CASE Nos. IPT/17/86 & 87CH

IN THE INVESTIGATORY POWERS TRIBUNAL

B E T W E E N:

(1) PRIVACY INTERNATIONAL
(2) REPRIEVE
(3) COMMITTEE ON THE ADMINISTRATION OF JUSTICE
(4) PAT FINUCANE CENTRE

Claimants

-and-

(1) SECRETARY OF STATE FOR FOREIGN AND COMMONWEALTH AFFAIRS
(2) SECRETARY OF STATE FOR THE HOME DEPARTMENT
(3) GOVERNMENT COMMUNICATIONS HEADQUARTERS
(4) SECURITY SERVICE
(5) SECRET INTELLIGENCE SERVICE

Respondents

SUBMISSIONS OF COUNSEL TO THE TRIBUNAL
ON THE "IPCO ISSUE"

I. Introduction

1. These submissions are served pursuant to paragraph 2 of the Tribunal's order dated 1 April 2020. They address the question of the procedure that should be adopted by the Investigatory Powers Tribunal ("**the Tribunal**" or "**the IPT**") when exercising its power under s.68(2) of the Regulation of Investigatory Powers Act 2000 ("**RIPA**") to request assistance from the Investigatory Powers Commissioner ("**the Commissioner**" or "**the IPC**") in relation to a complaint before it ("**the IPCO Issue**").

2. The circumstances in which this issue arose are set out in a joint note between Counsel to the Tribunal (**"CTT"**) and Counsel for the Respondents dated 2 August 2019 (and appended to these submissions) (**"the Note"**). At the time the Note was served, the Claimants were informed that the summary did not contain text that CTT had requested should be included but which the Respondents had declined to agree to include in the Note. The Respondents have recently confirmed that they have no national security objections to that text being provided to the Claimants and the text is referred to below.

3. Although "the IPCO issue" has been raised in the context of the Third Direction case, it gives rise to issues of wider importance and not all of those issues may be germane to the parties in the Third Direction. These submissions therefore seek to address the IPCO Issue not only in the context of this case but of the Tribunal's wider practice and procedures.

II. <u>The Statutory Framework</u>

4. Statute provides that the Tribunal has the power to require the IPC to provide it with "*all such assistance*" as the Tribunal thinks fit and imposes a duty on the IPC to provide the Tribunal with "*all such documents, information and other assistance (including the Commissioner's opinion as to any issue falling to be determined by the Tribunal)*". The relevant statutory provisions are as follows.

5. Section 68(2) of RIPA provides:

> "(2) The Tribunal shall have power—
> (a) in connection with the investigation of any matter, or
> (b) otherwise for the purposes of the Tribunal's consideration or determination of any matter,
> to require a relevant Commissioner appearing to the Tribunal to have functions in relation to the matter in question to provide the Tribunal with all such assistance (including that Commissioner's opinion as to any issue falling to be determined by the Tribunal) as the Tribunal think fit."

6. Rule 6(b) of the Investigatory Powers Tribunal Rules 2018 (**"the 2018 Rules"**) provides that this power can be exercised or performed by a single member of the Tribunal.

7. Section 232 of the Investigatory Powers Act 2016 (**"IPA"**)[1] provides in relevant part:

> "(1) A Judicial Commissioner[2] must give the Investigatory Powers 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.
>
> (2) A Judicial Commissioner may provide advice or information to any public authority or other person in relation to matters for which a Judicial Commissioner is responsible.
>
> (3) But a Judicial Commissioner must consult the Secretary of State before providing any advice or information under subsection (2) if it appears to the Commissioner that providing the advice or information might be contrary to the public interest or prejudicial to—
>
> (a) national security,
>
> (b) the prevention or detection of serious crime,
>
> (c) the economic well-being of the United Kingdom, or
>
> (d) the continued discharge of the functions of any public authority whose activities include activities that are subject to review by the Investigatory Powers Commissioner.
>
> […]
>
> (6) Subsections (3) and (4) do not apply to any advice or information provided under subsection (2) to the Investigatory Powers Tribunal."

8. The Tribunal's ability to determine complaints effectively is dependent to a significant degree on the statutory duty of the public bodies exercising powers under RIPA and the IPA to co-operate with the Tribunal – see section 68(6) of RIPA which provides:

> "It shall be the duty of the persons specified in subsection (7) to disclose or provide to the Tribunal all such documents and information as the Tribunal may require for the purpose of enabling them—
>
> (a) to exercise the jurisdiction conferred on them by or under section 65; or
>
> (b) otherwise to exercise or perform any power or duty conferred or imposed on them by or under this Act or the Investigatory Powers Act 2016."

9. RIPA also imposes a duty on the Tribunal to ensure that the IPC is "*made aware of*" any matter that is relevant to his functions and is kept informed of any determination that is made. Thus section 67(3) of RIPA provides:

> "(3) Where the Tribunal hear or consider any proceedings, complaint or reference relating to any matter, they shall secure that every relevant Commissioner appearing to them to have functions in relation to that matter—

[1] This replaces similar provisions in RIPA which were repealed when section 232 of the IPA came into force.

[2] This includes the Investigatory Powers Commissioner himself – see section 227(13)(a) of the IPA which provides that references in any enactment to a Judicial Commissioner are to be read as including the Investigatory Powers Commissioner.

(a) is aware that the matter is the subject of proceedings, a complaint or a reference brought before or made to the Tribunal; and
(b) is kept informed of any determination, award, order or other decision made by the Tribunal with respect to that matter."

Disclosure

10. Rule 7 of the 2018 Rules deals with the disclosure of information. It provides in relevant part:

> "(1) The Tribunal must carry out their functions in such a way as to secure that information is not disclosed to an extent, or in a manner, that is contrary to the public interest or prejudicial to national security, the prevention or detection of serious crime, the economic well-being of the United Kingdom or the continued discharge of the functions of any of the intelligence services.
> (2) Without prejudice to this general duty, but subject to paragraphs (3) to (6), the Tribunal may not disclose to the complainant or to any other person other than Counsel to the Tribunal—
> […]
> (c) any information, document or opinion provided to the Tribunal by a relevant Commissioner pursuant to section 68(2) of the Act;
> (d) the fact that any information, document, or opinion has been disclosed or provided in the circumstances mentioned in sub-paragraphs (a) to (c);
> […]
> (3) The Tribunal may disclose anything described in paragraph (2) with the consent of—
> […]
> (b) in the case of sub-paragraph (c), a relevant Commissioner and, to the extent that the information, document or opinion includes information provided to a relevant Commissioner by another person, that other person;
> […]"

11. The remaining provisions of rule 7, concerning disclosure in the absence of the consent of the providing party, do not apply to disclosure from a relevant Commissioner.[3] However the disclosure process contained within rule 7 (4) –(8) and rule 12(2) has been applied to CLOSED material provided to the Tribunal by the Commissioner which is considered for "opening up" to a claimant.

Jurisdiction

12. Section 65 of RIPA sets out the Tribunal's jurisdiction. By subsection (7), the Tribunal does not have jurisdiction over the conduct of a public authority "*to the extent it is authorised by, or takes place with the permission of, a judicial authority*". Subsection (7ZA) provides:

[3] See Rule 7(4)(a) of the 2018 Rules.

> "(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."

III. Examples where the Tribunal has sought assistance from the Commissioner (and his predecessors)

13. In considering the question of how the Tribunal should seek assistance from the Commissioner it may be helpful to consider the range of circumstances in which the Tribunal has sought assistance from the Commissioner (and his predecessors) in the past as any guidance the Tribunal gives as a consequence of the forthcoming hearing may need to reflect the range of circumstances in which assistance may be sought.

14. In recent years, the Tribunal has sought statutory assistance from the IPC (and his predecessors) in at least four different respects.

(i) The first concerns instances where the Tribunal has asked the IPC (or his predecessors) to assist – through the Commissioner's inspectors - in checking the accuracy of searches that have been conducted in relation to individual complaints. Thus in *Belhaj and others*[4], the Tribunal recorded in its Determination of 29 April 2015:

> "Under section 68 (2) the Tribunal exercised its power to require assistance from the Interception of Communications Commissioner, given that his office is best placed and has the technical expertise to scrutinise the evidence submitted. The Tribunal has been assisted by an Inspector appointed by the Commissioner, who carried out the investigative work required by the Tribunal to confirm the accuracy of the material evidence. On the basis of his investigative work, and its own assessment of the evidence, both written and oral, the Tribunal is fully satisfied that the evidence relevant to the complaints of the Claimants is accurate and complete."

(ii) The second concerns an instance where the Tribunal has asked for the Commissioner's opinion on a point of law relevant to a complaint. In *Re A Complaint of Surveillance* [2014] 2 AER 576 the Tribunal gave a ruling on a

[4] [2015] UKIPTrib 13_132-H

preliminary issue of law regarding paragraph 2.29 of the Surveillance Code of Practice. In order to determine the complaint, it was necessary for the Tribunal to decide whether the covert recording of a "*voluntary declared interview*" of the complainant amounted to "*surveillance*" for the purposes of Part II of RIPA. In the course of determining that complaint the Tribunal sought the opinion of the Intelligence Services Commissioner.[5]

(iii) The third concerns instances where the Commissioner (and his predecessors) have been asked to comment on the respondents' evidence and to provide information as to the oversight that it has provided in relation to a specific case. That happened in the Privacy International challenge concerning Bulk Personal Datasets (**"BPD"**) and Bulk Communications Data (**"BCD"**)[6] and led to the application to re-open the Tribunal's first judgment.[7]

(iv) The fourth concerns instances where the Tribunal has asked the Commissioner (or his predecessors) to disclose the confidential annexes to his reports and any other documentation relevant to a complaint. This happened in the BPD/BCD case as well as in this case concerning the Third Direction. Indeed, it was the disclosure of "opened up" versions of the confidential annexes in the BPD/BCD case that led to the existence of the Third Direction becoming known.

15. It is also worth noting that in the Third Judgment in the BPD/BCD case the Tribunal gave some preliminary consideration to the Tribunal's relationship with the Technical

[5] See Page 14 of the 2012 Annual Report

[6] The Tribunal has given three substantive judgments in this case so far:

Privacy International v Secretary of State for Foreign and Commonwealth Affairs [2016] UKIPTrib 15_110-CH [2017] 3 All E.R. 647;[2016] H.R.L.R. 21 (23 October 2016, "**the First Judgment**")

Privacy International v. Secretary of State for Foreign and Commonwealth Affairs [2017] UKIPTrib IPT_15_110_CH; EU OJ C 22, 22.1.2018, p. 29–30; [2018] 2 All E.R. 166 (8 September 2017, the judgment on the EU law issues, handed down September 2017, "**the Second Judgment**")

Privacy International v Secretary of State for Foreign and Commonwealth Affairs [2018] UKIPTrib IPT_15_110_CH [2018] 4 All E.R. 275 (handed down July 2018, "**the Third Judgment**")

[7] The Tribunal rejected the application to set aside its First Judgment for the reasons set out in its Third Judgment at §§ 95- 112 and at § 14 (a) –(f) of Appendix One of the OPEN judgment (which is an OPEN summary of its CLOSED judgment).

Advisory Panel when it gave its reason for rejecting the application that had been made by CTT for an expert to be instructed to assist determine the issue of proportionality. The Tribunal said: "*We note that the statute did not specifically make provision for this panel to be available to the Tribunal, although plainly we could ask the Commissioner for such assistance if required*." [8]

IV. General Principles Informing the Tribunal's Approach to Statutory Assistance

16. CTT submit that the following general principles should inform any guidance provided by the Tribunal on its approach to statutory assistance.

17. *First*, the Tribunal is an independent judicial body which, unusually, often determines complaints through an investigative rather than adversarial process. The majority of the Tribunal's complaints are determined following a primarily paper based investigation applying the principles of judicial review.[9] In order for the Tribunal to fulfil its statutory duties it is essential that it is able to investigate complaints as rigorously and as effectively as possible. The Tribunal's members must, by statute, all be legally qualified. [10] Thus, unlike SIAC, its membership does not comprise individuals with prior knowledge and expertise in national security and international relations. Equally, unlike the Commissioner's office, the Tribunal is not supported by inspectors or technical experts. In appropriate circumstances it is right for the Tribunal therefore to seek statutory assistance from the Commissioner, as indeed Parliament has intended.

18. *Second*, the Tribunal's ability to determine complaints effectively is dependent to a significant degree on statutory duty of the public bodies exercising powers under RIPA, the IPA, the Intelligence Services Act 1994 and Part III of the Police Act 1997 to co-operate with the Tribunal pursuant to section 68(6) of RIPA. On occasion, that duty has been breached (see, for example, the breach by GCHQ recorded in the Third Judgment

[8] §§ 88- 89 of the Third Judgment, *Privacy International v Secretary of State for Foreign and Commonwealth Affairs* [2018] UKIPTrib IPT_15_110_CH [2018] 4 All E.R. 275

[9] In determining complaints made to the IPT in relation to a complaint made by virtue of s.65(2)(b) of RIPA the IPT is required to "*apply the same principles as would be applied by a court on an application for judicial review*" (see s.67(3)(c) of RIPA).

[10] Schedule 3 of RIPA.

of the BPD/BCD at §6(iv)). The Commissioner may be able to assist the Tribunal in ensuring that public authorities comply with their duties under s.68(6) RIPA. Thus, the Tribunal may require the Commissioner's assistance to verify the accuracy of searches or to comment upon evidence served by the respondents in relation to the adequacy of the oversight performed by the Commissioner (or his predecessors)

19. Further, and related, the Tribunal must be able to carry out its functions, including making requests for assistance from the IPC, without interference by the parties. In this case there appears to have been such an instance which CTT sought to have included in the Note as follows:

> "On 5 March 2019 two members of the Respondents' staff contacted the Tribunal Secretary to state that the documents should not have been provided to the Tribunal. On 7 March 2019 the Tribunal Secretary wrote to the Respondents at the request of the President and stated that it was inappropriate to seek to intervene in the way that they had sought to do. On 12 March 2019 the Respondents wrote to the Tribunal Secretary apologising for any misunderstanding."

20. A similar incident occurred in the course of the BPD/BCD case. On 8 November 2017 the GCHQ Legal Adviser wrote directly to the IPC. At the outset the Legal Adviser stated that he was writing against the "*backdrop of the Privacy International v SSFCA case*". The letter was not copied to the Tribunal or to the Claimant in the BPD/BCD case. The GCHQ Legal Adviser asked the IPC "*to consider having some sort of appropriate process or protocol by which we, and perhaps the other agencies or wider government, might better liaise with IPCO to manage any circumstances where a piece of litigation, whether in the IPT or elsewhere, could raise issues in relation to oversight activity [and] whether in the current cases there may be any appropriate options for resolving any factual issues which may exist in relation to evidence currently before the IPT*". GCHQ wished to "*reduc[e] the risk of unnecessary misunderstandings and reduc[e] the list of issues before the IPT*".

21. On 28 November 2017, the Commissioner replied, stating at the outset "*I consider it is necessary to provide this exchange to the Tribunal in order to ensure that the present litigation is conducted with appropriate transparency. I will arrange for a copy of your letter and this reply to be served on the Tribunal*." The Commissioner went on to say:

> "Dealing first with developing a potential process or protocol to manage litigation that could raise issues in relation to oversight activity, may I say that I do not believe that this would be appropriate. My role (and that of the Judicial Commissioners) in respect of matters before the Tribunal is clearly outlined in section 232(1) of the Investigatory Powers Act 2016. I am required to give the tribunal all such documents, information and other assistance, including my opinion, as the Tribunal may require and I do not anticipate any situation where that engagement could be the subject of any form of prior agreement, however transparent, especially with a party which is subject to my oversight.
>
> I would also say that it is not for my office to attempt to reduce the list of issues before the tribunal but, rather, comply with our statutory obligations and provide a wholly independent assessment of the material before us.
>
> As regards the current matter before the Tribunal, whenever there are minor factual issues that require clarification I am content that the current process of fact checking with the relevant agencies prior to submission of our response remains the correct way forward. This naturally occurs when we submit our responses to ensure we comply with our national security and protective marking obligations and, save for one practical change discussed below, I am happy with this modus operandi.
>
> As regards more substantive areas of difference it is for the Tribunal to consider their significance and I do not believe that it would be appropriate to explore options to resolve these. As a robust oversight body I anticipate that there will be further differences of opinion on important matters. That goes with the territory
> ….
>
> You understandably refer a number of times in your letter to the issue of my independence. I consider this is a crucial aspect of the work of my office, and this factor has significantly underpinned my response to your suggestion."

22. *Third,* Parliament has created an oversight regime which comprises three different bodies with differing functions: the Tribunal, the IPC and the Intelligence and Security Committee of Parliament itself. They represent an intricate system of checks and balances on the exercise of the powers in RIPA and the IPA. It is important to recognise the distinct functions of each of those bodies. The Tribunal's functions are judicial; those of the Judicial Commissioners are essentially a mixture of quasi-judicial and administrative (albeit conducted by serving or former judges); whilst the ISC ensures parliamentary oversight. The importance of recognising those distinctions is all the greater because of the role of the IPC and Judicial Commissioners in authorising the more intrusive powers such as interception and equipment interference under the IPA.

23. *Fourth,* it is for the Tribunal alone to investigate and to determine the complaints that it receives. Whilst the Tribunal may seek assistance from the IPC, nothing in doing so should suggest that the Tribunal is in any way abrogating or delegating its statutory duty to determine the complaint.

24. *Fifth*, the Tribunal should consistently demonstrate independence and impartiality. Further it should act according to the rules of natural justice (subject to constraints imposed on it by its statutory duties in respect of ensuring that material is not disclosed contrary to Rule 7(1) of the 2018 Rules). This means that instances where the Tribunal exercises its statutory powers to seek the IPC's assistance should, subject to its duty under Rule 7(1) of the 2018 Rules, be transparent and, where appropriate, subject to full *inter partes* argument. Where that is not possible, the Tribunal may wish to instruct CTT to protect the claimant's interests.

25. *Sixth*, it is for the Tribunal itself to determine questions of law that arise in the course of determining a complaint.

26. *Seventh*, in recognition of all of the above, it is important that the Tribunal's relationship with the other oversight bodies is:
(i) arm's length;
(ii) as transparent as possible; and
(iii) in all circumstances fully documented.

V. Approach to Requests for Assistance

27. For convenience, we adopt below the three-stage approach taken by the Respondents, which has also been used by the Claimant and the Commissioner. We add two further suggested stages at the end.

(a) Stage one: formulating a request for assistance

28. The Tribunal should ordinarily inform the parties in advance of making a request for statutory assistance that: (i) a request is proposed, and (ii) its proposed scope.

29. If the request concerns CLOSED material, a claimant should ordinarily be told that a request is proposed and (to the extent possible) the content or a gist of the proposed request. Where a claimant is not provided with either, the Tribunal may wish to instruct CTT to make representations on behalf of the claimant.

30. The parties should be provided with an opportunity to comment on the proposed request. This will assist in ensuring that requests for assistance are targeted and specific, and ensure that the IPC does not need to liaise with the respondents. CTT agree with the Commissioner that liaison between him and a respondent "*might be seen as affecting the independence of the IPC in providing assistance to the Tribunal...[and] could also generate disagreements between the IPC and a respondent*" (§ 23(1) of the IPC submissions).

31. Where CTT is instructed, he or she may also assist the Tribunal and the parties in facilitating an agreed request for assistance (as happens in respect of agreeing a List of Issues in a case or in relation to agreeing Assumed Facts for a case) . CTT may also be instructed to draft CLOSED questions to the Commissioner (as happened in the BPD/BCD case).

32. In some cases, it may also assist the Commissioner if he is provided with the pleadings, any relevant witness statements and search reports. This is likely to assist the Commissioner in understanding the nature and scope of the request for assistance that is made. Whether the Commissioner should be provided with such material, and if so, what, may be the subject of submissions by the parties.

33. There may, however, be circumstances in which prior notification to the parties is neither possible nor desirable. It is important for there to be flexibility in any guidance promulgated given the Tribunal's investigative role. For example, it may not be appropriate for the Tribunal to give the parties prior notification where the Tribunal asks the IPC to assist—through the Commissioner's inspectors—to check the accuracy of searches that have been conducted in respect of individual complaints. Similarly, as suggested by the Commissioner in his Note, it may not be appropriate where the Tribunal has requested an unannounced inspection.

34. There may also be cases where notification to the claimant may be contrary to Rule 7(1) of the 2018 Rules.

35. In such cases, the Tribunal should indicate to the Commissioner that the request has been made without notification of any/all of the parties.

(b) Stage two: compiling the response

36. The Respondents identify three issues that may need to be considered at this stage: (i) LPP, (ii) sensitivity, and (iii) relevance.

LPP

37. The parties are, broadly, agreed that a respondent is entitled to object to documentation being provided to the Tribunal where it is subject to LPP. However, the Claimants and the Commissioner both point out the permissible scope of reliance on LPP as a basis to withhold material may be limited in a claim for judicial review where the decision under challenge was taken on legal advice (see § 8 of the Claimant's submissions and § 32 of the Commissioner's submissions).

38. Further, the parties and the IPC are, broadly, agreed that there needs to be a process by which a respondent may assert LPP over the documents identified by the IPC. The Claimants and the Commissioner rightly point out that the duty of candour and co-operation placed on parties before the Tribunal is relevant to whether or not a respondent asserts LPP in relation to material that was considered decisive by the Commissioner.[11] That will be of particular relevance where the Tribunal is called upon to consider the adequacy of the oversight regime as part of a complaint.

39. There is a dispute as to what the mechanism should be for a respondent to assert LPP in material to be provided by the IPC to the Tribunal: in particular, whether a respondent should routinely review all documentation to be provided by the IPC for LPP (see the Respondents' submissions at §11), whether the IPC should review the documentation for LPP initially and seek directions from the Tribunal where the documentation is or may be covered by LPP (see IPC's submissions at §37), and the extent to which the Tribunal has a role to play (see the Claimant's submissions at §10).

40. CTT consider that the approach proposed by the Commissioner is correct: i.e. when the IPC is providing the collated material to the Tribunal, he should identify any material

[11] See §§ 34-35 of the IPC's submissions and § 9 of the Claimants' submissions.

that might be covered by LPP so that the Tribunal can give appropriate directions (see § 37 of his Submissions).

41. It is neither necessary nor desirable for a respondent to review all documentation to be provided to the Tribunal for LPP, *before* it is provided to the Tribunal.

42. It would be open to a respondent where it considered necessary and appropriate to apply to have a dispute concerning LPP determined by the Tribunal (if necessary by a differently constituted panel). The Tribunal will recall that it dealt with a dispute as to whether the Respondents could reassert privilege in respect of two documents (disclosed by the Respondents rather than by the IPC to the Tribunal) which contained inadvertently disclosed LPP material at the July 2019 hearing in this case.

43. Occasions where the respondents wish to claim LPP over material provided to the Tribunal by the IPC are likely to be rare (particularly if the complaint concerns a police force or a local authority).

Sensitivity

44. CTT do not consider it appropriate that a respondent review the documentation to be disclosed by the Commissioner to the Tribunal for sensitivity for the reasons given by the Claimants (Submissions at §§11-12) and by the Commissioner (Submissions at §§38-43). In particular, CTT do not accept that it is necessary for a respondent to seek consent before providing material to the Tribunal from foreign partners, for the reasons given by the IPC at §§41-43 of his Submissions.

45. All material disclosed to the Tribunal by the Commissioner must be appropriately handled by the Tribunal in accordance with its security classification. Thereafter, any disclosure to the parties is subject to Rule 7(1) and, as noted above at paragraph 11, will go through a disclosure process for consideration as to whether it can be "opened up" without offending Rule 7(1) of the 2018 Rules.

Relevance

46. The Respondents submit that they may also be able to assist the IPC in deciding whether a document falls within the scope of the request, in particular where the request is framed by reference to categories rather than by reference to specific document(s).

47. CTT do not consider it appropriate for a respondent (or a claimant) to liaise with the IPC in this way. Rather, the IPC should form his own view, seeking further directions/clarification or explanation from the Tribunal where necessary if the scope of the request is unclear. The Tribunal can provide further directions/clarification or explanation with the assistance of the parties and, where instructed, CTT.

Disputes

48. Any disputes arising in the course of stage two should be referred to the Tribunal for determination, with the assistance of the respondent, the claimant (to the extent possible if the issue arises in CLOSED), and CTT.

(d) Stage 4: disclosure to the claimant of any CLOSED response from the IPC

49. The Commissioner should provide any response to a request for statutory assistance to the Tribunal only in the first instance (as has been his practice to date).

50. Where the Commissioner has provided a CLOSED response and /or CLOSED documents, the Tribunal may instruct CTT to review the material and make disclosure submissions in accordance with Rule 12(2) of the 2018 Rules.[12]

51. The Commissioner's consent should be sought for any disclosure to the parties in accordance with Rule 7(2) of the 2018 Rules.

[12] These provide:

> "(2) The Tribunal may request Counsel to the Tribunal to—
>
> (a)identify documents or information, parts of documents or a gist or summary of such documents or information, that ought to be disclosed to the complainant;
>
> (b)make submissions to the Tribunal in support of such disclosure of documents or information as is in the interests of the complainant and the public interest of open justice;"

Stage 5: recording the fact of statutory assistance in the Tribunal's judgment/determination

52. Where the Tribunal has sought the Commissioner's assistance it would be appropriate for that to be recorded in the ensuing judgment or determination (subject to the general duty in Rule 7(1) as well as Rules 7(8) and Rules 15(6) and (7)).[13]

53. Relevant judgments and determinations should be sent to the Commissioner pursuant to s.67(3) RIPA.

JONATHAN GLASSON QC

SARAH HANNETT

Matrix

24 April 2020

[13] See for example the Determination in *Belhaj and others* cited at paragraph 14 (1) above. Cf the *Re A Complaint of Surveillance* case where the fact that the Commissioner's opinion had been sought is not apparent from the judgment but is recorded in the Commissioner's 2012 Report.