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Investigatory Powers Tribunal

Ref: IPT/15/110/CH

FAO – Susan Cobb – your letter 31/10/2017

Gists are shown in *italics and double underlined

Sirs,

Privacy International v Secretary of State for Foreign and Commonwealth Affairs and Others (Bulk Communications Data and Bulk Personal Datasets)

Further to your request for additional assistance in the above matter we would comment in CLOSED as follows:

A. Comments on witness statements

You asked for our comments on the witness statements provided by GCHQ and MI5 during the hearing.

With regards to the MI5 statement of 16 October 2017, we can confirm that MI5's policy around the authorisation of disclosure of BPD outside of the SIA was part of a series of policy documents shared with Sir Mark Waller when he took up responsibility for oversight of BPD. [REDACTION] Sir Mark Waller was aware of, and content with, MI5's practice of sharing data with SIS and GCHQ.

With regards to GCHQ's statement of 16 October 2017, based on their letter to us of 16 October 2017, we replied to GCHQ on 9 November. That reply is attached to this letter (attached as **Annex 1**), and I hope summarises our position. Please note that in the copy attached we have redacted the name of the IPCO inspector who undertook the inspection.

B. Review of International Sharing

With regard to "the review of international sharing by Sir Stanley Burnton" referred to in Open by James Eadie QC on the 19 October 2017 our closed response is as follows:

The inspection of GCHQ by the Interception of Communications Commissioner (hereafter IOCCO) in November 2015 (attached as **Annex 2**) states -

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“IOCCO has decided to initiate a review of the arrangements in place within GCHQ for the sharing of intercepted material and related communications data (RCD) with foreign partners in order to review compliance with the s.15 safeguards.”.

Paragraph 4 of the inspection report (entitled ‘Partner Compliance’) contextualises the background for the decision to initiate a review and refers exclusively to ‘oversight of material and data that is intercepted under RIPA by GCHQ and shared with foreign partners’. The relevant recommendation within the report states as follows:-

Recommendation 3: GCHQ to facilitate a review by IOCCO of the arrangements in place for the sharing of intercepted material and related communications data (RCD) with foreign partners. GCHQ to provide IOCCO with a schedule / table containing the above listed detail by 31st May 2016. GCHQ to advise whether any other matters are worthy of consideration in order to ensure a comprehensive review.

It is noted that the above IOCCO recommendation makes no direct reference to either material or data acquired under either S.94 or Chapter 2 of Part 1 of RIPA. However, when the Report outlines the information that is required from GCHQ prior to this review commencing [REDACTION], this is followed by 2 supplementary questions related to communications data (referring to both S.94 directions and data acquired under Chapter 2 of Part 1 of RIPA).

In apparent recognition of the amount of work required by GCHQ to respond to this recommendation and to prepare for the subsequent review, the deadline for providing the information was 31st May 2016. By agreement, this deadline was extended to 10th June 2016 and, due to the volume of material concerned and IT issues, the bulk of the documentation was received by IOCCO on the 15th June 2016.

In an email received on 10th June 2016 (attached as **Annex 3**), GCHQ set out their response to Recommendation 3 arising from the November 2015 inspection. Again, this refers to ‘a review by IOCCO of the arrangements in place for the sharing of intercepted material and related communications data (RCD) with foreign partners.’ However, whilst the tables and spreadsheets relate primarily to intercepted material and related communications data, the covering letter also provides the following response to the 2 supplementary questions about sharing of material or data obtained under S.94 directions or acquired under Chapter 2 of Part 1 of RIPA:

“Supplementary questions on s.94 and RIPA Part 1 Chapter 2 communications data

2. In addition to the list of requirements set out in paragraph 1, there were also some supplementary questions relating to communications data:

- 1. Is any communications data obtained pursuant to any s.94 direction shared with any foreign partner?*
- 2. Is any communications data acquired under Chapter 2 of Part 1 of RIPA shared with any foreign partner?*

In respect of the first of these questions, as will have become clear from the recent s.94 review conducted by your inspectors, [REDACTION]

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In answering these supplementary questions concerning S.94 and RIPA 2000 Part 1 Chapter 2 Communications Data, GCHQ have referred above to the "recent S.94 review" conducted by IOCCO inspectors. This review commenced in October 2015 and concluded in July 2016 with publication of the review. That review did not cover the sharing of communications data and the report was completed end of June 2016.

We cannot find any evidence in the corporate record that the question of sharing 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 S.94 inspection, the report of which was provided to the Tribunal previously.

To avoid confusion we feel it appropriate to clarify one area: The IOCCO inspection referred to in 'the note' actually took place on 14 November 2016. The focus of this 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 of the inspection that James Eadie QC refers to in 'the note' (attached as **Annex 4**) This makes no direct reference to sharing of material or data obtained under S.94 directions or acquired under Chapter 2 of Part 1 of RIPA. The following is an extract from our wider report of GCHQ interception inspections conducted in 2016 and covers the inspection that took place on the 14th November:

9. Partner Compliance

When the IP bill comes into force GCHQ would be writing to all partner agencies to inform them and confirm that partners would continue to comply with the new legislation and retention and deletion requirements were sharing to take place.

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I trust the above information is sufficient to deal with the matters raised. Please revert if you require additional assistance.

Yours faithfully

Investigatory Powers Commissioner's Office

Attachments:

Annex 1 - Letter to GCHQ from IPCO dated 10th November 2017 replying to their letter of 16 October 2017.

Annex 2 - The inspection Report of GCHQ by the Interception of Communications Commissioner - November 2015.

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Annex 3 – Copy email 10th June 2016 with attachments - GCHQ set out their response to Recommendation 3 arising from the November 2015 inspection
Annex 4 - GCHQ File Note dated 14 November.

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