

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 COMMUNICATION HEADQUARTERS**
- (4) SECURITY SERVICE**
- (5) SECRET INTELLIGENCE SERVICE**

Respondents

**CLAIMANTS' REQUEST FOR FURTHER INFORMATION AND DISCLOSURE
CONCERNING THE RESPONDENTS' AMENDED OPEN RESPONSE**

On 7 May 2019, the Respondents served an Amended OPEN Response (*Amended Response*) to the Claimants' Re-Amended Statement of Grounds, dated 29 March 2019 (*Re-Amended Statement of Grounds*).

Further, on 9 April 2019, prior to service of the Amended Response, the Claimants wrote to the Respondents, bringing to their attention the fact that the *Pat Finucane Review* contained unredacted quotations from draft guidelines which became the Third Direction policy.¹ The draft guidelines set out the limitations on the Third Direction policy, namely that there could be no authorisation of or participation in physical assault, serious property damages, or extortion. As the letter records, the 1992 guidelines referred to in the *Pat Finucane Review* appears to be in materially identical form to the 1995 guidelines which have been disclosed to the Claimants in a heavily redacted form. On that basis, the Claimants noted that the limits of the Third Direction could not be secret (having been approved for publication by HM Government) and requested: (1) that the Respondents provide unredacted versions of the policies provided to date, removing any redactions that have been made in respect of the limits of the policy; (2) an unredacted version of the Witness Statement of MI5 Witness 2, with the removal of redactions on the same basis; and (3) an explanation for how and why redactions had been made to documents provided to the Claimants in the circumstances.

¹ A copy of that letter is attached.

The Claimants further requested a copy of all the documents referred to in Chapter 4 of the *Pat Finucane Review*.

The Respondents responded to that request on 17 May 2019,² refusing to provide the Claimants with the information and disclosure requested on the basis that “*publication was (i) of a policy in force some 20 years earlier and (ii) agreed to against a different national security background*”. The Respondents’ position is therefore that (for example) murder and torture could not have been purportedly “authorised” in 1992, but the current position is said to be secret.

The Claimants request the following further information and disclosure in respect of the Respondents’ Amended Response and the disclosure provided to date, and invite the Tribunal and Counsel for the Tribunal to consider whether any further information in the Respondents’ OPEN or CLOSED Amended Response, or the redacted documents disclosed on 2 May 2019, should be disclosed to the Claimants. References to paragraph numbers below are to paragraphs of the Response, except where otherwise stated.

This Request is not an exhaustive list of requests. The Claimants challenge the entirety of the redactions made to the Amended Response, and invite Counsel to the Tribunal to consider them. In particular, where a paragraph or paragraphs are redacted in full and there is no indication as to their subject matter, no submissions are made below, because the Claimants are not aware of the issue that is being left undisclosed.

AMENDED RESPONSE

Of Paragraph 4:

“As to the criminal nature of any particular conduct, this will depend on the constituent elements of the offence. Where mens rea is an element of the offence, the CHIS may well lack the requisite mens rea. [redacted]. This CHIS would not commit the offence of [redacted] since they would lack the necessary intention. [redacted]”

1. The Respondents’ position on the content of the law cannot be secret (*cf.* the *Pat Finucane Report*, which considers the potential significance of mens rea on agent participation in crime openly). The Claimants request disclosure of the redacted parts of paragraph 4.

Of Paragraph 9:

“The criticism [redacted] has no foundation in law, since the “authorisation” is not, and cannot be equated to, a forbidden “proleptic grant of immunity” (as per Lord Bingham, R (Pretty) v DPP [2002] 1 AC 800, §39)...”

² The Respondents’ letter of 17 May 2019 is attached.

2. It is not understood how the redacted section of paragraph 9 can be secret. the Respondents appear to be criticising the OPEN grounds on the basis of a submission as to the law. The Claimants request disclosure of the redacted part of paragraph 9.

Of Paragraph 11:

3. Paragraph 11 addresses the limits of the Third Direction policy. For the reasons set out above, the limits to the policy should be disclosed.

Of Paragraph 17:

"§23 is admitted, save that the parallel which the Claimants seek to draw with the Consolidated Guidance is inapposite. [redacted]"

4. It is not understood how the Respondents' response to the Claimants' comparison between the Third Direction and the Consolidated Guidance, for the purposes of highlighting that the latter imposes a clear and absolute prohibition on torture, could be secret. The Claimants request disclosure of the redacted parts of paragraph 17.

Of Paragraphs 24-27:

"There are various issues in §§32-48 RASG, with regard to the accuracy of those paragraphs as follows. [redacted]... For the avoidance of doubt, the Respondents accept that the Security Service is not able to "authorise" activity which would constitute a breach by it of the Convention..."

5. The majority of paragraphs 24 to 27 have been redacted without gist or explanation. Those paragraphs appear to set out supposed misunderstandings of the effect of the Third Direction policy. The Claimants need to understand the Respondents' position in this respect. The Claimants request disclosure of the reacted parts of paragraphs 24 to 27, alternatively a gist sufficient to disclose the nature of the case against them.

Of Paragraph 30:

"As to §41:

(a) the Memorandum of Understanding with the CPS for England and Wales does not specifically concern agent participation in criminality. [redacted]

(c) the CPS are aware of the Guidelines. The DPP was provided with a copy on 3rd September 2012."

6. The Claimants have previously requested disclosure of the Memorandum of Understanding with the CPS (see further the Claimants' letter to GLD of 19 February 2019). The Memorandum of Understanding is now referred to in the Amended

Response. The Claimants repeat their request for disclosure of that document, so far as is relevant.

7. Paragraph 30(c) notes that the DPP was provided with a copy of the Memorandum of Understanding with the CPS on 3 September 2012. Please provide the correspondence accompanying the Memorandum, and any further correspondence with the DPP in this respect, including (but not limited to) the response of the DPP.

Of Paragraph 31:

“As to §42, so far as Northern Ireland is concerned:

(a) There is a Protocol with PPSNI. Again it does not specifically concern agent participation in criminality. Unlike the MoU in England and Wales, it does not contain any express reference to “authorised” criminality. [redacted]

(c) The PPSNI is aware of the existence of the Guidelines.”

8. The Claimants request disclosure of the protocol with the PPSNI, so far as is relevant.
9. Paragraph 31(c) notes that the PPSNI is aware of the Guidelines. When was the PPSNI first told about the Guidelines? Please provide the correspondence by which the PPSNI was made aware of the Guidelines, and any further correspondence with the PPSNI in this respect, including (but not limited to) the PPSNI’s response.

Of Paragraph 32:

“As to §43, so far as Scotland is concerned:

(a) There is a Memorandum of Understanding with the Crown Office and Procurator Fiscal Service. Again, it does not specifically concern agent participation in criminality. [redacted]

(c) The Lord Advocate is now aware of the existence of the Guidelines. ”

10. The Claimants request disclosure of the Memorandum of Understanding with the Crown Office and Procurator Fiscal Service, so far as is relevant.
11. Paragraph 32(c) states that the Lord Advocate is “now” aware of the existence of the Guidelines. When was the Lord Advocate first told about the Guidelines? Please provide the correspondence by which the Lord Advocate was made aware of the Guidelines, and any further correspondence with the Lord Advocate in this respect, including (but not limited to) the Lord Advocate’s response.

Of Paragraph 89(b):

“Accordingly, in Northern Ireland, there is no offence at common law in respect of misprision or compounding of a felony, and the only available offence (save in respect of the compounding treason) is that set out in s.5 CL(NI)A 1967. Even were s.5 to apply to the Crown, its constituent elements are not made out in respect of the relevant offences “authorised” pursuant to the Guidelines. In particular:...

(b) there is “reasonable excuse” for non-disclosure. The conduct involves agents reporting covertly on individuals and organisations which pose a threat to national security. Their work is [redacted] vitally important [redacted].”

12. The Claimants request disclosure of the nature of the reasonable excuse for not telling a PSNI Special Branch constable with the appropriate security clearance of any offence purportedly authorised by the Security Service..

Of Paragraph 101:

13. For the reasons set out above, the limits to the policy should be disclosed.

Of Paragraph 106(e):

“The Respondents agree that Teixeira de Castro and Looseley are the two most important authorities in respect of entrapment and a consequential unfair trial. However:

...

(e) [redacted].”

14. Paragraph 106(e) appears to be part of an explanation as to why Article 6 will not be breached, in circumstances where the prosecutor and the judge will never be told of any agent participation in criminality. It is difficult to understand how a fair trial can be achieved in such circumstances. The Claimants request disclosure of the redacted part of this paragraph.

DISCLOSURE PURSUANT TO PARAGRAPH 11 OF THE AMENDED ORDER

Of the email dated 24 August 2012:

On 2 May 2019, the Claimants were provided with additional disclosure pursuant to paragraph 11 of the Amended Order. That included a draft invitation letter to the ISC, which accompanied an email dated 24 August 2012. The email notes that its sender has “has asked SyS to discuss the Policy in general terms with their CPS contacts and they will report back in due course. I can imagine they will say:

- They cannot comment on the policy in general [redacted]

- *The Prosecutors code of conduct provides clear advice on the public interest, including acts done in the interests of national security.*

15. It is not understood how the anticipated reaction of the CPS to disclosure of the existence of the Third Direction policy or its general terms can be secret. The Claimants request disclosure of the redacted part of the email above.

Of the letter of 23 September 2011:

16. The redaction at paragraph 3 of the letter from Andrew Parker to Sir Mark Waller has been redacted without gist or other explanation. The Claimants request disclosure of those paragraphs, alternatively a gist of the extensive redaction therein.

REMOVAL OF REDACTIONS IN RESPECT OF THE LIMITS OF THE THIRD DIRECTION POLICY

17. As set out above, the limits of the Third Direction Policy are in the public domain in the *Pat Finucane Review*. The Claimants request:

- a. disclosure of the redacted parts of any documents provided to date, where any disclosure has been made in respect of the limits of the Third Direction policy. This includes, but is not limited to, the removal of redactions to:
 - i. the witness statement of MI5 Witness 2;
 - ii. all Guidelines provided to date;
 - iii. any correspondence with the IP or IS Commissioners; and
 - iv. the Annual Reports and inspection reports of the Commissioners;
- b. an explanation as to how and why those redactions were made, in circumstances where the information in question was already in the public domain; and
- c. disclosure of the documents in Chapter 4 of the *Pat Finucane Review*.

BEN JAFFEY QC

CELIA ROONEY

Bhatt Murphy

20 May 2019