

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

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CLAIMANT'S NOTE ON SUPPLEMENTAL  
DISCLOSURE  
for hearing commencing 17 October 2017

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1. On 13 October 2017, six additional documents were disclosed to the Claimant in OPEN, namely:
  - 1.1. A 13-page IOCCO inspection report under s.94 TA 1984 issued on 14 September 2017 ("**BCD GCHQ Inspection Report**");
  - 1.2. Investigatory Powers Commissioner's Office ("**IPCO**") summary of the 2017 BPD audit dated 15 September 2017 ("**Audit Summary**");
  - 1.3. IPCO letter to the Tribunal dated 20 September 2017;
  - 1.4. IPCO response to questions prepared by Counsel to the Tribunal dated 28 September 2017;
  - 1.5. Letter from Sir Michael Burton to IPCO dated 2 October 2017; and
  - 1.6. IPCO response email to Sir Michael Burton dated 10 October 2017;
2. This additional disclosure demonstrates, in stark terms, the failure of oversight over the sharing of BCD and BPD to date, and the urgency with which the Commissioner has felt the

need to respond upon discovering (as a result of these proceedings) that such sharing was occurring. The suggestion that the safeguards in place satisfied the requirements of Article 8 ECHR is, particularly in light of this supplemental disclosure, untenable.

3. The Tribunal's attention is particularly drawn to the following:

#### BCD GCHQ Inspection Report

4. The BCD Inspection Report identifies significant improvements to the BCD regime, at least at GCHQ, resulting from Sir Stanley Burnton's report, and, no doubt, from this litigation – including, for example, the fact that the s. 94 directions now specify the data required to be disclosed thereunder.

5. 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:

5.1. *"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."* The ability for the Commissioner to examine and audit what BCD was accessed and why is self-evidently a precondition to any meaningful oversight; concerns in this regard are therefore central to the lawfulness of the regime. If accessible records are not kept that can be audited, then the Commissioner cannot provide adequate oversight.

5.2. 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"*. This concern is therefore central to the issues to be determined by the Tribunal in this hearing. The Tribunal is invited to consider whether the redaction is justified in its entirety. If so, the issue will need to be the subject of submissions in CLOSED.

#### Audit Summary

6. IPCO confirms that an immediate oversight inspection was necessary in response to the matters raised in this claim. As noted in the Claimant's Reply, such a position is inconsistent

with the Respondents' suggestion that such oversight was not necessary because sharing is allegedly limited.

7. To date, IPCO has been able to consider only phase one of its review, addressing the matters identified in paragraph 1; the second phase will consider *"the use of contractors, secondees and integrees by the agencies"*. This second phase forms a substantial part of the issues the Tribunal will be required to determine at this hearing; it is telling that, to date, there has not been any review by the Commissioner(s) of these practices.
8. IPCO notes, in paragraphs 3 and 4, *"some concern that GCHQ may not be adequately identifying BPDs"*. If GCHQ has not adequately identified its BPD holdings to the Commissioner, it is impossible to see how those holdings can have been properly authorised or overseen.
9. Paragraph 6 is gisted to indicate that the Intelligence Services Commissioner noted in June 2017 that MI5's acquisition forms met current requirements. The position prior to June 2017 is not considered, but is relevant to the issues to be determined in this claim.
10. Paragraph 8 refers to BPDs containing *"sensitive medical data or financial details"*. It also refers to BPDs of unstructured *"social media data"* (which are also referred to in paragraph 7 obliquely as *"unstructured databases"* whose lines of content are *"complicated to quantify"* because of their highly varied content). Such databases are highly intrusive, and will contain information at the very core of an individual's private life.
11. The gist at paragraph 11 is concerning. It is first identified that *"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"*. Nevertheless, following *"conversations"*, it has been concluded that *"there are no concerns about the proportionality of sharing as considered by"* that agency. Such a conclusion is surprising given the concern initially identified. The assessment of proportionality must be carried out systematically and thoroughly on the basis of evidence; proportionality cannot be demonstrated merely on the Agencies' say-so.
12. Paragraph 13 identifies *"a concern"* relating to *"contractors, industry partners and academics and, to an extent, [REDACTION]"* (we infer 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 the date of this claim, therefore remains without any proper oversight.

13. Paragraphs 14 and 15 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. Seemingly even after the critical and chronic embarrassment caused by Edward Snowden, no safeguards are in place to prevent misuse of the systems by third party contractors (whether or not their motives were or are as altruistic as Edward Snowden's). Quite apart from the absence of controls, there is no evidence of any oversight or audit of third party use of administrator rights.

Letter dated 20 September 2017

14. 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. The Tribunal is invited to consider this further category of sharing, if necessary in CLOSED.
15. 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.
16. 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). The Respondents therefore cannot place any reliance on these Commissioner briefings to suggest that there was oversight of industry sharing.

Letter dated 28 September 2017

17. 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

18. 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.
19. 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.
20. In respect of question (b) regarding an audit of the "privacy footprint" of the use of BPD and BCD, IPCO takes a high-level approach to answering the question, referring to IOCCO and ISCom's general consideration of the proportionality case in authorisation documents. This answer stands in contrast to the similar question answered in IPCO's letter dated 20 September 2017, regarding the "privacy footprint" of sharing (Q10), where it is noted that there is no material to indicate that the Commissioners considered the 'privacy footprint' in relation to sharing.
21. Question (e) asks what Commissioner oversight there has been regarding 'profiling' of individuals. The response cross-refers to the answer to question (a); however, it is unclear how this answers the question, given that (a) related to 'failed searches'.

Conclusion

22. It is not understood, in the light of the admissions of lack of oversight to date, how the Respondents contend that the regimes could be compliant.

**THOMAS DE LA MARE QC**

**BEN JAFFEY QC**

**DANIEL CASHMAN**

**Blackstone Chambers**

**BHATT MURPHY**

**16 October 2017**