



Neutral Citation Number: [2021] EWHC 1572 (Fam)

Case No: FD20P00845

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/06/2021

Before :

THE PRESIDENT OF THE FAMILY DIVISION

Between :

**THE CHIEF CONSTABLE OF GREATER
MANCHESTER POLICE**

Applicant

- and -

**CHRISTIAN ZUNIGA
CRAIG BAYLISS
DAVID GULLIVER
CATHERINE HILTON
AVROM LASAROW
DOUGLAS MACSWEEN
JAMES CAMPBELL**

Respondents

Mr Graham Wells (instructed by GMP Legal Services) for the Applicant

Hearing date: 13 May 2021

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE PRESIDENT OF THE FAMILY DIVISION

Sir Andrew McFarlane P:

Introduction

1. This judgment concerns an application by Greater Manchester Police (“GMP”) for orders in respect of materials currently held by GMP relating to data manipulation at a forensic laboratory, which they seek to use for an ongoing criminal investigation. The orders sought were granted at an uncontested hearing in private on 13 May 2021, with judgment to follow. This is that judgment.

Factual Background

2. The background to the case is an investigation begun in 2017 and led by GMP into data manipulation by the seven Respondents, who are the suspects in the case, at a forensic laboratory which, via two different companies consecutively operating at the laboratory, provided services to police forces for the purposes of identifying drug use. The forensics analysed hair, blood, and urine for quantities of illegal substances, and the results provided, some of which were falsified, were used in criminal, family, coronial or employment cases.
3. The investigation has uncovered 27,000 reports which appear to have been affected, and therefore the potential injustices which have occurred as a result of the data manipulation are many and serious. It is worth recording that an investigation of this scale, complexity, and irregularity is difficult and skilled work, which necessarily takes time.
4. The alleged activity occurred between 2011 and 2017 at the same Manchester testing centre, the Hexagon Tower. Two companies were primarily involved, and the Defendants span both: Trimega Laboratories (“TL”) operated at the Hexagon Tower from 2009, and continued under that name (after the Ingemino Group bought TL in 2012) until they ceased trading in April 2014 and the company was liquidated by KPMG; Radox Testing Services (“RTS”), bought the equipment and methodology from TL upon its liquidation and operated at the Hexagon Tower from 2014 onwards.
5. The Respondents are said to have engaged in data manipulation practices for the purposes of ensuring rapid accreditation by the regulator, UKAS, by which the company could provide its forensics services to the police forces, thereby gaining commercial advantage over competitors. The object was therefore the raise the value of the company by gaining a larger market share.
6. This data manipulation dates back almost a decade and takes a variety of forms, including copying results and quality assurance data from one sample and pasting it into another, as well as manipulating quality controls and suitability tests, and falsifying identification of drugs and validation data.
7. Against this background, the seven suspects have been served as Respondents in the case on the basis that they are affected by the order, following the Criminal Procedure Rules Part 47. None has chosen to appear to oppose the application.
8. The alleged data manipulation first came to light in January 2017, when RTS contacted GMP following their discovery of data manipulation at Hexagon Tower. Both RTS and

GMP began concurrent investigations, and RTS cooperated with GMP throughout. RTS discovered the erroneous results in the forensic data during a trial of a person accused of driving under the influence of drugs, in which the prosecution's expert evidence was challenged and, upon the defence instructing an expert, the two experts were unable to agree due to data anomalies which undermined the reliability of the report from RTS. RTS investigated this and found that the anomalies were data duplication that could only have been carried out by a laboratory assistant with extensive knowledge of the system. Their investigation uncovered that the data manipulation had been ongoing since before they purchased the laboratory and equipment in 2014.

9. GMP's investigation also involves the cover up of data anomalies relating in particular to two family court cases. These cases are "the *Welch* case" and *Bristol City Council v A & A and Others* (2012): in *Welch* a woman contested the results from TL of hair testing for drugs, and the another forensic provider was employed to test her hair; in *Bristol City Council*, TL's drugs testing was challenged by a woman whose children had been removed from her care on the basis of drugs use. In both cases TL's tests were contradicted by newly instructed forensics providers, and TL acted defensively, possibly for the purposes of competition with the alternative forensic providers used in those cases. Bayliss admitted in police interview to involvement in a cover-up during these two cases. The anomalies in these cases were discovered at the same time as the sale of TL to Ingemino. If disclosed, the fact of the anomalies would have dramatically reduced the value of the sale. There is also investigation into what the senior management of TL knew of these cases at the time.

The present issue

10. In July 2020, HHJ Nicholas Dean QC granted an order under s. 59 Criminal Justice and Police Act 2001 and a Production Order in relation to materials which had previously been lawfully obtained from KPMG. In making the orders HHJ Dean was aware of these applications. It is important to note that as a result of the orders made by HHJ Dean, at this time the retention of the material is lawful regardless of the outcome of the present applications. However, under s. 22 Police and Criminal Evidence Act 1984, GMP can only hold the biometric material for as long as is necessary in all the circumstances, meaning not for any other purpose than criminal law enforcement (per Lord Dyson MR, *X v Z(Children) & A (Local Authority)* [2015] EWCA Civ 34 [46]). Therefore what is sought is permission to use and hold the information, without that limitation, including if the material is not used.
11. The orders presently sought by GMP come under the purview of the Family Court as some of the information in question has been used in family cases: Family Procedure Rules 2010, rr 12.73 and 12.75 restrict the communication of information, in particular preventing the communication of the results of the tests, beyond the parties to the proceedings.
12. As such, permission to share the information with the police must be obtained (see *Lewisham London Borough Council v D (Local Authority disclosure of DNA samples to the police)* [2010] EWHC 1238 (Fam); [2011] 1 F.L.R. 895, *Re X,Y and Z (Disclosure to the Security Service)* [2016] EWHC 2400 (Fam); [2017] 2 F.L.R. 583 and *Re C (a minor) (Care proceedings: disclosure)* [1997] 2 W.L.R. 322). Applications may be made within proceedings for use of information (in this instance the forensic and expert reports), under the *2013 Protocol and Good Practice Model: Disclosure of information*

*in cases of alleged child abuse and linked criminal and care directions hearings (“2013 protocol”). Successful applications were made within the *Welch* and *Bristol* proceedings for GMP to hold and use the material.*

13. The present applications, though, seek orders firstly to allow GMP to retain documents, samples and digital materials produced for use in connection with cases heard and determined in the Family jurisdiction, and secondly to allow GMP to use and analyse those materials for tracing witnesses and securing evidence. This court previously directed that an application should be made to the Family Division of the High Court to resolve the issue; these applications are made in adherence with those directions.
14. As such the granting of these orders requires careful consideration. Following *Marper v United Kingdom* [2008] ECHR 1581 [67] and *X v Z & A* [31], retention, use, and disclosure of biometric data interferes with an individual’s Article 8 rights. Holding data of such a personal nature is of critical sensitivity. It is with the individual’s Article 8 rights in mind that Lord Dyson construed s. 22 Police and Criminal Evidence Act 1984 only to allow police to retain and use biometric data for criminal law enforcement. There remains only the question of what is necessary in a democratic society, and whether the measures are proportionate.
15. This is a unique case. Once GMP have directed the case towards a prosecution, much of the material concerned would not then be able to be held under s. 22. It is not hard to imagine the circumstances where this data would be sought by an individual concerned, given the size of the affected data, and the nature of the proceedings in which it was involved. There are likely to be criminal, family, coronial and employment cases, previously decided, which parties may wish to revisit on the basis of faulty data. The importance of this is hard to overstate. It concerns miscarriages of justice which may have occurred in reliance on what are now known to be erroneous drugs testing results. It is instructive that where material has been handed to GMP by RTS, RTS has approached the parties involved for their consent and it has not been refused in any such case.
16. Secondly, GMP rightly point out that this data is not “primary material” gathered by police at a crime scene as in *X v Z & A*, but rather material under the family courts’ control. As such, this is not material gathered for the purposes of criminal investigation, but material which has been transferred to the police and over which the Family Court has a continuing power under FPR r 12.73. Therefore it cannot be considered solely by reference to the criminal investigation rules.
17. GMP submit that this application is necessary for practical purposes: the alternative position would be to require them to apply for permission for each case, or even each circuit, which given the volume concerned would be a disproportionate burden on court resources. However this application relates to the materials collected as a whole: they do not refer to specific cases or forensic reports unlike those mentioned previously, but to the information obtained from the Hexagon Tower laboratory via KPMG, and the holding of that information for purposes including and beyond the criminal investigation.
18. The permission sought is an extension of the cooperation permitted by the *2013 Protocol*, allowing application by the police for the disclosure of data. The only difference here is that, for practical reasons, this is one application made for a class of

data rather than on a case by case basis. There is no alternative custodian of the material given that TL was liquidated, and so the material would otherwise be destroyed. Given the number of people affected who may require these materials at some point, it is important that it is retained. The alternative would allow individuals concerned to access the material produced for court, but not the background material which demonstrates the data manipulation. In my judgment there is no viable alternative to allowing the data to be held by GMP which would also allow the individuals concerned access to the material needed to demonstrate a miscarriage of justice.

19. With reference to proportionality, GMP suggest reviewing the orders to allow retention of the data every 12 months. This suggestion acknowledges the sensitivity of the data and the interference with Article 8. It seems a reasonable suggestion which will allow retention and use of the data without disproportionate infringement of the rights of the individuals concerned.
20. For the reasons given above I grant the order sought by GMP, amended such that the identity of individuals is only revealed in criminal trials if the individual has consented to their identification. This matter will be retained to the President of the Family Division for review every 12 months.