

IN THE FIRST TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
(INFORMATION RIGHTS)

Appeal nos: EA.2018.0164 and 0170

B E T W E E N :

PRIVACY INTERNATIONAL

Appellant

-and-

(1) THE INFORMATION COMMISSIONER'S OFFICE

(2) COMMISSIONER OF THE METROPOLITAN POLICE

(3) POLICE AND CRIME COMMISSIONER FOR WARWICKSHIRE

Respondents

**FIRST WITNESS STATEMENT OF
ULF BUERMAYER**

I, Ulf Buermeyer, of the Society for Civil Rights (*Gesellschaft für Freiheitsrechte e.V.*), Hessische Straße 10, 10115 Berlin, Germany, say as follows:

INTRODUCTION

1. I am a judge at the Regional Court of Berlin, currently delegated as a law clerk to the Berlin Constitutional Court, and the co-founder and President of the Society for Civil Rights (*Gesellschaft für Freiheitsrechte e.V.* – “GFF”). GFF is a Berlin-based non-profit NGO founded in 2015. Its mission is to establish a sustainable structure for successful strategic litigation to strengthen human and civil rights in Germany and Europe.
2. GFF's initial cases have focused on protecting privacy, freedom of information and freedom of the press against state intrusion, and on defending equal freedom for all. These are the realms in which GFF's founders are most active and that currently present both particularly critical challenges as well as litigation opportunities. GFF's longer-term mission is to help protect and strengthen human and civil rights in general by legal means, thus permanently improving human and civil rights law across Europe.

3. I have particular expertise in the field of constitutional law (especially in the areas of telecommunications freedoms, informational self-determination and freedom of information) as well as criminal law (including criminal proceedings and penitentiary law). Cases I have supervised as GFF's President include a constitutional complaint against the monitoring of data traffic and the warrantless spying on telecommunications between targets abroad by Germany's foreign intelligence service; a constitutional complaint against strategic mass surveillance in accordance with the so-called "G 10" Act, which restricts the freedom of communication under Article 10 of the German Basic Law; and various transparency law suits under the German Freedom of Information Act.
4. During an earlier delegation to the Federal Constitutional Court (*Bundesverfassungsgericht* – "BVerfG"), I clerked for the then Vice President of the BVerfG, Prof. Dr. Winfried Hassemer, and the current President of the BVerfG, Prof. Dr. Andreas Voßkuhle. My doctoral thesis addressed "Informational Self-Determination in the Penitentiary System". In 2013/2014 I received an LL.M. from Columbia Law School in New York City. I am also a Fellow of the Centre for Internet and Human Rights (CIHR) at the European University Viadrina (Frankfurt/Oder).
5. Where the contents of this statement are within my knowledge, I confirm that they are true; where they are not, I have identified the source of the relevant information, and I confirm that they are true to the best of my knowledge and belief.
6. I make this statement in relation to the application brought by the Appellant to the First-tier Tribunal. In doing so, I set out background information for the Tribunal on the regulation of IMSI catchers in Germany, in particular how information on IMSI catchers is required to be publicly available. I will cover the following areas:
 - a. Notification obligations regarding the use of IMSI catchers under German law;
 - b. Reporting obligations regarding the use of IMSI catchers under German law;
and
 - c. Parliamentary questions regarding the use of IMSI catchers in Germany.
7. My goal in this statement is to provide this Tribunal with such publicly available information as exists. It is not, and cannot be, to provide a complete recitation of the facts surrounding the use of IMSI catchers in Germany. I am also unable to

provide such facts that I have become aware of that are protected by obligations of professional secrecy in my role as a judge. Finally, none of these assertions should be taken as admissions or legal conclusions or in any other way as statements by any GFF client.

NOTIFICATION OBLIGATIONS IN CRIMINAL PROCEEDINGS AND IN FEDERAL POLICE INVESTIGATIONS

8. If an IMSI catcher is used in criminal proceedings or by the Federal Criminal Police Office, the target person must be notified.¹ **Therefore, persons who have been targeted by an IMSI catcher become aware that an IMSI catcher was used when notified.**
9. Notification shall take place **as soon as it can be effected without endangering the purpose of the investigation,** the life, physical integrity and personal liberty of another or significant assets.² Where notification has not taken place **within 12 months** after completion of the measure, **any further deferral of notification shall be subject to the approval of a court.** The court may approve the permanent dispensation from the obligation to notify where there is a probability bordering on certainty that the requirements for notification will never be fulfilled.³
10. In criminal proceedings, the public prosecution office that has arranged for the use of the IMSI catcher is responsible for the notification to the target person.⁴ Thus the acting authority has to reveal its identity. Similarly, the Federal Criminal Police Office must itself notify the target person as far as its own investigations are concerned.⁵
11. The content of the notification must enable the person concerned to determine the legality of the measure in order to potentially prepare a judicial review.⁶ Thus key

¹ See sec. 101 para. 4 no. 8 of the German Code of Criminal Procedure (*Strafprozessordnung – “StPO”*), sec. 74 para. 1 no. 11 of the Federal Criminal Police Office Act (*Bundeskriminalamtgesetz – “BKAG”*).

² See sec. 101 para. 5 StPO, sec. 74 para. 2 BKAG.

³ See sec. 101 para. 6 StPO, sec. 74 para. 3 BKAG.

⁴ See Michael Bruns in Rolf Hannich (ed.), Karlsruhe Commentary on the Strafprozessordnung: StPO, 7. Ed. §101 para. 10, Sigrid Hegmann in Jürgen Peter Graf (ed.), Beck’sche Online Commentary, 13. Ed. §101 para. 45.

⁵ See sec. 74 para. 2 sentence 4 BKAG.

⁶ See Michael Bruns in Rolf Hannich (ed.), Karlsruhe Commentary on the Strafprozessordnung: StPO, 7. Ed. §101 para. 22a, Sigrid Hegmann in Jürgen Peter Graf (ed.), Beck’sche Online Commentary, 13. Ed. §101 para. 46.

facts, like the time and duration of the measure, must be disclosed. The notifications by the public prosecution offices and by the Federal Criminal Police Office do not include information on the specific geographic location where the IMSI catcher was used. Nonetheless, because each regional public prosecution office must notify the target person itself and thus reveal its identity, that notification allows conclusions to be drawn about the general geographical location where the investigation was led.

REPORTING OBLIGATIONS OF INTELLIGENCE AGENCIES AND THE FEDERAL CRIMINAL POLICE OFFICE

12. If an IMSI catcher is used by federal intelligence agencies, the Parliamentary Control Panel (“**PKGr**”) has to be notified.⁷ The PKGr in turn regularly publishes a report containing key figures on the use of IMSI catchers by intelligence agencies. For example, the report for 2015 reads:⁸

"In the reporting period of 2015, IMSI Catchers were deployed in 19 cases (18 cases of the Federal Office for the Protection of the Constitution and one of the Military Counter-Intelligence Service). [...] The majority of the deployments concerned Islamism."

13. These PKGr reports used to be the only regular reporting on the use of IMSI catchers at the federal level. Notably, as **IMSI catchers can only be used to identify device or SIM card numbers and/or the location of a mobile device**, the central reporting requirements in criminal proceedings do not include the use of IMSI catchers. Instead, those requirements extend to the interception of telecommunications and of private speech on private premises, to online searches, and to the collection of telecommunications traffic data.⁹
14. However, as from 2019, the German Parliament will also be informed about the use of IMSI catchers by the Federal Criminal Police Office and will publish this infor-

⁷ See sec. 9 para. 4, sec. 8b para. 3 of the Act on Cooperation Between the Federation and the States (*Bundesländer*) in Matters of Protection of the Constitution and on the Federal Office for the Protection of the Constitution (*Bundesverfassungsschutzgesetz* – “**BVerfSchG**”). Similar mechanisms exist in regard to state intelligence agencies.

⁸ See “*Bericht zu den Maßnahmen nach dem Terrorismusbekämpfungsgesetz für das Jahr 2015*” (Report on the measures under the Counter-Terrorism Act for the year 2015), German Parliament Document No. 18/11228, 16 February 2017, page 10, available at <https://dip21.bundestag.de/dip21/btd/18/112/1811228.pdf> (last accessed 4 April 2019).

⁹ See sec. 101b StPO. An exceptional reporting duty at the state level (*Bundesland*) regarding the use of IMSI catchers does exist for the Hamburg police, see sec. 10e para. 7, sec. 10d para. 3 Police Data Processing Act Hamburg (*Gesetz über die Datenverarbeitung der Polizei* – “**PoIDVG**”).

mation accordingly.¹⁰ As to the content of this reporting, the relevant provision reads:

*"This notification shall in particular describe the extent to which powers have been exercised on the basis of which type of suspicion and to what extent the persons concerned have been informed hereof."*¹¹

15. This change in law originated in a decision of the BVerfG in 2016. In a judgment on the authorisation of the Federal Criminal Police Office to carry out certain covert surveillance measures for the purpose of protecting against threats from international terrorism, the BVerfG stressed the need for comprehensive reporting duties around covert surveillance measures. It stated:

"Finally, to guarantee transparency and oversight, a legal rule on reporting duties is also needed."

Since covert surveillance measures occur largely unnoticed by persons concerned and the public, and since the obligation to notify or the right to information can only counteract this to a limited extent by offering the subsequent possibility of the protection of subjective rights, regular reports by the Federal Criminal Police Office to Parliament and to the public on the exercise of these powers must be required by law. These are necessary and must be sufficiently substantial in order to facilitate a public discussion on the nature and scope of data collected by means of these powers, including the handling of the obligations to notify or delete, and thus subject the data collection to democratic oversight and review (...)." ¹²

16. The use of IMSI catchers was not the focus of the judgment and therefore not directly covered by the court's ruling on reporting obligations. Nonetheless, the wording of the court's decision seems to apply to all covert surveillance measures that go unnoticed by persons concerned and the public. Correspondingly, the German Parliament decided to extend the reporting duties to cover IMSI catchers. As explicitly stated in the explanatory memorandum of the draft bill, the established comprehensive report-

¹⁰ See sec. 88 BKAG.

¹¹ The first report is due 1 October 2019, see sec. 88 sentence 1, 2 BKAG.

¹² See BVerfG, Judgment of the First Senate of 20 April 2016 - 1 BvR 966/09, paras 142, 143, available at https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2016/04/rs20160420_1bvr096609en.html (last accessed 4 April 2019).

ing duties were considered necessary to meet the standards set by the court.¹³

17. Furthermore, given the court's approach, it seems likely that it will in future cases further extend the reporting duties under German law to the use of IMSI catchers by other bodies, e.g. in criminal proceedings.

PARLIAMENTARY QUESTIONS

18. In practice, the use of IMSI catchers by the police has also to some extent been made public by means of parliamentary questions. Federal and state governments are constitutionally obligated to answer questions from members of Parliament. Exceptions arise from the core area of executive self-determination – which concerns the immediate political decision-making process – as well as where answers would undermine public interest or the fundamental rights of third parties.
19. Hence the German Government upon request periodically discloses information on the use of IMSI catchers by some federal authorities. Regarding the first half of 2018 it stated:

*“In the period in question, the Federal Criminal Police Office used ‘IMSI catchers’ in 20 cases and the Federal Police in 32 cases. These total figures also include support measures for other authorities”.*¹⁴

20. At the state level (*Bundesländer*), the governments upon request often identify the local authorities using IMSI catchers. For example, in 2014 the state government of Bavaria (*Bayern*) provided a detailed overview of IMSI catcher deployments, subdivided according to occasion, legal basis and requesting authority.¹⁵

¹³ See “*Entwurf eines Gesetzes zur Neustrukturierung des Bundeskriminalamtgesetzes*” (Draft law restructuring of the Federal Criminal Police Office Act), German Parliament Document No. 18/11163, 14 February 2017, page 135, available at <http://dipbt.bundestag.de/dip21/btd/18/111/1811163.pdf> (last accessed 4 April 2019).

¹⁴ See “*Use of silent SMS, WLAN catchers, IMSI catchers, radio cell queries and image search software in the first half of 2018*”, German Parliament Document No. 19/3678, 3 August 2018, page 6, available at <https://dipbt.bundestag.de/doc/btd/19/036/1903678.pdf> (last accessed 4 April 2019).

¹⁵ See “*Einsatz von IMSI-Catchern und Funkzellenabfragen*” (Use of IMSI catchers and radio cell queries), Bavarian Parliament Document No. 17/2836, 9 September 2014, page 2, available at: http://www1.bayern.landtag.de/www/ElanTextAblage_WP17/Drucksachen/Schriftliche%20Anfragen/17_0002836.pdf (last accessed 4 April 2019).

Use of IMSI-Catchers - Overview 2013			
		Legal Basis	
Requesting authority	Occasion	sec. 100i StPO	sec. 34a PAG
BLKA	Narcotics/OC/Robbery/Murder	12	-
PP München	Narcotics/OC/Robbery/Murder	14	-
	Missing person	-	3
PP Schwaben S	Narcotics/OC/Robbery/Murder	3	-
	Arrest warrant	1	-
	Missing person	-	5
PP Schwaben N	Narcotics/OC/Robbery/Murder	4	-

21. Also in 2014, the state government of North Rhine-Westphalia (*Nordrhein-Westfalen*) disclosed how often each local authority (*Behörde*) had deployed IMSI catchers in recent years:¹⁶

Behörde	2010	2011	2012	2013
PP Aachen	6	8	4	7
PP Bielefeld	6	7	5	7
PP Bochum	1	0	5	9
PP Bonn	2	11	5	1
PP Dortmund	3	3	9	3
PP Duisburg	2	3	22	9
LR Düren	0	1	0	1
PP Düsseldorf	17	9	10	19
LR Ennepe Ruhr-Kreis	1	0	0	0
PP Essen	20	5	19	17

22. In 2013 the government of Bremen also identified the only local authority that had used an IMSI catcher. It stated:

“In 2013, the local police authority of Bremerhaven carried out one IMSI catcher operation.”¹⁷

¹⁶ See “Überwachung und Datenzugriff im Bereich der Telekommunikation. Wie nutzen nordrhein-westfälische Ermittlungsbehörden Funkzellenabfragen, Stille SMS, IMSI-Catcher und W-LAN-Catcher?” (Surveillance and data access in the field of telecommunications. How do North Rhine-Westphalian investigation authorities use radio cell queries, silent SMS, IMSI catcher and W-LAN catcher?), North Rhine-Westphalian Parliament Document No. 16/6051, 11 June 2014, page 23, available at: <https://www.landtag.nrw.de/portal/WWW/dokumentenarchiv/Dokument/MMD16-6051.pdf> (last accessed 4 April 2019).

¹⁷ See “Überwachung durch Funkzellenabfragen” (Monitoring by radio cell queries), Bremische Bürgerschaft Document No. 18/ 1176, 29 November 2013, available at https://www.bremische-buergerschaft.de/drs_abo/2013-11-27_Drs-18-1176_8073b.pdf (last accessed 4 April 2019).

CONCLUSION

23. As shown above, there is a high degree of transparency regarding the use of IMSI catchers in Germany, both at the individual and the institutional level. This includes individual notifications, public reporting mechanisms and information revealed in parliamentary questions. Important key figures have been published, including the specific bodies that have used IMSI catchers. This information has facilitated a public discussion, as evidenced by several news articles on the matter.¹⁸

Statement of Truth

I believe that the facts stated in this witness statement are true.



Ulf Buermeyer

Dated this 10. day of April 2019

¹⁸ See, e.g., "Halbjahreswerte für Stille SMS, IMSI-Catcher und Funkzellenabfragen" (Semi-annual figures on silent SMS, IMSI catcher and cell queries), Matthias Monroy, 22 August 2018, available at <https://netzp politik.org/2018/halbjahreswerte-fuer-stille-sms-imsi-catcher-und-funkzellenabfragen/>; "Warum Apps nicht immer gegen Überwachung helfen" (Why Apps Don't Always Help Against Surveillance), Andreas Kraft, 21 August 2017, available at <https://www.zeit.de/digital/datenschutz/2017-08/imsi-catcher-apps-helfen-nicht>; "IMSI-Catcher, Stille SMS & Co.: Digitale Ermittlungswerkzeuge bleiben schwer kontrollierbar" (IMSI-Catcher, Silent SMS & Co.: Digital investigation tools remain difficult to control), Christiane Schulzki-Haddouti, 3 February 2017, available at: <https://www.heise.de/newsticker/meldung/IMSI-Catcher-Stille-SMS-Co-Digitale-Ermittlungswerkzeuge-bleiben-schwer-kontrollierbar-3616911.html>; "Solange keiner meckert ...Wie IMSI-Catcher unauffällig legalisiert wurden", Christiane Schulzki-Haddouti, 5 April 2014, available at <https://www.heise.de/ct/ausgabe/2014-9-Wie-IMSI-Catcher-unauffaellig-legalisiert-wurden-2166054.html> (all last accessed 4 April 2019).