, the Vice President will carry out the functions of the President.

Appointments are for terms of five years but members may be re-appointed.

A Member of the Tribunal is called upon to determine Tribunal cases, to sit on Tribunal oral hearings and to undertake any other prescribed duties as the need arises. The frequency of reviewing case files and sittings depends upon the workload of the Tribunal and on the commitments of the office holder.

## Present Members

### Lord Justice Singh (President)

The Rt. Hon. Lord Justice Singh has been a member of the Investigatory Powers Tribunal since 2016 and was appointed a Lord Justice of Appeal in October 2017. He was appointed President on 27 September 2018.

Lord Justice Singh was called to the Bar in 1989 and practised at the Bar from 1990 to 2011. He was on the Attorney General's Panels of Junior Counsel to the Crown from 1992 to 2002. He was also additional Junior Counsel to the Inland Revenue from 1997 to 2002. He was appointed a QC in 2002 and Chaired the Administrative Law Bar Association from 2006 to 2008.

From 2003 to 2011 he was a Deputy High Court Judge and Recorder of the Crown Court from 2004 to 2011. He was appointed High Court Judge - Queen's Bench Division - in October 2011 and was a Presiding Judge of the South Eastern Circuit from 2013 to 2016. He was also Administrative Court liaison judge for Wales and the Midland and Western circuits during 2017.

He was a visiting Professor of Law at the London School of Economics from 2003 to 2009 and a Visiting Fellow, Lady Margaret Hall, Oxford from 2016 to 2019; and has been an Honorary Professor of Law at Nottingham University since 2007.

His publications include The Future of Human Rights in the UK (1997); as co-author with Sir Jack Beatson and others, Human Rights: Judicial Protection in the UK (2008); and The Unity of Law (2022).

### **Lord Boyd of Duncasby (Vice-President)**

The Rt. Hon. Lord Boyd of Duncasby was appointed Vice-President of the Investigatory Powers Tribunal, for a period of five years with effect from 1 June 2019.

Lord Boyd was appointed a Senator of the College of Justice in Scotland and, thus, as a judge of the Supreme Courts of Scotland in June 2012. He was appointed to the First Division of the Inner House of the Court of Session in January 2022. He qualified as a solicitor in 1978; became an advocate in 1983; and was appointed as a QC in 1995.

He practised at Caesar & Howie from 1978 to 1982 and as an advocate from 1983 to 1997, building up a practice in administrative, and particularly planning and environmental, law. He was an advocate depute (prosecuting in the High Court of Justiciary) from 1993 to 1995. He became a QC in 1995 and was appointed Solicitor General for Scotland (for the UK Government) in 1997 and for the Scottish Executive in 1999.

He was Lord Advocate from 2000 to 2006. His time in office saw the devolution of legislative responsibility to the new Scottish Parliament and the introduction of the European Convention on Human Rights into domestic law. He brought in significant reforms to the Crown Office and Procurator Fiscal Service. He was also responsible for the prosecution of the Lockerbie trial. He returned to practice as a solicitor advocate in 2007 joining Dundas & Wilson Solicitors as a Consultant and Head of Public Law. He was appointed a privy councillor in 2000 and became a life peer in 2006.

### **Lord Justice Edis**

Lord Justice Edis was appointed as a High Court Judge in October 2014, assigned to the Queen's Bench Division and then to the Court of Appeal in 2021. He was educated at Liverpool College and University College, Oxford. Called to the Bar in 1980, he took silk in 1997. His practice in silk included prosecuting and defending serious criminal cases, including terrorism. He was appointed Senior Treasury Counsel at the Central Criminal Court and served from 2008-2014. He was Head of Chambers at Atlantic Chambers in Liverpool from 2000-2006. In October 2022 he was appointed the Senior Presiding Judge for England and Wales. He was appointed to the Tribunal in 2016.

### **Lady Carmichael**

Lady Carmichael was appointed as a judge of the Supreme Courts in May 2016. She served as a part-time sheriff and as a deputy judge of the Upper Tribunal (Administrative Appeals Chamber). She is a graduate of the University of Glasgow and became an advocate in 1993. She was appointed a QC in 2008, and has served as Standing Junior Counsel to the Home Department and as reporter to the Scottish Legal Aid Board.

She was a tutor at the University of Edinburgh and a member of the Equality and Human Rights Commission panel of counsel. She was appointed to the Tribunal in 2019.

### **Mrs Justice Lieven**

Mrs Justice Lieven was called to the Bar, Gray's Inn, in 1989, and took Silk in 2006. She was appointed a Deputy High Court Judge in 2016 and a High Court Judge (Family Division) in 2019. She was appointed to the Tribunal in 2019.

### **Mr Justice Chamberlain**

Mr Justice Chamberlain was born and brought up in Edinburgh. After a university education in Oxford and London, he was called to the Bar of England and Wales in 1997. He specialised in public law, human rights, EU and international law. He appeared as counsel in the UK, the Court of Justice of the European Union and the European Court of Human Rights.

Mr Justice Chamberlain was a member of the Attorney General's panels of counsel and acted for and against the Crown and other public bodies. He served as a Special Advocate in national security proceedings and was appointed a QC in 2013 and a Deputy High Court Judge in 2016. He was Chair of the Constitutional and Administrative Law Bar Association. He became a High

Court Judge in October 2019 and is a Bencher of the Middle Temple. He was appointed to the Tribunal in 2022.

### **Judge Rupert Jones**

Judge Rupert Jones is Chief Justice of a British Overseas Territory and a salaried Judge of the Upper Tribunal in the United Kingdom. He was called to the Bar of England and Wales in 2000 and was a member of the Attorney General's Panel of Counsel. He specialised in the proceeds of crime, indirect tax and public law including national security cases. He was appointed as the Attorney General and Director of Public Prosecutions of Anguilla in 2014. He was appointed as a fee paid judge of the First-Tier Tribunal (Tax Chamber) in 2015 and a salaried Judge of the Upper Tribunal assigned to the Administrative Appeals Chamber in 2018. He was assigned to the Upper Tribunal (Tax and Chancery Chamber) in 2020. In 2022 he was authorised to sit as a Judge of the High Court (KBD). In the same year he was appointed the Chief Justice of St Helena, Ascension Island and Tristan Da Cunha. He is a co-author and co-editor of Millington and Sutherland Williams on the Proceeds of Crime and was co-editor of the first edition of National Security: Law, Procedure and Practice published by Oxford University Press. He was appointed to the Tribunal in 2022.

### **Charles Flint KC**

Charles Flint KC is a former head of Blackstone Chambers. He specialises in financial services regulation and acts as a mediator in banking and financial services disputes. He is a non-executive director of the Dubai Financial Services Authority, a deputy chairman of the Bar Mutual Indemnity Fund Limited, a member of the Club Financial Control Panel of the Union of European Football Associations and President of the National Anti-Doping Panel. He has been a Member of the Tribunal since 2009.

### **Professor Graham Zellick CBE KC**

Graham Zellick read law at Cambridge (MA, PhD) and was then Ford Foundation Fellow at the Stanford Law School in California. He became Professor of Public Law at Queen Mary and Westfield College and later served as Drapers' Professor of Law, Head of the Department of Law and Dean of the Faculty of Laws. He was Principal of the College from 1990 to 1998 and Vice-Chancellor and President of the University of London for six years before becoming Chairman of the Criminal Cases Review Commission. From January 2009 to August 2015, he was the first President of the Valuation Tribunal for England.

Professor Zellick is a Master of the Bench and former Reader of the Middle Temple, an Honorary Fellow of the Society for Advanced Legal Studies, Fellow of the Academy of Social Sciences and an Honorary Fellow of Gonville and Caius College, Cambridge.

He was editor of Public Law and founding editor of the European Human Rights Reports, was one of the first Electoral Commissioners, a member of the Criminal Injuries Compensation Appeals Panel, the Competition Appeal Tribunal, the Data Protection Tribunal and the Lord Chancellor's Legal Aid Advisory Committee. Professor Zellick was appointed to the Tribunal in 2013.

### **Christopher Symons KC**

Christopher Symons KC practised as a commercial barrister from 3 Verulam Buildings Gray's Inn until 2016. He was called to the Bar at the Middle Temple in 1972 and took silk in 1989. His practice largely consisted of insurance and reinsurance matters with some professional negligence work. He was head of chambers from 2000 to 2011. He now sits as a Commercial Arbitrator dealing with commercial disputes in London and elsewhere. He sat both as a Recorder of the Crown Court and as a Deputy High Court Judge where much of his time was spent sitting in the Administrative Court. He was the Treasurer of Middle Temple in 2013. He is the President of the Lloyd's Appeal Tribunal dealing with disciplinary matters arising from Lloyd's of London. He was made a Member of the Tribunal in 2018.

### **Stephen Shaw KC**

Stephen Shaw KC was called to the bar of Northern Ireland in 1980 and became a QC (now KC) in 2001. He has specialised in commercial, chancery and public law. He has wide experience of strategic advice as well as litigation, arbitration and mediation. He has acted for banks, public companies and private business, as well as the Speaker of the Northern Ireland Assembly, local and central government. He also undertakes cases in the Lands Tribunal, rates appeals, rent reviews, arbitrations and planning appeals. He was appointed to the Tribunal in 2022.

### **Annabel Darlow KC**

Annabel Darlow KC was called to the Bar in 1993 (Middle Temple) and took silk in 2015. She practises from 21 College Hill, primarily in criminal law with a particular emphasis on serious and complex crime, including homicide, terrorism and fraud. She was appointed as a Recorder of the Crown Court in 2009 and authorised to sit as a Deputy High Court Judge (KBD) in 2022. She was appointed to the Tribunal in 2022.

## Francesca Del Mese

Francesca Del Mese was called to the Bar in 1998. She is now an international criminal and human rights lawyer. Francesca has held many positions, both in the UK and overseas, including the Senior Strategy Advisor on counter-terrorism with the UN Assistant Secretary General in the UN Department of Peacekeeping Operations New York, the Justice Advisor for the UK government in Pakistan, and the UK's Counter-Terrorism Prosecutions Advisor in Ghana. She is a former Commissioner for the Independent Commission for Aid Impact, and has led a number of independent evaluations and inquiries for the UN. In 2011 she was the Legal Advisor to the UN Mission of Inquiry into Atrocities Committed in Syria. Francesca was appointed a Recorder in 2019 and also chairs panels into serious police misconduct. She was appointed to the Tribunal in 2022.

## Appendix A s65 RIPA

### 65 The Tribunal

(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;

(c) to consider and determine any reference to them by any person that he has suffered detriment as a consequence of any prohibition or restriction, by virtue of [section 56 of the Investigatory Powers Act 2016], on his relying in, or for the purposes of, any civil proceedings on any matter; and

(d) to hear and determine any other such proceedings falling within subsection (3) as may be allocated to them in accordance with provision made by the Secretary of State by order.

(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]

[(ca) . . .

(cb) . . .]

(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.

[(4A) . . .]

(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;

[(ba) conduct for or in connection with the obtaining of secondary data from communications transmitted by means of such a service or system;

(bb) the issue, modification, renewal or service of a warrant under Part 2 or Chapter 1 of Part 6 of the Investigatory Powers Act 2016 (interception of communications);]



- [(c) conduct of a kind which may be permitted or required by an authorisation or notice under Part 3 of that Act or a warrant under Chapter 2 of Part 6 of that Act (acquisition of communications data);
  - (cza) the giving of an authorisation or notice under Part 3 of that Act or the issue, modification, renewal or service of a warrant under Chapter 2 of Part 6 of that Act;
  - (czb) conduct of a kind which may be required or permitted by a retention notice under Part 4 of that Act (retention of communications data) but excluding any conduct which is subject to review by the Information Commissioner;
  - (czc) the giving or varying of a retention notice under that Part of that Act;
  - (czd) conduct of a kind which may be required or permitted by a warrant under Part 5 or Chapter 3 of Part 6 of that Act (equipment interference);
  - (cze) the issue, modification, renewal or service of a warrant under Part 5 or Chapter 3 of Part 6 of that Act;
  - (czf) the issue, modification, renewal or service of a warrant under Part 7 of that Act (bulk personal dataset warrants);
  - (czg) the giving of an authorisation under section 219(3)(b) (authorisation for the retention, or retention and examination, of material following expiry of bulk personal dataset warrant);
  - (czh) the giving or varying of a direction under section 225 of that Act (directions where no bulk personal dataset warrant required);
  - (czi) conduct of a kind which may be required by a notice under section 252 or 253 of that Act (national security or technical capability notices);
  - (czj) the giving or varying of such a notice;
  - (czk) the giving of an authorisation under section 152(5)(c) or 193(5)(c) of that Act (certain authorisations to examine intercepted content or protected material);
  - (czl) any failure to—
- (i) cancel a warrant under Part 2, 5, 6 or 7 of that Act or an authorisation under Part 3 of that Act;
  - (ii) cancel a notice under Part 3 of that Act;
  - (iii) revoke a notice under Part 4, or section 252 or 253, of that Act; or
  - (iv) revoke a direction under section 225 of that Act;
- (czm) any conduct in connection with any conduct falling within paragraph (c), (czb), (czd) or (czi);]
  - [(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 [an immigration officer or] 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;
- [(ca) the Police Investigations and Review Commissioner;]
  - [[d) the National Crime Agency;]
  - [(dza) the Competition and Markets Authority;]
  - [(da) . . .] or]
  - [(f) 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.

[(6A) Subsection (6) does not apply to anything mentioned in paragraph (d) or (f) of subsection (5) which also falls within paragraph (czd) of that subsection.]

(7) For the purposes of this section conduct takes place in challengeable circumstances if [it is conduct of a public authority and]—

(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[, subject to subsection (7ZA),] 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.

[(7ZA) The exception in subsection (7) so far as conduct is authorised by, or takes place with the permission of, a judicial authority does not include conduct authorised by an approval given [by a Judicial Commissioner or under section 32A of this Act or section 75 of the Investigatory Powers Act 2016].]

[(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.]

[(7ZB) For the purposes of this section conduct also takes place in challengeable circumstances if it is, or purports to be, conduct falling within subsection (5)(bb), (cza), (czc), (cze), (czf), (czg), (czh), (czj), (czk) or (czl) or (so far as the conduct is, or purports to be, the giving of a notice under section 49) subsection (5)(e).]

(8) The following fall within this subsection—

[(a) a warrant under Part 2, 5, 6 or 7 of the Investigatory Powers Act 2016;

(b) an authorisation or notice under Part 3 of that Act;

(ba) a retention notice under Part 4 of that Act;

(bb) a direction under section 225 of that Act;

(bc) a notice under section 252 or 253 of that 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.

[(9A) In subsection (5)(ba) the reference to obtaining secondary data from communications transmitted by means of a postal service or telecommunication system is to be read in accordance with section 16 of the Investigatory Powers Act 2016.]

(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.

## Appendix B Legislation, Rules and Codes of Practice – Links

### Relevant Primary Legislation

The Investigatory Powers Act 2016

<http://www.legislation.gov.uk/ukpga/2016/25/contents/enacted>

The Regulation of Investigatory Powers Act 2000 ('RIPA')

<https://www.legislation.gov.uk/ukpga/2000/23/contents>

Covert Human Intelligence Sources (Criminal Conduct) Act 2021

<https://www.legislation.gov.uk/ukpga/2021/4/contents/enacted>

The Regulation of Investigatory Powers (Scotland) Act 2000 ('RIP(S)A')

[http://www.legislation.gov.uk/asp/2000/11/pdfs/asp\\_20000011\\_en.pdf](http://www.legislation.gov.uk/asp/2000/11/pdfs/asp_20000011_en.pdf)

The Human Rights Act 1998

<http://www.legislation.gov.uk/ukpga/1998/42/contents>

The Police Act 1997

<https://www.legislation.gov.uk/ukpga/1997/50/data.pdf>

The Intelligence Services Act 1994

[http://www.legislation.gov.uk/ukpga/1994/13/pdfs/ukpga\\_19940013\\_en.pdf](http://www.legislation.gov.uk/ukpga/1994/13/pdfs/ukpga_19940013_en.pdf)

The Security Service Act 1989

[http://www.legislation.gov.uk/ukpga/1989/5/pdfs/ukpga\\_19890005\\_en.pdf](http://www.legislation.gov.uk/ukpga/1989/5/pdfs/ukpga_19890005_en.pdf)

### Relevant Secondary Legislation

The Investigatory Powers Tribunal Rules 2018

[The Investigatory Powers Tribunal Rules 2018 \(legislation.gov.uk\)](http://www.legislation.gov.uk/si/2018/1100/contents/made)

The Investigatory Powers Tribunal Rules 2000

[http://www.legislation.gov.uk/uksi/2000/2665/pdfs/uksi\\_20002665\\_en.pdf](http://www.legislation.gov.uk/uksi/2000/2665/pdfs/uksi_20002665_en.pdf)

Statutory Instrument 2010 No.521 “The Regulation of Investigatory Powers (Directed Surveillance and Covert Human Intelligence Sources) Order 2010”

[http://www.legislation.gov.uk/uksi/2010/521/pdfs/uksi\\_20100521\\_en.pdf](http://www.legislation.gov.uk/uksi/2010/521/pdfs/uksi_20100521_en.pdf)

Statutory Instrument 2010 No.480 “The Regulation of Investigatory Powers (Communications Data) Order 2010”

[The Regulation of Investigatory Powers \(Communications Data\) Order 2010 \(legislation.gov.uk\)](http://www.legislation.gov.uk/uksi/2010/480/pdfs/uksi_20100480_en.pdf)

[The Regulation of Investigatory Powers \(Communications Data\) \(Amendment\) Order 2015 \(legislation.gov.uk\)](http://www.legislation.gov.uk/uksi/2015/1000/pdfs/uksi_20151000_en.pdf)

Scottish Statutory Instrument 2010 No.350 “The Regulation of Investigatory Powers (Prescription of Offices etc and Specification of Public Authorities) (Scotland) Order 2010”

[http://www.legislation.gov.uk/ssi/2010/350/pdfs/ssi\\_20100350\\_en.pdf](http://www.legislation.gov.uk/ssi/2010/350/pdfs/ssi_20100350_en.pdf)

NI Statutory Rule 2002 No.292 “Regulation of Investigatory Powers (Prescription of Offices, Ranks and Positions) Order (Northern Ireland) 2002”

[http://www.legislation.gov.uk/nisr/2002/292/pdfs/nisr\\_20020292\\_en.pdf](http://www.legislation.gov.uk/nisr/2002/292/pdfs/nisr_20020292_en.pdf)

#### **Codes of Practice**

*Please note that the Interception Code of Practice and CHIS Code of Practice are currently being revised and a Statutory Instrument regarding the revised Codes was laid on 19 October 2022. The revised Codes will come into force by the end of the year and will supersede the current versions. The list below shows both versions of the relevant Codes.*

Interception of Communications

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/496064/53659\\_CoP\\_Communications\\_Accessible.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/496064/53659_CoP_Communications_Accessible.pdf)

[Draft revised Interception of communications code of practice 2022 - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/114444/Draft_revised_Interception_of_communications_code_of_practice_2022_-_GOV.UK_(www.gov.uk))

Covert Human Intelligence Sources

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/384976/Covert\\_Human\\_Intelligence\\_web.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/384976/Covert_Human_Intelligence_web.pdf)

[Draft revised Covert Human Intelligence Sources code of practice 2022 - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/384975/Draft_revised_Covert_Human_Intelligence_Sources_code_of_practice_2022.pdf)

Acquisition and Disclosure of Communications Data

[Communications Data Code of Practice.pdf \(publishing.service.gov.uk\)](https://www.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/384975/Communications_Data_Code_of_Practice.pdf)

Covert Surveillance and Property Interference

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/384975/Covert Surveillance Property Interference web 2 .pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/384975/Covert_Surveillance_Property_Interference_web_2.pdf)

Investigation of Protected Electronic Information

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/97959/code-practice-electronic-info.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/97959/code-practice-electronic-info.pdf)

Equipment Interference

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/496069/53693\\_CoP\\_Equipment\\_Interference\\_Accessible.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/496069/53693_CoP_Equipment_Interference_Accessible.pdf)

Intelligence services' retention and use of bulk personal datasets

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/715478/Bulk Personal Datasets Code of Practice.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/715478/Bulk_Personal_Datasets_Code_of_Practice.pdf)

### **RIP(S)A Scottish Codes of Practice**

Covert Surveillance

<https://www.gov.scot/publications/covert-surveillance-property-interference-code-practice/documents/>

Covert Human Intelligence Sources

<https://www.gov.scot/binaries/content/documents/govscot/publications/advice-and-guidance/2017/12/covert-human-intelligence-sources-code-practice/documents/00529742-pdf/00529742-pdf/govscot%3Adocument/00529742.pdf>

### **Independent Oversight**

Investigatory Powers Commissioner's Office

<http://www.ipco.org.uk>

Biometrics and Surveillance Camera Commissioner

<http://www.gov.uk/government/organisations/biometrics-and-surveillance-camera-commissioner>

### **Parliamentary Oversight**

Intelligence and Security Committee of Parliament

<https://isc.independent.gov.uk>

### **Other Complaints Bodies**

[Information Commissioner's Office \(ICO\)](#)

<http://ico.org.uk/>

The Adjudicator's Office

<http://www.adjudicatorsoffice.gov.uk/>

Independent Office for Police Conduct

<https://policeconduct.gov.uk>

Police Investigations and Review Commissioner

<http://pirc.scotland.gov.uk/>

Police Ombudsman for Northern Ireland

<http://www.policeombudsman.org/>

Local Government Ombudsman

<http://www.lgo.org.uk/>

Scottish Public Services Ombudsman

<http://www.spsso.org.uk/>

European Court of Human Rights

<http://www.echr.coe.int/Pages/home.aspx?p=home>

## Appendix C Acronyms and Abbreviations

The following is a list of acronyms or abbreviations common to the jurisdiction of the Tribunal, some of which are used in this Report:

- Bailii:** British and Irish Legal Information Institute
- BPD:** Bulk Personal Data
- BCD:** Bulk Communications Data
- CCTV:** Closed Circuit Television
- CD:** Communication Data
- CHIS:** Covert human intelligence sources
- CJEU:** Court of Justice of the European Union
- CNE:** Computer Network Exploitation
- CSPs:** Communications Service Providers
- CTSA 2015:** Counter Terrorism and Security Act 2015
- DRIPA 2014:** Data Retention and Investigatory Powers Act 2014
- DP:** Designated Person
- DPA 1998:** Data Protection Act 1998
- DPA 2018:** Data Protection Act 2018
- DPI:** Deep Packet Inspection
- ECA 1972:** European Communities Act 1972
- ECHR:** European Convention on Human Rights
- ECtHR:** European Court of Human Rights
- EU:** European Union
- EU Charter:** European Union Charter of Fundamental Rights
- EI: Equipment Interference**
- GCHQ:** Government Communications Headquarters
- GPS:** Global Positioning System
- HMRC:** Her Majesty's Revenue and Customs
- HRA 1998:** Human Rights Act 1998
- IOCA 1985:** Interception of Communications Act 1985
- IOCCO:** Interception of Communications Commissioner's office
- IP:** Internet Protocol
- IP address:** Internet Protocol address
- IPA:** Investigatory Powers Act 2016
- IPC:** Investigatory Powers Commissioner
- IPT:** Investigatory Powers Tribunal



**IPCO:** Investigatory Powers Commissioner's Office  
**ISA 1994:** Intelligence Services Act 1994  
**ISC:** Intelligence and Security Committee of Parliament  
**ISCom:** Intelligence Services Commissioner  
**ISP:** Internet Service Provider  
**LI:** Lawful Interception  
**LPP:** Legal Professional Privilege  
**MI5:** Security Service  
**MI6:** Secret Intelligence Service  
**MoD:** Ministry of Defence  
**NCND:** Neither confirm nor deny  
**NCA:** National Crime Agency  
**NGO:** Non-governmental organisation  
**OSC:** Office of Surveillance Commissioners  
**PACE:** Police and Criminal Evidence Act 1984  
**PSNI:** Police Service of Northern Ireland  
**RIPA:** Regulation of Investigatory Powers Act 2000  
**RIP(S)A:** Regulation of Investigatory Powers (Scotland) Act 2000  
**SIAs:** Security and Intelligence Agencies  
**SPoC:** Single Point of Contact  
**SSA 1989:** Security Service Act 1989  
**TA 1984:** Telecommunications Act 1984  
**TI:** Targeted Intercept  
**WTA 2006:** Wireless Telegraphy Act 2006

## Appendix D: Lectures and Speeches

### **2019 Kay Everett Memorial Lecture**

The second Kay Everett memorial lecture was delivered by the President of the Tribunal, Lord Justice Singh, on Wednesday 20 February 2019 entitled “Holding the Balance: National Security, Civil Liberties and the Role of the Investigatory Powers Tribunal”.

The lecture can be viewed here:

<https://drive.google.com/file/d/1oqLpAd6Ks1NeUIWJgovjdOTbrQ4W7DJS/view>

The full text of the lecture can be found here:

<https://www.ipt-uk.com/docs/soas-lecture-20-feb-19-final.pdf>

