In the Crown Court at Woolwich

HHJ Leonard QC

27 March 2018

The Information Commissioner's Office

-v-

SCL Elections Ltd

Application for a Search Warrant

History

1. Late on Friday 23rd March 2018 I granted the Information Commissioner's Office ("ICO", an abbreviation I shall use hereafter to refer to the Commissioner herself or her office) a warrant to search the premises of SCL Elections Ltd ("SCLE") for documents and other materials specified in the application. Whilst I was able to reach my decision without difficulty by the end of the hearing, it was too late to deliver any ruling in respect of the application. I said that I would give my reasons on Tuesday 27th March.

2. The application for a search warrant pursuant to Schedule 9 of the Data Protection Act 1998 ("the Act") was made by Sally Anne Poole who gave evidence in which she confirmed that the contents of her statement in support of the application was true to the best of her knowledge and belief and she confirmed that nothing had come to her attention since she signed the application on 20th March which she ought to draw to my attention as material which may affect my decision whether to grant the application. Neither Mr Christopher Coltart QC or Mr Philip Coppel QC who appeared jointly on behalf of SCLE, wanted to ask Ms Poole any questions.

3. There was a preliminary point to be resolved in that this application was first before Edis J who asked the parties to consider whether he was able to hear the application which, by virtue of Paragraph 1(1) of Schedule 9 confers the power on "…a circuit judge or a District Judge (Magistrates' Court)". In subsequent skeleton arguments from both sides it was agreed that the matter should be put before a circuit judge and that is why it came before me at the adjourned hearing. Although the matter was listed in the High Court, I was sitting as a Circuit Judge at the Crown Court at Woolwich.

The Power to Issue a Warrant

4. I start with the search power set out in Schedule 9 to the Act. Before a warrant can be issued there has to be reasonable grounds for suspecting that:-

   (a) A data controller is or has contravened any of the data protection principles, and this application limited it to a contravention of Principles 1 and 7, or

   (b) An offence under the Act is or has been committed, and this application specified s.55 of the Act.

5. There is a further condition that evidence of the contravention or of the commission of the offence is to be found on the premises. Mr Coltard QC argued that, because that was not set out as subparagraph (c) of Paragraph 1(1) a different and higher test than "reasonable grounds for suspecting" ought to be applied. I do not agree. In my judgment the words "reasonable grounds for suspecting" govern all parts of the same paragraph. What the judge has to find is that there are reasonable grounds for suspecting that there will be evidence of the contravention of the data protection principles or of the commission of an offence under the Act to be found on the premises specified in the information.

6. Of importance in this application is the requirements of Paragraph 2. This requires the ICO to:-

(a) Give seven days' notice in writing to the occupier of the premises in question demanding access, and

(b) That access, at a reasonable hour, was either denied or, although entry was granted the occupier unreasonably refused to comply with a request by the ICO to permit them to enter to carry out any of the operations set out in Paragraph 1(3), and

(c) The occupier has, after the refusal, been notified by the ICO of the application for a warrant and has been given the opportunity to be heard by the judge on the question of whether it should be issued.

7. It follows that the occupier of the premises either consents to the search or, on a failure to do so and as a last resort, the ICO obtains a warrant. The ICO are not prevented from making an application where the occupier either agrees to hand over certain items or proposes that a third party carries out the search. Although, in common with the many statutory *ex parte* search powers that exist, the party seeking the material, and the court on an application for a search warrant, should consider whether the material can be obtained by agreement from the holder of it, the purpose of Schedule 9 is to allow the ICO either by consent or pursuant to a warrant to enter the premises and satisfy herself as to whether there is material which may assist the ICO in their investigation.

8. I further note that the ICO did not attempt to use the power provided in Paragraph 2(2) to circumvent the need for notice or an opportunity to consent to entry or for the occupier to be heard before a judge, a power which is confined to cases of urgency or where compliance with those provisions would defeat the object of the entry. That subparagraph would seem to give the ICO the power to make an *ex parte* application without notice where it can be justified.

<u>Contravention of Data Principles/Commission of an Offence</u>

9. I begin with the prerequisite requirement as to whether I have reasonable grounds for suspecting that the data controller is or has contravened any of the data protection principles or that an offence under the Act has been committed. In addressing me Mr Ben Summers on behalf of the ICO sought to extend the possible contravention to all the seven data protection principles set out in the Act. The application specifically referred to principles 1 and 7 and no application to amend its terms had been made. In my judgement, it is on the basis of the evidence set out in the application that I had to decide whether to grant a warrant and I did not permit the ICO to broaden the scope of their application beyond principles 1 and 7.

10. The Application sets out the information on which the ICO contends that an offence contrary to s.55 and breaches of data protection principles have occurred and I do not intend to reproduce that material here. Annexed to the application is the statement of Christopher Wylie who was the director of research for SCLE and Cambridge Analytica who sets out how the data was obtained from Facebook as part of Project Ripon and how it was referred to on the SCLE servers under a variety of different names. He indicated that the data is unlikely to be held in a single file or table and that multiple tables or databases with varying file names would be likely to contain elements or fragments of its data or its derivatives.

11. S.55 of the Act specifically deals with the unlawful obtaining of personal data which is what this investigation is all about. In his skeleton argument and before me Mr Coltart QC laid emphasis on the words "…not knowingly or recklessly…" in s.55(1) and in the failure of Mr Summers on behalf of the ICO to draw attention to s.55(2) which states that s.55(1) does not apply to a person who shows that he acted in the reasonable belief that he had in law the right to obtain or disclose the data or information or, as the case may be, to procure the disclosure of the information to the other person.

12. In my judgment that is but one of a number of occasions in which, with respect to the arguments advanced on behalf of SCLE, counsel have been looking beyond what I need to be satisfied about in respect of the application for a search warrant towards what might be submitted in a trial if any charge was to be brought against SCLE or any individual. Issues of a company's or an individual person's knowledge or belief cannot be ascertained at this stage. What I need to be satisfied of is that there are reasonable grounds for suspecting that an offence pursuant to s.55 has been committed. I am so satisfied and issues as to any company's or person's state of mind may need to be resolved at a later stage.

13. Mr Koppel QC provided me with a masterly analysis of the, at times, almost impenetrable legislative purpose of the Act, and I am grateful to him.

14. As I have already stated I have limited the ICO to the first and seventh data protection principles as set out in Schedule 1, Part 1.

15. The first principle reads:

> "Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless (a) at least one of the conditions of Schedule 2 is met, and, (b) in the case of sensitive personal data at least one of the conditions in Schedule 3 is met"

16. The seventh principle reads:

> "Appropriate technical and organisational measures shall be taken against unauthorised or unlawful processing of personal data and against accidental loss or destruction of, or damage to, personal data."

17. In respect of both principles Mr Koppel QC has taken me through the complexities in the legislation which lies behind these two data principles and has put forward arguments why they may not apply in this case. However, in my judgment, this is again to look beyond the stage with which I am concerned. In my judgment there are reasonable grounds to suspect that there have been breaches of both the data principles put forward in the application

such as to allow the ICO to search for material which may or may not support that reasonable suspicion. Even if I am wrong in that, the positon is clear with regard to s.55.

Reasonable Grounds to Suspect that Evidence Remains on the Premises

18. It was accepted on behalf of SCLE that material covered by the first bullet point in Paragraph 3 of the application is on the premises, not least by their willingness to hand over all such documentation. In considering the application in respect of the second and third bullet points, I have taken into account that Wylie stated that he last had sight of this data in September 2014.

19. It was argued that the data has been erased from the severs, and counsel on behalf of SCLE submitted that there is cogent evidence provided by Alex Tayler that it has been, even with regard to any metadata that might remain on the servers. However, this does not necessarily mean that there will be no trace of the material and, in so finding, it does not mean, as it was suggested by Mr Coltart QC, that I would have to find that Mr Tayler lied in his statement provided to the court. If, as I find, there are reasonable grounds to suspect that the data was on the servers in the first place, it may well still be there in some form, even if only as traces of metadata, and, because I judge on the material I have been provided with that there are ground for reasonably believing that it may still be there in some form, the ICO is entitled to enter the premises to see if it is still there or whether they can find any traces of it having been there.

Requirements of Paragraph 2 in Respect of Notice and Refusal

20. The ICO sent a "Demand for Access" notice dated 7th March 2018. It follows that SCLE were given seven days' notice of ICO's intention to enter the premises at midday on 15th March. It is not challenged, therefore that the requirement of Paragraph 2(1)(a) has been satisfied.

21. Accompanying that formal notice was a letter of the same date which has a section headed "next steps":

> "If you refuse this demand for access and do not consent to providing the requested material to the ICO I would ask that you notify us, in writing prior to [15th March]".

22. Although the notice clearly refers to access to the premises as required under Schedule 9, the letter identified another route by which the material might be provided outside of Schedule 9. I have assumed that it was offered because the ICO only wished to apply for a warrant as a last resort. Schedule 9 in fact provides two options, either entry by consent or by a search warrant.

23. SCLE did not respond until 14th March. In that letter they profess to being "…committed to helping the ICO with its investigations". SCLE sets out that it has material which, because of the scope of the request, will take time to assemble and confirmed that it did not hold any data obtained from Global Science Research ("GSR"). It requested further time and stated that "…in the next few days…" they will set out the interactions between SCLE and GSR.

24. The ICO responded by email on 14th March asking for clarification of points raised in the letter and indicating that the ICO would write further following a review of the documents received. On 15th March SCLE answered the questions and undertook to send on documentation within two weeks, that is by 29th March.

25. ICO wrote back on 16th March stating that they were not satisfied with the two-week timescale and they reiterated their demand to access the premises which they intended to do on 21st March and requiring confirmation by 4pm on 19th March whether access would be granted or refused. It must have been clear to SCLE that that timetable was set to give the ICO time to apply for a warrant if access was refused. At this point the ICO were giving the two options

provided for under Schedule 9 and any voluntary disclosure was not being actively pursued by them.

26. In a further letter dated 18th March the ICO offered to "expedite" their inspection which could take place on 21st March which was the same date as identified in the letter two days' earlier. This letter was, no doubt, sent because of the public interest that existed in the investigation.

27. SCLE's response was sent by their solicitors, Squire Patton Boggs on the following day stressing SCLE's continuing desire to assist in the investigation and agreeing to expedite the provision of information and undertaking to do so by 21st March. They requested the ICO to provide answers to two matters raised in their letter of 14th March. SCLE was, therefore still following the route of voluntary disclosure which was no longer being actively offered in the ICO's letter to them.

28. Nevertheless, the ICO replied on 19th March stating that they required the material to be provided by 5pm on 21st March and setting out their answer to the issues raised in the letter of 14th March.

29. That evening the ICO was interviewed by Jon Snow on Channel 4 News. She told him that they were going to apply for a warrant on 20th March. Whilst it may not have been the best approach to deal with the application on a television broadcast, by that time SCLE were aware of the timetable which the ICO was going to follow and which it had set out in their letter of 16th March.

30. SCLE wrote on 20th March that they were not unreasonably refusing access to their premises. The letter stated that no notice of their application for a warrant had been given to them. I do not agree. The letter of 16th March made that course implicit if not explicit where SCLE had not agreed, even by 20th March to allow the ICO to enter their premises voluntarily. A second letter of that date sets out, amongst other things, SCLE's position that Mr Wylie's evidence

is not credible in challenging whether the ICO had reasonable grounds for suspicion.

31. The ICO responded on the same day to both letters and requesting them to confirm by 3pm that SCLE will provide them access to their premises at 12 noon on 21st March, failing which they will or may resolve matters by applying for a warrant.

32. There was an email at 15.06 that day giving an undertaking not to delete, remove or otherwise interfere with the material requested pending a negotiated settlement of these issues and asking for confirmation that the threat of a court hearing on 21st March will now be removed. In response the ICO asked for confirmation by 4.30pm that SCLE will allow the access demanded and, if not, the ICO will assume that they are refusing access and will apply to the court for a warrant. No undertaking was forthcoming.

33. I have set the correspondence out at length because in my judgment it shows that, looking at the position overall, the ICO acted properly. It gave notice of its demand for access on 7th March and showed itself to be willing to explore a way in which the material could be provided by a route which was outside of the Schedule 9 procedure. This option was never resolved satisfactorily and so the ICO proceeded pursuant to Schedule 9.

34. Having extended its request for access on 15th March, they finally sought agreement to access by 20th March and, in the absence of agreement, they have applied for a warrant. Bearing in mind the public interest in the investigation and the ICO's need to get on with that investigation, they were entitled to abandon a route which was taking too much time and seek either agreement to entry or, in the absence of agreement, a warrant.

Use of Other Powers

35. Mr Coppel QC raised whether the ICO should have used the power provided by s.22 of the Act to serve a notice on SCLE. In my judgment that provision is not designed to deal with an investigation of the kind contemplated by the ICO. The ICO has the power provided in Schedule 9 and it is there for her to use in the appropriate circumstances.

Scope of the Articles Sought

36. Although the argument was not fully developed, Mr Coltart QC questioned whether the description of the articles sought in Part 3 of the warrant was sufficiently specific. In my judgment the ICO have set out with particularity the type of documents and data they are looking for and the names of the parties of interest to them. That these specific terms may involve a vast quantity of material is not an indication that its terms are too wide, but may be indicative of the size of the investigation which is being undertaken.

Conclusion

37. Finally I have had to consider whether I was also satisfied having regard to all the circumstances, and that this was an order which infringes rights, that it was proportionate to make this order, and I so found.

38. Although this matter was listed as if I was sitting at Woolwich, it has been agreed by the Presiders that, if there are any follow-up issues concerning this application for a warrant, they should come before me at the Central Criminal Court. If any file exists at Woolwich or at the High Court in respect of this application, that file should be transferred to the Central Criminal Court.