IN THE INVESTIGATORY POWERS TRIBUNAL **Case No. IPT/15/110/CH**

B E T W E E N:

PRIVACY INTERNATIONAL

Claimant

-and-

(1) SECRETARY OF STATE FOR FOREIGN AND COMMONWEALTH AFFAIRS

(2) SECRETARY OF STATE FOR THE HOME DEPARTMENT

(3) GOVERNMENT COMMUNICATIONS HEADQUARTERS

(4) SECURITY SERVICE

(5) SECRET INTELLIGENCE SERVICE

Respondents

CLAIMANT'S SKELETON ARGUMENT

for the OPEN hearing on 1 December 2017

A. Introduction

1. This OPEN hearing is to consider:

   1.1. The Respondents' application dated 15 November 2017 to rely on three further witness statements and the exhibits thereto, such evidence having been produced after the relevant hearing on 17-19 October 2017 (the "**October 2017 Hearing**"); and

   1.2. The Claimant's application, formalised by notice dated 10 November 2017, for the Tribunal to reconsider its findings contained in the Tribunal's October 2016 judgment [2016] 3 All ER 647 (the "**October 2016 Judgment**") in light of the new information that has been disclosed.

   1.3. Whether the information in the unredacted version of GCHQ Exhibit 13 should be made OPEN. The information was (apparently in error) disclosed to the Claimant, which means that submissions as to its lack of sensitivity can be dealt with in private without excluding the Claimant.

2. In respect of the Claimant's application, its position is set out in full in its submission dated

10 November 2017. The contents of that notice are therefore not repeated, but a copy is appended for the Tribunal's convenience. Defined terms from that document are adopted here.

B. Background to the Respondents' Application

3. By a letter dated 2 June 2017, the Claimant first became aware of the fact that the Commissioners and their inspectors had never conducted a formal inspection or audit of industry partners in relation to the sharing of BPD and BCD. The Respondents have therefore also known, since this date, that the Claimant intended to make submissions to this effect to the Tribunal.

4. On 8 September 2017, the Tribunal held a directions hearing (*inter alia*) to set out directions for the hearing on 17-19 October 2017. In relation to whether there was need for any additional evidence, there was the following exchange (p. 86 ln 17 – p.87 ln 4, emphasis added):

> "*THE CHAIRMAN: [The evidence] is all complete and all that, but it is new. I am not wrong to say that there is some new evidence. Whatever it is, it is complete.*
>
> *MR DE LA MARE: That is the point – inaccurately I was seeking to make. It is all locked and ready to go.*
>
> *THE CHAIRMAN: Yes. It was done subsequent [to the hearing in June 2017]. There has been some [evidence] subsequent to the last hearing, but at any rate, whatever it is, it is all locked and ready to go on delegation which was never going to be heard in July, and on transfer of data which we had hoped to be heard in July, all evidence is closed, so no more evidence.*
>
> *MR DE LA MARE: Just skeletons.*
>
> *THE CHAIRMAN: Just skeletons."*

5. The subsequent order of the Tribunal dated 19 September 2017 thus did not make any order regarding the provision of disclosure, but only in respect of the dates of skeleton arguments (paragraphs 5 to 9). The Respondents' statement in their application at §3(a) that "*the Tribunal made no order setting deadlines for the service of OPEN and CLOSED evidence*" is correct, but it was because the clear understanding of the Tribunal reached at the Directions hearing was that there was to be no more relevant evidence to be served for the October 2017 Hearing.

6. The lack of audit by the Commissioners was further confirmed, and expanded upon, by the

response from the Investigatory Powers Commissioner's Office ("**IPCO**") dated 19 September 2017. This letter was provided by email from the Tribunal to all parties on 21 September 2017. The Respondents' application notice is incorrect to state at §3(a) that it did not receive this letter until 25 September 2017.

7. The additional disclosure prior to the October 2017 Hearing (identified at paragraph 13 of the Claimant's application) was provided to the Claimant on Friday 13 October 2017. This disclosure was provided to the Respondents in advance of this date:

   7.1. The BCD GCHQ Inspection Report states that it was issued on 14 September 2017. A letter from GCHQ to IPCO dated 16 October 2017 explains that this report was provided to the Respondents in draft on 12 September 2017;

   7.2. The Audit Summary was dated 15 September 2017;

   7.3. It is not known when the Respondents received the IPCO response dated 28 September 2017; and

   7.4. The Respondents state that they received the IPCO response email dated 10 October 2017 on 11 October 2017 (§3(a) of the Respondents' application).

8. The October 2017 Hearing to consider the issue of sharing and proportionality was on Tuesday 17 to Thursday 19 October 2017.

9. During that hearing, and after the Claimant's counsel had opened the case, the Respondents served new evidence:

   9.1. On 16 October 2017, the Respondents served a witness statement from MI5 Witness "*in order to provide some further context to one matter arising from the OPEN version of IPCO's email of 10 October 2017 to the Tribunal*".

   9.2. On 17 October 2017, the Respondents served a CLOSED (and partially opened-up) witness statement from GCHQ Witness (dated 16 October 2017 but unsigned and un-numbered), responding to "*points that have been raised in recent correspondence between the Tribunal and the Commissioners*". The witness statement exhibited a letter from GCHQ to IPCO dated 16 October 2017, explaining that it had not previously been "*possible to respond substantively within [IPCO's] timeframe*" but that "*we have now had the chance to*

work through the draft report properly" and making various submissions on it. (The letter was further opened up during the course of the hearing).

9.3. On 18 October 2017, the Respondents served an OPEN witness statement from GCHQ Witness (seventh statement). Paragraphs 9 and 10 of that statement concerned administrator privileges within GCHQ (considered further at paragraph 18 below).

C. <u>The Respondents' Application</u>

10. The Respondents seek the Tribunal's permission to rely on three further CLOSED witness statements, and the three exhibits thereto. The witness statements have been partially opened up (the latest version the Claimant has received in respect of each statement is dated 24 November 2017).

11. The Claimant objects to the application for the following reasons.

12. These proceedings have been marred by consistently late disclosure and late production of evidence by the Respondents. All of the prejudice of this behaviour falls on the Claimant. Indeed, on one occasion, it has led to the hearing needing to be vacated. The Respondents' application is merely a continuation of this unacceptable and inappropriate approach to the litigation. The effect is to protract the determination of litigation that is already substantially delayed.

13. Further, by the conclusion of the OPEN proceedings on 19 October 2017 (at the very latest), the evidence in relation to the issues being determined had closed. All parties had been given a reasonable (indeed, generous) opportunity to produce the material they wanted to rely on. Indeed, the Respondents produced further evidence throughout the course of the October 2017 Hearing, even after the Claimant's counsel had opened the Claimant's case and in response to such submissions. It would be entirely unfair and contrary to the interests of finality in litigation to permit any party a further bite of the cherry after submissions have been made. If such a request were made by the Claimant, it would undoubtedly and rightly be refused. (Indeed, this is precisely what the Tribunal decided in <u>*Liberty*</u>, when Liberty was refused permission to advance new points and seek disclosure late in the day).

14. It is correct that there is to be a further CLOSED hearing to consider the Respondents'

submissions on those CLOSED aspects of the evidence, which have either been redacted in full or gisted to the Claimant. However, any CLOSED process may not properly be used as a basis for putting in material that could have been served in time for the OPEN hearing. That is the very purpose of ensuring that a process of considering the 'opening up' of CLOSED evidence occurs *in advance of* any OPEN hearing.

15. The Respondents state in their application at §3(a) that there is a good explanation for the evidence being served at this stage, and it gives two reasons:

    15.1. First, it is said that the Respondents "*did not prioritise responding to the CLOSED issues, since they were aware that there was to be a further CLOSED hearing in any event*". However, the Respondents' alleged priorities are not a good reason for prejudicing the Claimant by permitting additional evidence after the OPEN hearing. As outlined at paragraph 7 above, the Respondents had been in possession of the relevant material for a considerable time (and longer than the Claimant) by the close of the October 2017 Hearing. Nor is the explanation accepted on its face, given that the Respondents did in fact serve CLOSED responsive evidence during the hearing; that response was the opportunity to deal with the material.

    15.2. Second, it is said that some of the further evidence is responsive to submissions made by the Claimant at the October hearing. However, it is not accepted that there can have been any surprise in the Claimant's submissions made at the hearing. The Respondents must have been well aware of the points adverse to their position that can be derived from the evidence, because they are obvious on the face of the documents.

16. Finally, the Claimant notes that it would suffer material prejudice if the Respondents were permitted to rely on this further evidence:

    16.1. First, if this evidence had been provided in advance of the OPEN hearing, the Claimant would have wanted and needed to make oral and written submissions on it. (The Respondents' suggestion at §4 of their application that any prejudice can be resolved by further written submissions alone is not accepted).

    16.2. Second, the Claimant would also have wanted the opportunity to provide responsive

evidence to it. For example, at paragraphs 22 to 25 of the (proposed) eighth statement of GCHQ Witness, various technical evidence is provided; it is the Claimant's position that this technical evidence to the Tribunal is inaccurate, and it would have submitted (or will need to submit) evidence from an appropriately qualified individual to explain why. To the extent there is still a factual dispute, there will need to be cross-examination.

16.3. Third, the Respondents are wrong to suggest that the Claimant suffers no prejudice by CLOSED material not having been served prior to the October hearing *"because by its nature the evidence would never have been considered at that hearing in any event"* (§3(b) of the Respondents' application). Such submissions invite the Tribunal in effect to pre-determine all potential issues relating to the opening up or gisting of the proposed new material. Yet these proceedings have repeatedly demonstrated that the process of considering redactions with Counsel to the Tribunal leads to significant opening up of the material; experience indicates that the Respondents' practice is to "overclaim" substantially, that is to claim secrecy over material that is (at least in part) embarrassing and adverse to its case rather than genuinely sensitive.

16.4. Fourth, the Claimant suffers prejudice from delay. It is no answer to state that the Respondents can always submit additional evidence, because there can, if necessary, always be a further hearing. These hearings delay the Tribunal's ability to deliver judgment on the legality of the arrangements. This litigation has already been proceeding for over two years. Further, the Claimant's representatives are all acting *pro bono*; it is a considerable and unfair burden on them repeatedly to be required to attend further hearings because of the Respondents' undisciplined approach to disclosure and evidence.

17. Without prejudice to all of the above (including the Claimant's need to provide responsive evidence and submissions in the event that the evidence is admitted by the Tribunal), the Claimant notes that, if the Tribunal were to consider the proposed evidence *de bene esse*, the OPEN content of the new evidence in any event is of little assistance to the Tribunal or the Respondents' case:

The GCHQ Witness Statement (8th)

17.1. At §§4-6, the statement seeks to qualify the wording of the BCD GCHQ Inspection Report, by suggesting that the sole complaint was the audit logs were not make available "*outside of audit inspections*". With respect, this does not reflect the wording of the amber warning in the inspection report, which expressed a concern regarding the need for "*a more thorough inspection and audit to be undertaken by IOCCO. In particular, to assess what BCD was accessed and the justifications as to why it was necessary and proportionate*".

17.2. At §§7-8, information is provided regarding the paperwork accompanying s.94 directions. It may be that the sole purpose of this evidence is because the Respondents are concerned they may have misled the Tribunal by suggesting that GCHQ triggering directions are always provided together with the Secretary of State's direction, whereas in fact there was a period of around 7 weeks between the two.

17.3. §§9-10 considers profiling activities carried out by GCHQ. The witness accepts that profiling occurs, but in respect of certain individuals rather than entire populations. Other than the fact that profiling occurs by searching across the vast datasets, it is not clear what relevance this has to the issues being determined at the October 2017 Hearing.

17.4. §§11-13 are heavily redacted, and maintain an implausible and belated NCND claim to the holding of social media BPDs (given that the IPCO Audit Summary refers to the holding of "*less structured databases, such as social media data*"). It has therefore been officially confirmed that social media datasets are held by GCHQ as BPDs. In these circumstances, any attempt to maintain an NCND response is improper.

17.5. §§14-16 concern the use of artificial intelligence techniques. The witness indicates that they are used for "*volume reduction*" rather than as the "*basis for decision making*". The Claimant's submission in relation to these techniques concerned the Commissioner's lack of resources to understand and audit the relevant techniques; this evidence therefore does not affect that submission.

17.6. Sections E and F concern '*remote access to BPD and BCD by international parties*' and

'*additional information on the transfer of BPD and BCD*'. These sections of the witness statement are entirely redacted. It is not understood how the Respondents can maintain that these issues were not apparent prior to the October 2017 Hearing – they were the very core of what was to be argued. The attempt to serve such evidence now is improper and should be rejected by the Tribunal. There ought to be finality to litigation.

17.7. §§17-20 are significant, and are considered in more detail at paragraphs 18 to 20 below.

17.8. §§21-25 are addressed at paragraph 16.2 above. The witness provides technical evidence regarding command line interfaces, which the Claimant does not consider to be accurate. If this evidence is admitted, the Claimant will need to prepare and serve expert evidence in response. If the responsive evidence is not agreed, the witnesses will need to attend for cross-examination. It is too late for all of this. Detailed technical evidence ought to be served in good time.

The MI5 Witness Statement (2nd)

17.9. §§5-6 concern social media data. See paragraph 17.4 above.

17.10. §§7-10 concerns artificial intelligence techniques. See paragraph 17.5 above.

17.11. §§11-14 concerns the profiling activities carried out by MI5. See paragraph 17.3 above. The witness also notes that MI5 made 20,728 applications in the last year to access communications data from its BCD. This gives a flavour of the extent of the intrusion of privacy that is posed by this capability without adequate safeguards.

17.12. §§15-17 concerns the fact that, by default, every single BPD is searched, rather than requiring the analyst to consider which BPDs should be searched. The witness merely states that (i) otherwise there would risk intelligence failure, and (ii) urgency requires it. This answer demonstrates that no consideration is being given to those circumstances in which it would not be necessary and proportionate to search every BPD. At §17, the witness also relies on the fact that a 'preview' of data is provided, before all the data is accessed; this, however, does not negate the breach of Article 8 if accessing the data was not necessary and proportionate in the first place.

17.13. §18 assets that the Commissioners had good technical understanding. This does not appear to have been the view held by the Head of IOCCO (Jo Cavan), nor the Interim Head who succeeded her (see letter dated 28 September 2017), who advised Sir Mark Waller to obtain inspectorate, technical and legal resources. He declined to do so. For the reasons set out in the application to re-open, it is difficult to see how in these circumstances his oversight of BPDs was sufficiently effective.

The SIS Witness Statement (5th)

17.14. §5 concerns social media data. See paragraph 17.4 above.

17.15. §§6-9 provide a general description (heavily redacted) of the data held in BPDs by SIS. It is entirely unclear why this evidence is being provided to the Tribunal only now, over a year after the Tribunal's first judgment relating to BPDs.

17.16. §§10-14 concern artificial intelligence techniques. See paragraph 17.5 above.

17.17. §§15-18 describe the search techniques used at SIS. §18 contains very surprising submissions regarding why the default is to search every BPD. First, it is alleged that there is secrecy – even from the analysts – regarding which databases are held, and so the "*analysts do not know when they commence a search what BPDs are available*"; this is plainly no legal justification for infringing privacy rights unnecessarily. Indeed, this system design makes it more likely that a BPD will be searched unnecessarily. Second it is asserted that "*the ability to deselect BPDs at the point of initial query would be disproportionate*"; no explanation is given as to why this simple action would be disproportionate. Third, it is said that this approach is adopted to "*minimise the risk of intelligence failure*"; however, that belies no consideration of whether, on the particular facts of any particular search, the need to search wider across BPDs is or is not likely to lead to intelligence failure.

17.18. §§19-23 concern the auditing carried out by the Commissioners. The Tribunal will no doubt wish to take the details of auditing procedures from the Commissioners themselves from the relevant audit reports; equivalent evidence for MI5 and GCHQ is notable by its absence.

17.19. §24 asserts that the Commissioners had good technical understanding; paragraph

17.13 above is repeated.

17.20. §25 concerns IPCO's question whether an action-on log specific to BPDs would be kept by an agency were sharing to take place. The point of significance for the October 2017 Hearing is that IPCO did not know whether such a log existed, and so no oversight had formerly been provided in respect of it. This submission is unchanged by the new evidence.

18. One part of the Respondents' proposed new evidence is distinct from the rest, because – rather than its purpose being to provide new evidence – it serves to correct inaccurate evidence previously provided to the Tribunal. Paragraphs 17 to 20 of the eighth statement of GCHQ Witness explain that the information regarding administrator rights given to industry contractors as contained in the witness's seventh statement was incorrect:

> *"In my seventh OPEN Witness Statement dated 18th October 2017 I explained in paragraph 10 that for [sic] some systems contractors may have administrator rights (known within GCHQ as a "Privileged User" (PU)). I explained that contractors only have privileged access during the design, build and testing phase and that once that was complete the administrator rights were passed to members of GCHQ staff. This is no longer the case. Following a change in policy introduced a few years ago there are contractors within GCHQ who are administrators or operational systems. …*
>
> *Currently there are about 100 contractors with PU accounts for the main BPD and BCD repositories."*

19. It is obviously right that the Tribunal should be made aware at the earliest available opportunity where a witness has provided inaccurate information to the Tribunal (and, presumably, to IPCO once it began inquiries into this topic). What is striking in this statement is the absence of any explanation of how the witness's statement was so materially inaccurate. There is no explanation of what enquiries were in fact made, what enquiries should have been made, and hence how the error was made. Nor is there any apology for misleading the Tribunal and the Claimant. In these circumstances, it is unclear how the Claimant, and more importantly the Tribunal, can trust the accuracy and correctness of the constant drip-feed of evidence that is being provided to the Tribunal.

20. The Claimant therefore does not object to the admission into evidence of these four paragraphs; indeed, it is essential that the Tribunal receive this correction. However, it is submitted that the Tribunal should properly take this example into account in reaching its

determination whether the Respondent should be permitted to continue its practice of throwing in haphazard evidence in an attempt to respond to each submission the Claimant makes based on the existing evidence.

D. IPCO Correspondence

21. The Claimant understands, from the Tribunal's directions dated 31 October 2017, that IPCO has been asked to comment on the MI5 and GCHQ witness statements served at the October 2017 Hearing, and to provide details to the Tribunal of the review of international sharing by Sir Stanley Burnton. The Claimant further understands from Counsel to the Tribunal that a number of further questions have been put to IPCO arising from its response.

22. On Tuesday 28 November various further materials were disclosed to the Claimant. The materials are of some importance.

23. First, the new material covers the alleged review by Sir Stanley Burnton of sharing of BCD by GCHQ:

    23.1. On the final afternoon of the October 2017 hearing an additional gist was provided to the Claimant and read out: "*Sir Stanley Burnton has conducted a review of GCHQ in relation to international sharing, which has covered any sharing of BCD by GCHQ. It has not yet reported*" (underlining added). The Respondents belatedly disclosed this gist in an attempt to show that all was well in terms of oversight of BCD sharing and that a full review was in hand.

    23.2. Remarkably, IPCO have now explained that the gist provided by the Respondents was false. In an undated letter in response to a letter of 31 October 2017 from the Secretary to the Tribunal[1] IPCO said:

> *"We cannot find any evidence in the corporate record that the question of sharing*

[1] The letter of 31 October from the Tribunal (and other recent correspondence with IPCO) have not been disclosed to the Claimant, even in redacted form. The Tribunal is respectfully invited to remedy this, and to cease its practice of keeping relevant correspondence private until shortly before a hearing, if it is disclosed at all. The presumption, as Article 6 requires, is of open justice. The letter of 31 October cannot (all) be secret, not least because the response has been substantially provided in OPEN. Unless correspondence needs to be secret, it should be promptly disclosed to all parties, at the time it is sent. The issues under consideration are complex and sensitive. Much may turn on the precise questions asked and the wording of the answers given. Further, if the Tribunal's questions turn out to be incomplete, a further round will be required, consuming further time.

communications data was specifically considered by inspectors or the Commissioner in the period between GCHQ's email of 10 June 2016 in reply to Sir Stanley's request for information, and the April 2017 [IOCCO] s. 94 inspection, the report of which was provided to the Tribunal previously".

23.3. Further, IPCO have confirmed that the published s. 94 review prepared by IPCO "*did not cover the sharing of communications data and the report was completed end of June 2016*".

23.4. Sir Stanley Burnton did ask the question whether s. 94 BCD had been shared. The answer is redacted ("*as will have become clear from the recent s. 94 review conducted by your inspectors*, [REDACTION]…") This redaction is not justified. The s. 94 review is a public document. It explains the relevant features of GCHQ's systems at §8.83 ("*GCHQ in the main merges the communications data obtained under a section 94 direction with other datasets containing communications data (for example, related communications data obtained as a consequence of an interception warrant). GCHQ … cannot easily differentiate the source from which the data is derived*…"). Presumably GCHQ are seeking to suggest that because they mix up all communications data, including BCD, Sir Stanley Burnton's audit of sharing of intercept material logically must have covered sharing of s. 94 data. By this sleight of hand, GCHQ can assert that there was in fact oversight of sharing. But if this is what is being suggested in CLOSED, it is also false. As IPCO explain:

"To avoid confusion we feel it is appropriate to clarify one area: The IOCCO inspection referred to in 'the note' actually took place on 14 November 2016. The focus of the inspection was very much in line with the wording of Recommendation 3 (ie. sharing of intercepted material and related communications data). This is reflected in GCHQ's file note…" (underlining in original).

24. Second, the material deals with whether GCHQ were properly considering steps to minimise the level of intrusion from any sharing of datasets. IPCO expressed some concerns during its initial audit. During the October 2017 hearing, GCHQ sent a belated letter to IPCO complaining that IPCO's initial view "*doesn't really reflect the discussions*". IPCO disagree and (by a gist of the letter of 10 November 2017) said:

"We have a different recollection of the discussion relating to the steps that would be taken by partners were sharing to take place. [REDACTION]

During the August inspection, we asked several members of staff about the considerations taken to minimise intrusion were sharing of datasets to take place. This question was intended to see whether officers would take steps to ensure the minimum necessary data was disclosed, as

required by section 6.3 of the arrangements. This question was not answered in a way that gave us confidence that limiting intrusion would be a consideration…".

25. Third, on 8 November 2017, GCHQ wrote to IPCO, without copying in either the Tribunal or the Claimant. Sir Adrian Fulford was asked "*to consider having some sort of appropriate process or protocol by which we, and perhaps the other agencies or wider government, might better liaise with IPCO to manage any circumstances where a piece of litigation, whether in the IPT or elsewhere, could raise issues in relation to oversight activity [and] whether in the current cases there may be any appropriate options for resolving any factual issues which may exist in relation to evidence currently before the IPT*". GCHQ wished to "*reduc*[e] *the risk of unnecessary misunderstandings and reduc[e] the list of issues before the IPT*".

26. The letter was written "*against the background of the Privacy International v SSFCA case*". GCHQ were at pains to emphasise "*we would want to suggest nothing that had, or could be seen to have, any impact on the independence of your office or on the proper conduct of proceedings*". GCHQ offered to provide a copy of the letter to the Claimants "*if that was thought to be appropriate*" by Sir Adrian Fulford.

27. It is plain that GCHQ had no intention of providing this correspondence to the Claimant (or the Tribunal) if IPCO did not insist on this. GCHQ was perfectly happy, if it could persuade IPCO to do so, to agree a secret protocol with IPCO "*for resolving any factual issues*" and reducing "*the list of issues before the IPT*".

28. The letter to IPCO was improper and should not have been sent:

    28.1. The most straightforward test of propriety is to apply the golden rule. Would GCHQ be content for factual disputes about what happened in a relevant meeting between *the Claimant* and IPCO to be resolved in this manner? If the Claimant had acted this way, it would expect to be subject to strong and justified criticism.

    28.2. Disputes of fact between IPCO and GCHQ concerning "*evidence currently before the IPT*" are for the IPT alone to determine.

    28.3. The Commissioner's involvement in IPT proceedings is at the request of the IPT under s.68(4) of RIPA and s.232 of IPA. The Tribunal asks questions and requests information and documents from IPCO. IPCO then respond. The parties should not attempt to intermediate between a statutory request by the IPT and IPCO's answers.

Still less is it proper for a party (especially a state party such as GCHQ) to seek what amounts to prior approval or sign off from IPCO of their evidence, or seek to obtain prior sight of IPCO's evidence and the opportunity to resolve disputes by a secret process.

29. GCHQ seem to have only a limited understanding of basic constitutional principles as to:

    29.1. the proper relationship between a regulated public body and its independent statutory regulator; and

    29.2. the proper role of the IPT (as fact-finder) and IPCO (as a supplier of evidence and information to the Tribunal, at the request of the Tribunal).

30. On 28 November 2017, Sir Adrian Fulford sent the reproof valiant. The correspondence was provided to the Tribunal. A "*potential process or protocol to manage litigation*" would "*not [be] appropriate*". IPCO's role is defined in the legislation to assist the Tribunal as the Tribunal requires. Such assistance cannot be "*the subject of any form of prior agreement, however transparent, especially with a party which is subject to my oversight*". Nor is it for IPCO to "*attempt to reduce the list of issues before the Tribunal*". Any substantive differences are "*for the Tribunal and I do not believe that it would be appropriate to explore options to resolve these. As a robust oversight body I anticipate that there will be further differences of opinion on important matters. That goes with the territory*". Two changes are then proposed. One is redacted. The other is that GCHQ's "*primary witness*" is "*liaising directly and principally*" with IPCO; for obvious reasons "*this is not the most appropriate way of running this litigation*".

31. Finally, in a separate letter of 28 November 2017, IPCO has clarified the statement in its letter of 28 September 2017:

> "*Sir Mark Waller (ISCom) remained wholly resistant to acquiring any inspector resources (or indeed technical/legal resources) to assist him in his duties despite being advised by the then Head of IOCCO, Jo Cavan, and the Interim Head that succeeded her of the benefits of such resourcing in September 2016. ...*
>
> *On being made aware of the issues raised in this litigation the IPC ordered that an immediate inspection should be undertaken of any sharing of BPD/BCD datasets by the UKIC"*.

32. The clarification notes that Sir Mark Waller "*was very clear that he did not believe that he required his own inspectors*" essentially because he considered oversight to be a personal

judicial responsibility. IPCO has or is acquiring investigative, technical and legal resources. IPCO notes that "*it would be incorrect to infer from that statement that the approach adopted by the predecessor organisations were either less than rigorous or effective*."

33. No clarification has been made of the absence of any oversight of algorithms used for searching, machine learning techniques, industry sharing or any of the other matters set out in the Claimant's application to re-open, in particular the question of whether privacy impacts were being effectively minimised.

34. The Claimant does not seek to draw an inference from IPCO's sensible decision to acquire suitable technical support. It instead makes a positive case that key areas were never inspected or audited under the old regime and that was inadequate to meet the requirements of the Convention, applying the Strasbourg case law. The Commissioner was not aware of key relevant areas of activity. This is not surprising because his office was inadequately resourced for him to conduct meaningful audit. Sir Mark Waller plus a single staff member were plainly insufficient to enable the conduct of a thorough and detailed audit and oversight of the agencies. GCHQ's website says it employs "*over 6,000 people*". MI5 currently employs "*around 4,000 people*". MI6 currently has over 2,500 staff. It is simply impossible for a single judge and one assistant to provide meaningful audit and oversight over such a scale of activity.

35. IPCO then cite extensive passages from Sir Mark Waller's reports. The passages tend to support the Claimant's analysis. For example:

    35.1. "*An officer from the compliance team was available to me at all times during my pre-read to clarify any technical points or acronyms*" (p. 22). However, the Commissioner has never analysed any of the processing techniques or algorithms used to extract data from BPDs.

    35.2. "*no one person can act on their own or access information on any of the systems holding sensitive information individually, without someone else knowing about it and without having to go to a more senior officer*" (p. 8). This statement is incorrect, not least in light of the new disclosure that in excess of 100 external contractors had administrator access to systems. Having sufficient technical understanding of how large and complex computer systems can be used (and abused) is a necessary precondition for effective

oversight.

35.3. There appear to have been no audits of the actual use of BPD at GCHQ or MI5 (p. 33).

E. <u>GCHQ 13</u>

36. In GCHQ exhibit 13, as originally disclosed to the Claimant, the identity of certain recipients of section 94 directions was included. The Claimant promptly informed the Respondents. It is agreed that the Tribunal should now rule on whether this material should continue to be redacted.

37. The proper approach to such an application is well-established. What has been read cannot be unread. The Claimant can make a submission that the material the Respondents now seek to redact should not be redacted because its disclosure would not breach Rule 6(1). In circumstances where the Claimant and its lawyers have seen the material, that submission can (and therefore should) be made by the Claimant's lawyers. The Tribunal has power to sit in private as necessary.

38. The same approach is taken in SIAC. For example, see the judgment of Mitting J in SIAC in <u>*XX*</u> at [6]:

> "*For the second time in a SIAC appeal (the first was the Operation Pathway case Naseer and others v SSHD SC/77/2009) the Secretary of State inadvertently disclosed a number of confidential Foreign and Commonwealth Office documents which should have been considered only in closed session in the interest of the international relations of the United Kingdom. But for the inadvertent disclosure, it would have been SIAC's duty to ensure that the information contained in them was not disclosed to XX's Open Advocates… Because the error was not discovered until after Mr Otty had read and considered the documents, an ad hoc solution had to be found to deal with the problem it created. For reasons briefly explained in the confidential (but not closed) judgment, we rejected Mr Otty's submission that the documents should be treated as fully open. That left two alternatives: to require the open advocates to hand back the documents to the Secretary of State and to make no reference to them in questions or submissions in the open session; or, as happened with the consent of all parties in the Operation Pathway case, to deal with the Secretary of State's case on the issue of safety on return and with the submissions of the open advocates (and of the Secretary of State on open matters) on that issue in a private session from which the public and XX were excluded. The power to conduct part of the hearing in private is contained in rule 43(2) of our procedural rules. We are satisfied that it was right to exercise it, to achieve the least bad solution to the problems created by the error. It would not have been fair to Mr Otty or to XX to require him, a short notice, to put out of mind everything which he had learnt from the inadvertently disclosed documents. Fairness required that he should be able to deploy, in questions and submissions, all of the information helpful to XX's case which he had properly acquired. Conducting part of the hearing in private permitted him to do this. It also*

permitted SIAC to fulfil its duty to secure that information was not further disclosed contrary to the interests of the international relations of the United Kingdom provided that appropriate undertakings from the open advocates and those who instruct them were given, which they were."

39. There is no good reason for the identity of these recipients of section 94 directions to be kept secret. The Claimant will make oral submissions at the hearing.

F. <u>Conclusion</u>

40. For all of the above reasons, the Claimant respectfully asks the Tribunal to order that the time for serving new evidence has passed, and therefore to rule that the Respondents' use of the CLOSED process to serve further evidence is improper and impermissible. (And, in the event such evidence is permitted, the Claimant's submissions on the redactions in GCHQ 13 then become relevant).

41. Further, for the reasons set out in the Claimant's application dated 10 November 2017, the Tribunal is respectfully requested to revisit the findings it made regarding Commissioner oversight in the October Judgment, in the light of the true factual position now known to it.

42. The Claimant also notes that the Tribunal has before it the parties' full submissions on the 'delegation' issue and the 'EU transfer' issue. These are matters of law unrelated to any of these further disputes. The Claimant therefore respectfully requests the Tribunal's confirmation that it intends to give judgment on these two issues without delay.

THOMAS DE LA MARE QC

BEN JAFFEY QC

DANIEL CASHMAN

Blackstone Chambers

BHATT MURPHY

29 November 2017

IN THE INVESTIGATORY POWERS TRIBUNAL **Case No. IPT/15/110/CH**

B E T W E E N:

PRIVACY INTERNATIONAL

Claimant

-and-

(1) SECRETARY OF STATE FOR FOREIGN AND COMMONWEALTH AFFAIRS

(2) SECRETARY OF STATE FOR THE HOME DEPARTMENT

(3) GOVERNMENT COMMUNICATIONS HEADQUARTERS

(4) SECURITY SERVICE

(5) SECRET INTELLIGENCE SERVICE

Respondents

CLAIMANT'S APPLICATION FOR RECONSIDERATION OF THE OCTOBER 2016 JUDGMENT

A. Introduction

1. This is the Claimant's application, developed in oral submissions during the hearing 17-19 October 2017, for the Tribunal to reconsider its findings contained in the judgment in these proceedings [2016] UKIPTrib 15_110-CH (the "**October Judgment**") concerning Commissioner oversight.

2. During the course of these ongoing proceedings, but subsequent to the October Judgment, new and additional evidence and information has been disclosed which fundamentally undermines the Tribunal's findings concerning Commissioner oversight. It follows that the Tribunal is requested to correct its factual findings, and its conclusions consequent to them.

B. The October Judgment

3. At [62] of the October Judgment, the Tribunal summarised the ECHR jurisprudence it was applying as follows (emphasis added):

> *"Accordingly, by reference to our considered assessment of the ECHR jurisprudence, we can summarise in short terms what we conclude the proper approach is:*

(i) There must not be an unfettered discretion for executive action. There must be controls on the arbitrariness of that action. We must be satisfied that there exist adequate and effective guarantees against abuse.

(ii) The nature of the rules fettering such discretion and laying down safeguards must be clear and the ambit of them must be in the public domain so far as possible; there must be an adequate indication or signposting, so that the existence of interference with privacy may in general terms be foreseeable.

(iii) Foreseeability is only expected to a degree that is reasonable in the circumstances, being in particular the circumstances of national security, and the foreseeability requirement cannot mean that an individual should be enabled to foresee when the authorities are likely to resort to secret measures, so that he can adapt his conduct accordingly.

(iv) It is not necessary for the detailed procedures and conditions which are to be observed to be incorporated in rules of substantive law.

(v) It is permissible for the Tribunal to consider rules, requirements or arrangements which are "below the waterline" i.e. which are not publicly accessible, provided that what is disclosed sufficiently indicates the scope of the discretion and the manner of its exercise.

(vi) The degree and effectiveness of the supervision or oversight of the executive by independent Commissioners is of great importance, and can, for example in such a case as Kennedy, be a decisive factor."

4. The Tribunal addressed Commissioner oversight in the period prior to avowal at [72]-[82] of the October Judgment (emphasis added):

"Supervision/Oversight

72 This is the other underlying question, and it is not a straightforward picture. We shall consider the position separately in respect of BCD and BPD.

73 What is clear is that, as set out in the Agreed Facts in [19] above, there was no statutory oversight of BPD prior to March 2015, when the Prime Minister gave his Direction as set out in [13] above, and that there has never been any statutory oversight of BCD, save in respect (in both cases) of data obtained under RIPA , which would fall under the responsibility of the ICC under ss.57 and 58 of RIPA , or under the ISA 1994 , in which case the IS Commissioner had responsibility for its oversight under ss.59 and 60 of RIPA .

74 Mr de la Mare submits that any but statutory supervision is wholly ineffective, because of the absence of the statutory powers and duties contained in those sections. We are not persuaded that that is a sufficient answer to the Respondents' case that there was in fact effective independent oversight by the Commissioners which indeed led to the disclosure of errors from time to time, which they caused to be remedied. It is necessary to look at what in fact occurred.

75 As for BCD, dealing with the successive ICCs, Sir Peter Gibson carried out some oversight from 2006, and as from the appointment of his successor, Sir Paul Kennedy, and then Sir Anthony May, there were six-monthly reviews of the databases and of their use. They were provided with a list setting out details of all s.94 Directions and any that had been cancelled,

although in the July Review the current ICC, Sir Stanley Burnton, criticises the lack of codified procedures and a sufficiently accessible and particularised list.

76 Sir Mark Waller as IS Commissioner also included a review of BCD within his responsibility upon his six-monthly visits, and he reviewed the use of the datasets and the case for their acquisition and retention, including necessity, proportionality and the risk of collateral intrusion. He included consideration of BCD in all his Reports between 2011 and 2015. Those Reports and the witness evidence from the SIAs show that he was concerned to carry out a perceptive examination and analysis both of the directions and the use of the data, but he did not carry out a detailed audit.

77 Both Commissioners approved and subsequently reviewed the ("under the waterline") GCHQ Compliance Guide relating to s.94 Directions.

78 From March 2015 Sir Anthony May was asked to take over full responsibility for oversight of BCD, and agreed to do so as from July 2015, provided that he was given additional staff and enabled to carry out the work properly, and it was only by December 2015 that his successor Sir Stanley Burnton was in a position to do so. At this stage his inspectors were provided with full access to the MI5 electronic systems which processed authorisations for access to the database and communications data requests made to the PECNs, and they undertook query-based searches and random sampling of the MI5 system for authorising access to the database and reviewed requests for authorisations relating to the database, and that process, as we have been informed by the ICC's office, continues in place.

79 Sir Stanley Burnton recorded his conclusion in paragraph 2.5 of the July Review that, leaving aside the involvement of the IS Commissioner, oversight by the ICC of BCD prior to 2015 was "limited because it was only concerned with the authorisations to access the communications data obtained pursuant to the directions. The oversight was not concerned with, for example, the giving of the s.94 directions by the Secretary of State (including the necessity and proportionality judgments by the agency or Secretary of State) or the arrangements for the retention, storage and destruction of the data."

80 There were internal audits pursuant to the internal Compliance Guidance, and there was a regular review of the Directions by the Home Secretary (MI5) and the Foreign Secretary (GCHQ). However, we are not satisfied that, particularly given the fragmented nature of the responsibility apparently shared between the Commissioners, there can be said to have been an adequate oversight of the BCD system, until after July 2015. In the absence of the necessary oversight and supervision by the ICC, the secondary roles of this Tribunal and the ISC were no replacement.

81 We turn to BPD, in respect of which it is plain that it was determined as a result of the 2010 report by Mr Hannigan referred to in [70] above (and as later recorded in the Introduction to the Joint Bulk Personal Data Policy of November 2015), that there should then be an improvement in respect of its oversight. Although there had been some oversight of BPD prior to 2010 by the then IS Commissioner Sir Peter Gibson, and Sir Paul Kennedy as ICC included consideration of BPD on his visits between January 2011 and May 2015, the major oversight of BPD was by Sir Mark Waller, Sir Peter Gibson's successor, as from December 2010, on his bi-annual visits. There is a short summary of his supervision in para.56 of the respondents' Amended Response to the claimant's Supplemental Request for Further Information. This does not adequately take into account (because it was prior to their disclosure in open) the content of the Confidential Annexes

to his Reports, particularly those between 2011 and 2013, which we have read, and, for example, in the 2013 Annexe he referred to the nature of his oversight of BPD:

*"*Firstly I require the services to provide me with a list of all data sets held. What I am concerned to do is to assess whether the tests of the necessity and proportionality of acquiring and retaining the data sets has been properly applied in relation to decisions to acquire, retain or delete those data sets. This is normally quite straightforward because each service has an internal review body which considers the retention of data sets on a regular basis and records the decision in writing. These documents are available for me to inspect.*

**I then consider how operatives and which operatives gain access to the data sets and review how the necessity and proportionality (i.e. the justification) of that intrusion is maintained.*

**Finally I review the possible misuse of data and how this is prevented. I consider this to be the most important part of my oversight in that it seems to me that*

**it is critical to that access to bulk data is properly controlled and*

**it is the risk that some individuals will misuse the powers of access to private data which must be most carefully guarded against."*

We have considered the relevant parts of his recent Report of 8 September, since the hearing, and the short written submissions of the parties in relation to it, which we invited. It is apparent that he has continued a rigorous oversight, and he will no doubt consider as such oversight continues, the important suggestions which the claimant makes.

82 Although the oversight by the IS Commissioner was not made statutory until March 2015, as set out in [13] above, the careful recital was that:

"The Intelligence Services Commissioner must continue [our underlining] to keep under review … "

It was thus recognised that the supervision had previously existed. We are satisfied that during the period of Sir Mark Waller's supervision the independent oversight of BPD had been and continued to be adequate."

5. The Tribunal considered the oversight subsequent to avowal in the following passages (emphasis added):

91 The most significant of the points emerging from the July Review and from the claimant's submissions relating to it are these:

(i) There is no present limit on the duration of a s.94 direction, i.e. to the period during which the PECNs should continue to comply with it and provide data. The Commissioner did not make a recommendation that there should be a maximum duration imposed on directions made under s.94 , but advised at para.4.14 its proposed inclusion in a code of practice; such a requirement was not included in his recommendations in s.12 . However, we are satisfied that under the Handling Arrangements (and as appears in the Agreed Facts, at para.19(a)(v)) there are adequate restrictions imposed on the SIAs in relation to the duration for which the data can be retained (thus protecting the interests of the persons whose communications data has been obtained), and

there are also provisions for a review of the directions.

(ii) The Commissioner did recommend that there should be standardised processes for the review of directions, and the reporting of errors. We consider that the comprehensive Handling Arrangements, combined with proper oversight by the Commissioners, do adequately provide effective safeguards.

(iii) There are recommendations by the Commissioner as to what should be included in a s.94 direction. A further specification may in due course be introduced, but in our Judgment, given the adequacy of the safeguards provided by the published Handling Arrangements, such is not necessary for compliance with art.8 …

…

94 Whatever the failings in the system of oversight obtaining prior to avowal of these powers, the system now in operation does, in our judgment, operate effectively. The ICC has conducted a review of the s.94 powers. The lines of demarcation between the two Commissioners in relation to the use of BCD have been agreed. The IS Commissioner has, as referred to in [81] above, recently published his annual Report for 2015, which contains a review of the BPD regime. The fact that these reviews are not uncritical, and, particularly on the part of the ICC, contain recommendations for improvement, indicates that the system of oversight is effective.

95 The only area in which we need to give further consideration relates to the provisions for safeguards and limitations in the event of transfer by the SIAs to other bodies, such as their foreign partners and UK Law Enforcement Agencies. There are detailed provisions in the Handling Arrangements which would appear to allow for the placing of restrictions in relation to such transfer upon the subsequent use and retention of the data by those parties. It is unclear to us whether such restrictions are in fact placed, and in para.48.2 of their Note of 29 July 2016 the respondents submit that the Tribunal is not in a position to decide this issue. We would like to do so and invite further submissions."

6. The Tribunal also appended to its judgment the schedule attached to the Respondents' skeleton argument, which included the following (emphasis added):

"48. §§4.6.4 to 4.6.7 address oversight by the Interception of Communications Commissioner:

"4.6.4 The Interception of Communications Commissioner has oversight of:

a) the issue of Section 94 Directions by the Secretary of State enabling the Intelligence Services to acquire BCD;

b) the Intelligence Services' arrangements in respect of acquisition, storage, access, disclosure, retention and destruction; and

c) the management controls and safeguards against misuse which the Intelligence Services have put in place.

4.6.5 This oversight is exercised by the Interception of Communications Commissioner on at least an annual basis, or as may be otherwise agreed between the Commissioner and the relevant Intelligence Service.

4.6.6 The purpose of this oversight is to review and test judgements made by the Secretary of State and the Intelligence Services on the necessity and proportionality of the Section 94 Directions and on the Intelligence Services' acquisition and use of BCD, and to ensure that the Intelligence Services' policies and procedures for the control of, and access to BCD are (a) are sound and provide adequate safeguards against misuse and (b) are strictly observed.

4.6.7 The Interception of Communications Commissioner also has oversight of controls to prevent and detect misuse of data acquired under Section 94, as outlined in paragraph 4.6.2 and 4.6.3 above."

…

59. §§10.1 to 10.4 address oversight by the Intelligence Services Commissioner:

"10.1 The acquisition, use, retention and disclosure of bulk personal datasets by the Intelligence Services, and the management controls and safeguards against misuse they put in place, will be overseen by the Intelligence Services Commissioner on a regular six-monthly basis, or as may be otherwise agreed between the Commissioner and the relevant Intelligence Service, except where the oversight of such data already falls within the statutory remit of the Interception of Communications Commissioner.

Note: The Prime Minister's section 59A RIPA direction was issued on 11 March 2015. Paragraph 3 of this makes it clear that the Commissioner's oversight extends not only to the practical operation of the Arrangements, but also to the adequacy of the Arrangements themselves.

10.2 [T]he Intelligence Services must ensure that they can demonstrate to the appropriate Commissioner that proper judgements have been made on the necessity and proportionality of acquisition, use, disclosure and retention of bulk personal datasets. In particular, the Intelligence Services should ensure that they can establish to the satisfaction of the appropriate Commissioner that their policies and procedures in this area (a) are sound and provide adequate safeguards against misuse and (b) are strictly complied with, including through the operation of adequate protective monitoring arrangements.

10.3 [T]he Intelligence Services Commissioner also has oversight of controls to prevent and detect misuse of bulk personal data, as outlined in paragraph 8.3 and 8.4 above.

10.4 [T]he Intelligence Services must provide to the appropriate Commissioner all such documents and information as the latter may require for the purpose of enabling him to exercise the oversight described in paragraph 10.1 and 10.2 above."

C. Disclosure subsequent to the October Judgment

7. By letter dated 13 April 2017 from the Tribunal, the Commissioners were asked (based on assumed facts) whether, if a transfer of BCD and/or BPD to another agency or organisation, including a foreign agency, had taken place, they would have regarded it as within their remit, and confirm that, in that event, they would have provided active oversight.

8. The Commissioners responded by letter dated 27 April 2017, stating that it was within the

Commissioners' remit. This did not answer the latter part of the question.

9. Following the Claimant's submissions at a hearing on 5 May 2017, the Tribunal wrote to the Commissioners seeking further information.

10. By letter dated 2 June 2017 from the Commissioners, it was confirmed that *"[n]either Commissioner with responsibility for the intelligence agencies, nor their inspectors, has ever conducted a formal inspection or audit of industry"*.

11. At a hearing in June 2017, the Claimant submitted that the oversight provided to date had not been adequate because the Commissioners had not in fact carried out any audit or oversight of industry sharing. This led the Tribunal to send the letter dated 4 August 2017 requesting additional information from the Commissioners.

12. The response dated 19 September 2017 was provided by the Investigatory Powers Commissioner's Office ("**IPCO**"), which took over from ISCom and IOCCO with effect from 1 September 2017. IPCO stated:

> *"A review of the corporate record of ISCom has established that following the Intelligence Services Commissioner (Additional Review Functions) (Bulk Personal Datasets) Direction 2015 there is no corporate record that the Commissioner audited any sharing of Bulk Personal Data sets (BPD) with UKIC "industry partners" nor is there any material in the corporate record to show that such sharing was considered during an inspection visit of UKIC undertaken by ISCom.*
>
> *A review of the corporate record of the IOCCO can establish that following avowal of the use of Section 94 Telecommunications Act 1984 there is no record that the Commissioner audited any sharing of Bulk Communications Data (BCD) with UKIC "industry partners" nor is there any evidence that such sharing was considered during any inspection visit of the UKIC undertaken by IOCCO.*
>
> *Neither ISCom nor IOCCO were previously informed by GCHQ that the sharing of BPD/BCD data sets with industry partners, as described in the statement of the GCHQ witness supplied with the above letter, had occurred.*
>
> *…*
>
> *On being advised of the issues raised by this case the IPC immediately ordered than an inspection of those UKIC agencies that may share datasets should be undertaken. I can confirm that these inspections have now incurred."*

13. On 13 October 2017, six additional documents were disclosed to the Claimant in OPEN, namely:

    13.1. A 13-page IOCCO inspection report under s.94 TA 1984 issued on 14 September 2017

("**BCD GCHQ Inspection Report**");

13.2. Investigatory Powers Commissioner's Office ("**IPCO**") summary of the 2017 BPD audit dated 15 September 2017 ("**Audit Summary**"); this was further opened up three times during the hearing, with additional disclosure being provided on 18 and 19 October 2017, and an additional gisted sentence being read out in OPEN on the afternoon of 19 October 2017;

13.3. IPCO letter to the Tribunal dated 20 September 2017; this was further opened up during the hearing on 18 October 2017;

13.4. IPCO response to questions prepared by Counsel to the Tribunal dated 28 September 2017;

13.5. Letter from Sir Michael Burton to IPCO dated 2 October 2017; and

13.6. IPCO response email to Sir Michael Burton dated 10 October 2017.

BCD GCHQ Inspection Report

14. There are two 'amber' ("*non-compliance to a lesser extent… remedial action must be taken in these areas as they could potentially lead to breaches*") recommendations made to GCHQ:

14.1. *"It is recommended that GCHQ work with IOCCO to explore how GCHQ's development tools and current audit systems may be modified to enable a more thorough inspection and audit to be undertaken by IOCCO. In particular, to assess what BCD was accessed and the justifications as to why it was necessary and proportionate. Such a development will enhance the oversight given by the Commissioner."*

14.2. The background to this recommendation is that before an analyst conducts a search, he or she must record on GCHQ's systems an authorised purpose (e.g. national security, serious crime or the economic well-being of the United Kingdom), an intelligence requirement and a written justification of the necessity and proportionality of the search. The written justification must be sufficiently detailed to allow another analyst, not directly involved in that area of work, to determine whether it makes a sufficient case for the intrusion into privacy. This is what GCHQ's witness statement served during the hearing in October 2017 correctly described as the "*audit*

standard". However, IOCCO's understanding was that the written justification was not available to them during their attempted audit. GCHQ's position is that it was not made available routinely, but would have been made available on request. The correct position is irrelevant. The problem is that IOCCO have never looked at any justification for access and therefore cannot have carried out a meaningful audit.

14.3. Further, IOCCO had no access to the actual search terms used (or if IOCCO did in theory have access, it did not in fact obtain such access). This mean that IOCCO could not possibly have made any assessment of whether the search was necessary or proportionate. For example, a search may have been inappropriate or swept too wide. IOCCO would not have been able to assess this. The mere fact that a search (for an unknown selector or search term) was said by an analyst to have been made for national security purposes and a particular intelligence purpose is plainly insufficient to determine whether it was lawful. It is necessary to look at the search terms utilised, the written justification given by the analyst and the results of the search. None of these materials were available to the auditors. Such 'audit' is audit in name only. It provides no meaningful check that searches were in fact being conducted for proper purposes, or that they were in fact necessary and proportionate.

14.4. The ability for the Commissioner to examine and audit what BCD was accessed and why it was necessary and proportionate is self-evidently a precondition to any meaningful oversight; concerns in this regard are therefore central to the lawfulness of the regime. If the records kept are not in fact accessible and accessed, then the Commissioner cannot provide adequate oversight.

14.5. The second recommendation has been redacted in its entirety. It relates to the "*disclosure of BCD in its entirety or as a subset outside of the intelligence services*".

Audit Summary

15. IPCO confirms that an immediate oversight inspection was necessary in response to the matters raised in this claim.

16. As at 15 September 2017, IPCO had been able to consider only phase one of its review, addressing the matters identified in paragraph 1 of the Audit Summary; the second phase

will consider "*the use of contractors, secondees and integrees by the agencies*". To date, there has not been *any* review by the Commissioner(s) of these practices.

17. The further opened up 'Overview of findings' stated in paragraph 4 that:

> "*… it was felt that GCHQ fell short of providing IPCO complete assurance of their compliance in some areas. Those included:*
>
> - *That when questioned staff were not considering steps to minimise the level of intrusion from any sharing (Handling arrangements 6.3).*
> - *Identifying and classifying BPDs appeared to cause some difficulty because of the complexity of GCHQ's acquisition methods. There is some question of whether all BPDs held by GCHQ have been adequately identified, while some datasets identified as BPDs were not.*
> - *GCHQ have not provided clear and specific briefings to the Foreign Secretary, other than via the Choice Letter. There is some question of whether the Foreign Secretary has provided ministerial oversight in this area.*"

18. Paragraph 17 stated: "*When questioned, staff at one agency were not able to demonstrate any work to ensure that only as much of the information as is necessary is disclosed were any sharing to take place (6.1). That agency explained that due to the complexities of some unstructured datasets this might not be possible.*"

19. Paragraph 19 identifies "*a concern*" relating to "*contractors, industry partners and academics and, to an extent, [REDACTION]*" (the Claimant infers the reference is to secondees and/or integrees as these are the categories of staff referred to as subject to further inquiry in paragraph 2). However, further investigation by the Commissioners will need to wait until the second phase of the review. This concern (inappropriate and uncontrolled/uncontrollable sharing with industry third parties), as at 15 September 2017, therefore remained without any proper oversight.

20. Paragraphs 20 and 21 refer to the fact that some system contractors are given administrator rights. It is noted that a contractor with system access rights could enter the Agencies' system, extract data, and then cover their tracks. The Agencies would be none the wiser.

21. On the final afternoon of the hearing, the following additional gist was provided: "*Sir Stanley Burnton has conduct[ed] a review of GCHQ in relation to international sharing, which has covered any sharing of BCD by GCHQ. It has not yet reported*" (Day 3, p. 46, ln 13-15). It

therefore appears that this was the first, and presently incomplete, review of international sharing by the Commissioners, which the Tribunal is awaiting to hear whether IPCO will take over, complete and publish.

Letter dated 20 September 2017

22. The Commissioner has noted that it has been necessary to consider sharing *beyond* that with industry partners, foreign partners and UK law enforcement. There therefore appears to be a yet further category of sharing of which the Claimant is unaware.

23. In respect of industry partners, the Commissioner notes that neither ISCom nor IOCCO was "*made aware of any UKIC practice of the UKIC's sharing BPD/BCD data sets with industry partners*". Nor is there any material in the corporate record of ISCom or IOCCO to indicate that the issue of any potential sharing with UK law enforcement partners was considered or inspected. In respect of foreign partners, IPCO noted that "*there is material in the corporate record of ISCom and IOCCO that ISCom and IOCCO addressed whether any sharing had taken place*".

24. In response to question 1, IPCO notes that the fifth GCHQ witness statement is misleading in referring to a briefing of Sir Mark Waller in October 2015 and April 2016: the Commissioner was informed that GCHQ worked with industry partners, but "*he was never made aware of any practice of GCHQ sharing bulk data with industry*" (emphasis added).

Letter dated 28 September 2017

25. IPCO identifies, in frank and highly critical terms, the limited oversight that ISCom was previously able to perform, due to the former Intelligence Services Commissioner's refusal to take on the resources required for the role to be carried out effectively, despite pleas to the contrary from senior officials:

> "*Sir Mark Waller (ISCom) remained wholly resistant to acquiring any inspector resources (or indeed technical/legal resources) to assist him in his duties despite being advised by the then Head of IOCCO, Jo Cavan, and the Interim Head that succeeded her of the benefits of such resourcing in September 2016. …*
>
> *On being made aware of the issues raised in this litigation the IPC ordered that an immediate inspection should be undertaken of any sharing of BPD/BCD datasets by the UKIC*".

Email dated 10 October 2017

26. By the email dated 10 October 2017, IPCO responded to the Tribunal's request that it address the proportionality questions set out in the Claimant's skeleton argument.

27. It is noted that neither IOCCO nor ISCom had any technical understanding of industry partners' processing techniques; "*IPCO, in contrast, is acquiring these resources*". It is also noted that the Commissioners conducted no audit of the Respondents' artificial intelligence techniques.

D. Analysis

(i) Effect of the new disclosure on the October Judgment

28. The above disclosure is plainly material to the findings that the Tribunal made in the October Judgment.

29. The Tribunal was unaware that the Commissioner's oversight over one of the key *Weber* categories was missing, in that there was no active oversight over key aspects of disclosure of BCDs and BPDs.

30. The IOCCO inspections of BCD did not consider the justifications as to why its access was necessary and proportionate, nor were they assessing what BCD was in fact accessed (irrespective of the justification given for it), nor did IOCCO examine the search terms used. It follows that the oversight being exercised by IOCCO over BCD could not in fact have been sufficient.

31. The Intelligence Services Commissioner repeatedly refused to take on adequate resources for his role to be carried out effectively, despite pleas to the contrary from senior officials; nor did any of the Commissioners have any technical understanding of processing techniques. Nor had they any understanding or technical ability to audit automated algorithms, modern artificial intelligence processing techniques. In contrast, IPCO is now acquiring these resources. No attempt was made by either Commissioner to audit the "privacy footprint" – to consider whether the level of intrusion into privacy could reasonably have been reduced.In light of the above information coming to light, the account provided by the October Judgment is materially incomplete. Further, various of the

Tribunal's conclusions in the October Judgment are not correct on the evidence now available. For example:

31.1. The finding at [76] that Sir Mark Waller was able to review the necessity and proportionality of BCD. How could he have done so without looking at *any* queries, justifications or results of searches?

31.2. The finding at [81] that the oversight of BPD exercised by Sir Mark Waller was "*rigorous*", and the finding at [82] that "*during the period of Sir Mark Waller's supervision the independent oversight of BPD had been and continued to be adequate*". This conclusion cannot be reconciled with the failure to conduct any audit of modern processing techniques (including the use of algorithms and artificial intelligence techniques) or the failure to accept or obtain appropriate technical support for such audit.

31.3. The finding at [91(ii)], in respect of BCD, that the Handling Arrangements "*combined with proper oversight by the Commissioners*" adequately provided effective safeguards.

31.4. The finding at [94] (and implied at [80]) that the system of oversight over BCD from July 2015 "*does, in our judgment, operate effectively*".

32. Such findings are of broader significance to the finding of compatibility with the ECHR following avowal in respect of both the BCD and BPD regimes. As the Tribunal recognised at [62(vi)], applying *Kennedy*, the oversight exercised by a Commissioner can be a decisive factor as to ECHR compliance. Given that effective Commissioner oversight was lacking until IPCO assumed responsibility (at the earliest), the regimes cannot have been in accordance with the ECHR until such point.

(ii) Tribunal's vires to re-consider the October Judgment

33. To the extent it is contended by the Respondents that the Tribunal lacks the power to revisit its findings in the October Judgment, this is denied.

34. First, the October Judgment reflected, in effect, consideration of a preliminary issue by the Tribunal, in respect of proceedings that are *still ongoing*. It follows that the Tribunal is not *functus officio* in respect of the proceedings, and so is entitled to revisit its findings in determining the matters pleaded.

35. Second, there can be no allegation that an issue estoppel arises, given that these proceedings arise in a context akin to judicial review. See, for example, the judgment of Dunn LJ in R v Secretary of State ex p Hackney BC [1984] 1 WLR 592 (CA), in which he expressed the view that *"the Divisional Court was right to hold that the doctrine of issue estoppel cannot be relied on in applications for judicial review … Like the Divisional Court, I adopt the passage from Professor Wade's* Administrative Law, *5th ed. (1982), p. 246 …"*. The relevant part of the Divisional Court's judgment ([1983] 1 WLR 524 at 539) was as follows:

> *"We respectfully adopt a passage from Professor Wade's treatise on Administrative Law , 5th ed. (1982), p. 246 where he writes:*
>
> *"in these procedures the court 'is not finally determining the validity of the tribunal's order as between the parties themselves' but 'is merely deciding whether there has been a plain excess of jurisdiction or not.' They are a special class of remedies designed to maintain due in the legal system, nominally at the suit of the Crown, and they may well fall outside the ambit of the ordinary doctrine of res judicata. But the court may refuse to entertain questions which were or could have been litigated in earlier proceedings, when this would be an abuse of legal process; and in the case of habeas corpus there is a statutory bar against repeated applications made on the same grounds."*
>
> *We also quote a short passage from Professor de Smith's Judicial Review of Administrative Action , 4th ed. (1980), p. 108:*
>
> *"It is difficult not to conclude that the concept of res judicata in administrative law is so nebulous as to occlude rather than clarify practical issues, and that it should be used as little as possible."*
>
> *The principle that relief under Order 53 is granted in discretion only, as well as the obligation to obtain leave from the court before an application for relief can be made, seems to us to be contrary to the concept of a final determination of an issue between parties which is at the root of issue estoppel. The court, under this jurisdiction, is fully able to give effect to the rule of public policy that there should be finality in litigation, which underlies the doctrines of issue estoppel in civil litigation and the prohibition against double jeopardy in criminal prosecution, by the use of its powers to refuse to entertain applications and to refuse to grant relief in the process of judicial review of administrative acts or omissions: this is particularly but not exclusively so when the application may be oppressive, vexatious or an abuse of the process of the court."*

36. Third, and in the alternative, even if there could be some form of issue estoppel by virtue of the Tribunal's findings in the October Judgment, the present facts would fall within an exception to it. See the test articulated in Arnold v National Westminster Bank Plc (No 1) [1991] 2 AC 93 (HL) at 109 *per* Lord Keith:

> *"In my opinion your Lordships should affirm it to be the law that there may be an exception to issue estoppel in the special circumstance that there has become available to a party further material relevant to the correct determination of a point involved in the earlier proceedings, whether or not that point was specifically raised and decided, being material which could not by*

reasonable diligence have been adduced in those proceedings."

37. The Claimant undertook all reasonable diligence to adduce the relevant evidence before the Tribunal in advance of the October Judgment. Many of the newly-disclosed materials were first created after the October Judgment; however, they pertain to relevant facts in existence at the time of the October Judgment, which the Respondents did not disclose.

38. Further, following the Court of Appeal's judgment in *Kamoka v Security Service* [2017] EWCA Civ 1665, it is no answer to suggest that the true facts could have been made known to Counsel to the Tribunal, as there is no privity of interest between the Claimant and the Counsel to the Tribunal's position in CLOSED hearings.

E. Conclusion

39. For all the above reasons, the Tribunal is respectfully requested to revisit the findings it made regarding Commissioner oversight in the October Judgment, in the light of the true factual position now known to it.

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BHATT MURPHY
10 November 2017