



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

Communicated on 3 January 2017

FIRST SECTION

Application no. 60646/14
PRIVACY INTERNATIONAL against the United Kingdom
lodged on 4 September 2014

STATEMENT OF FACTS

The applicant, Privacy International, is a charity registered in the United Kingdom founded in 1990 and based in London. It is represented before the Court by Leigh Day & Co, a firm of solicitors based in London.

A. The circumstances of the case

The facts of the case, as submitted by the applicant, may be summarised as follows.

The applicant campaigns at an international level on privacy issues. Its mission is to defend the right to privacy across the world and to fight unlawful surveillance and other intrusions into private life by governments and corporations. It routinely publishes research in the form of reports and analyses and engages in a wide range of public debate on privacy issues. In this way it plays an important “watchdog” role.

The Government Communications Headquarters (“GCHQ”) is an intelligence service of the United Kingdom Government, operated under the control of a Director appointed by the Secretary of State for Foreign and Commonwealth Affairs.

On 4 March 2014 the applicant wrote to the Director of GCHQ seeking access to information under the Freedom of Information Act 2000 (“the 2000 Act”). The request was in the following terms:

“Pursuant to section 1 of the Freedom of Information Act 2000, we kindly request copies of any and all records consisting of or relating to:

1. An organisational chart(s) of the departments within GCHQ.
2. The number of people who work for GCHQ, broken down by departmental classifications that GCHQ uses in its normal course of business.
3. The current menu and price lists for any restaurants, canteens, cafes or other food service providers that operate within any GCHQ controlled building.

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4. Copies of all indoctrination declarations, official secrets act declarations, oaths and other declarations GCHQ employees sign to receive confidential information.
5. A hierarchical list of the levels of security clearance and/or levels of access to classified information in use by GCHQ.
6. Documents describing the process and requirements a person must fulfil in order to obtain each level of security clearance and/or access to classified information, including but not limited to counter-terrorism check, security check and developed vetting.
7. The number of people working for GCHQ who have obtained, respectively, each level of security clearance and/or access to classified information, including but not limited to counter-terrorism check, security check and developed vetting.
8. Documents, internal policies, or memoranda provided to new GCHQ employees regarding the legality of actions undertaken by GCHQ.
9. Documents provided to GCHQ employees setting out ways in which employees can raise concerns regarding the legality or ethical nature of activities undertaken by GCHQ.
10. Documents provided to GCHQ employees relating or regarding compliance with the Official Secrets Act.
11. Documents provided to GCHQ employees relating to compliance with section 4(2)(b) of the Intelligence Services Act 1994 (ISA).
12. Between 2000 and the present, the number of warrants issued pursuant to RIPA on which GCHQ has relied to carry out its activities, broken down by year and by the section of RIPA that authorized the warrant.
13. Between 1994 and the present, the number of warrants issued pursuant to the ISA on which GCHQ has relied to carry out its activities, broken down by year and by the section of the ISA that authorized the warrant.
14. A document index, including document title and number of pages, or similar inventory provided to the Interception of Communications Commissioner pursuant to the requirements of the Regulation of Investigatory Powers Act 2000 (RIPA) section 58.
15. A document index, including document title and number of pages, or similar inventory provided to the Intelligence Services Commissioner pursuant to the requirements of the RIPA section 60.
16. Number of instances, broken down by year, when the Director of GCHQ has refused to disclose information to the Intelligence and Security Committee pursuant to Schedule 3, sub-paragraph 3(1)(b)(i) of the ISA; and, the same information as regards sub-paragraph 3(1)(b)(ii) of the ISA.
17. Number of violations of any of the Codes of Practice promulgated under RIPA, broken down by year and section of the code violated.
18. The British-United States Communications Intelligence Agreement (now known as the UKUSA Agreement, also referred to as the Five Eyes Agreement) and subsequent instruments or other documents constituting agreements regarding the exchange of communications intelligence between the UK government and the United States, New Zealand, Australia and Canada.
19. Any other intelligence sharing agreements between the UK government and any other government, aside from the agreements described in request number 18.

20. Documents describing the process and requirements a foreign intelligence or security agency must fulfill in order to receive access to information classified by GCHQ.
21. The number of foreign intelligence or security agencies who currently have access to information classified by GCHQ.
22. The number of employees in foreign intelligence or security agencies, who currently have access to information classified by GCHQ, broken down by agency.”

On the same day, the Head of Information Rights at GCHQ replied by email informing the applicant that the request had been refused. The email stated:

“The Freedom of Information Act 2000 ... does not apply to GCHQ by virtue of s.84, which provides that GCHQ is not a Government department for the purposes of the Act. This means that GCHQ is excluded from the list of public authorities listed in Schedule 1 and to which the Act does apply. As such we are not obliged to comply with the provisions and requirements of the Act and we cannot assist you further.”

B. Relevant domestic law and practice

1. The Freedom of Information Act 2000

Section 1 of the Freedom of Information Act 2000 creates a general right of access to information held by public authorities. It provides:

- “(1) Any person making a request for information to a public authority is entitled—
- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request [“the duty to confirm or deny”], and
 - (b) if that is the case, to have that information communicated to him.”

Section 1 of Part 1 of Schedule 1 to the 2000 Act includes, in the definition of “public authorities”, “any Government department”. However, pursuant to section 84, “government department” does not include “the Security Service, the Secret Intelligence Service or the Government Communications Headquarters”.

Section 50 of the 2000 Act permits any person to apply to the Information Commissioner for a decision on whether a public authority has dealt with a request for information in accordance with the requirements of Part I of the 2000 Act. If the Commissioner decides that a public authority has failed to comply with its duties under the 2000 Act, it must serve a decision notice specifying the steps to be taken by the authority to comply with the Act and the period within which those steps must be taken.

Section 57 of the 2000 Act provides that where a decision notice has been served, the complainant or the public authority may appeal to the First Tier Tribunal (Information Rights) against the notice.

2. Kennedy v. the Charity Commission [2014] UKSC 20

Mr Kennedy was a journalist who requested information from the Charity Commission under the Freedom of Information Act 2000. The request was refused by the Charity Commission, which invoked an absolute exemption from the requirements of the 2000 Act. This decision was upheld by both the Information Commissioner and the Information Tribunal. However, on appeal to the Court of Appeal Mr Kennedy sought to argue

that the refusal of his request was in breach of his rights under Article 10 of the Convention. The Court of Appeal referred the appeal to the First Tier Tribunal (Information Rights) (to which the Information Tribunal's duties had been transferred). However, although the First Tier Tribunal would have allowed the appeal on this ground, the Court of Appeal considered itself bound by a recent Supreme Court judgment which had held that Article 10 did not apply to a Freedom of Information request to a public authority for disclosure of a document.

On appeal, a panel of seven justices of the Supreme Court considered whether the Charity Commission's refusal of Mr Kennedy's Freedom of Information request was compatible with his rights under Article 10 of the Convention. The majority held that the correct reading of the 2000 Act was not that the information requested benefitted from a blanket exemption from disclosure, but rather that such information was taken outside the framework of the Act altogether since the Charity Commission had the power to disclose information to the public both in pursuit of its statutory objectives under the Charities Act 1993 of increasing public trust in and accountability of charities, as well as under the general common law duties of openness and transparency incumbent on public authorities. The exercise of that power was subject to judicial review by the courts. It was therefore for Mr Kennedy to make a request to the Charity Commission under its general powers of disclosure and for the Charity Commission to consider the public interest in disclosure and weigh any competing private or public interests in the balance. As the Charities Act, bolstered by the common law principle of open justice, put Mr Kennedy in a no-less-favourable position regarding disclosure than he would have had under Article 10, the majority found that there was no question of "reading down" the Act or finding it to be inconsistent with Article 10.

Mr Kennedy subsequently brought an application to this Court, which is currently pending (*Times and Kennedy v. the United Kingdom*, no. 64367/14).

COMPLAINTS

The applicant complains under Article 10 of the Convention that the interference with its right to receive information was not necessary in a democratic society. It also complains under on Article 13 of the Convention that there was no effective remedy capable of dealing with the substance of the alleged violation.

QUESTIONS TO THE PARTIES

1. Did the applicant have an effective domestic remedy by which to challenge the alleged violation of Article 10? If so, has it failed to exhaust domestic remedies within the meaning of Article 35 § 1 of the Convention? If not, does a separate issue arise under Article 13 of the Convention?

2. In light of the Grand Chamber's recent judgment in *Magyar Helsinki Bizottság v. Hungary* [GC], no. 18030/11, 8 November 2016, has there been an interference with the applicant's rights under Article 10 of the Convention? If so, was the interference justified?