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Investigatory Powers Tribunal
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29 March 2017

Dear Sirs

Privacy International v The Secretary of State for Foreign and Commonwealth Affairs and Others, IPT/15/110/CH

We refer to the 'Open Response to the Claimant's Request for Further Information Relating to Searches Dated 22 February 2017' dated 21 March 2017.

We regret that the response is inadequate and does not answer a number of the questions posed. We understand from correspondence between Counsel to the Tribunal and the Respondents that no closed response has been served either. In consequence, adequate responses to the questions are not before the Tribunal, even in closed.

The structure of the response is novel and unhelpful. The proper method of responding to a RFI is to answer each question, in turn, after identifying the question posed. This avoids the need for extensive cross-referencing and enables the Tribunal to check that each request has been properly answered. This approach has not been taken. The questions posed are answered in groups, without identifying the questions, and generally not answering the actual question. It is assumed that this has not been done accidentally.

The context in which the RFI was served is the IPT's judgment that pre-avowal use of BPD and BCD was unlawful. In consequence, the retention of data about the Claimant in either type of dataset was unlawful. The Tribunal directed searches so that it could apply its judgment to the facts of the Claimant's case. If data was retained or processed pre-avowal, a determination will be made in the Claimant's favour.

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The problem is that it may have been deleted since the claim was brought. No procedures were put in place to ensure that relevant data was retained. This means that the Tribunal will need to make findings of fact, on the balance of probabilities, as to whether data was held but has now been deleted. To make such findings, the Tribunal will need to have detailed understanding of what was (and was not) likely to have been retained and the circumstances in which data is likely to have been deleted. This is the central purpose of the RFI.

Taking the questions in turn, questions 1-4 seek to discover whether it is likely that data has been deleted. GCHQ's response is simply that this is "possible" without condescending to any explanation, open or closed. This is an inadequate response because the Tribunal must make a finding of fact as to the extent of possibility. If it is more likely than not that data has been deleted, a determination must be made in favour of the Claimant. So the Respondents need to give proper particulars of the reason for their answers. This was the purpose of the detailed questions asked, none of which have been answered. For example, there is no explanation of the relevant data retention periods, the deletion arrangements, the likely date and circumstances of deletion.

No response has been given to question 5. It is now admitted that MI5 held data on an unauthorised BPD, which was of course unlawful. However, no attempt has been made to identify the data held, the degree of intrusiveness, the time period, whether the data was searched electronically or otherwise processed, or whether the data was shared with any foreign liaison service, other government department or commercial/academic partner. All these questions were asked, but no attempt has been made to answer them.

The same questions were asked (and not answered) in relation to each of the other agencies. The RFI response suffers from the same defects.

Finally, the Claimant asked what steps were taken pursuant to the Government's published guidance on disclosure and the duty of candour to ensure that the Defendant departments preserved relevant documents and suspended automatic document destruction policies when the claim was issued (question 22). The response given is simply "*if the question that is asked is whether all deletion of BPD and BCD data held by all three agencies was suspended... because this claim had been issued, the answer is no*". However, that was not the question asked. The question asked was what steps were taken to ensure that materials relevant to this case (i.e. the Claimant's data) were preserved and not deleted. This question has not been answered. In particular, the Claimant asked what steps the Government Legal Department took to ensure that the Respondents understood the importance of preserving relevant materials. Again, this important question has not been answered.

The Tribunal is invited to:

1. Direct the re-service of the reply, in the ordinary format, setting out a full and complete response to each question.

2. Direct the production of a closed response, answering any question which the Respondents contend cannot be answered in open.

Yours faithfully

A handwritten signature in black ink, consisting of a looped 'B' followed by 'hatt' and 'Murphy'.

Bhatt Murphy

c.c. Government Legal Department

