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3 April 2016

Dear Sirs

BPD IPT

We write in relation to the Claimant's first and second letters dated 29 March 2017. Their letters respectively concern the Respondents' responses dated 21 and 28 March 2017 to requests for further information.

Claimant's first letter of 30 March 2017

The Respondents do not accept the Claimant's criticisms of their response of 21 March 2017 to the Claimant's Request for Further Information Relating to Searches dated 22 February 2017 ("the Searches RFI"). The Respondents have disclosed not only the matters in that response, but also OPEN and CLOSED search reports dated 17 February 2017. In undertaking the search process they have carried out a substantial amount of work, which took (as indicated at §3 of the response to the Searches RFI) in excess of 30 working days. The searches were ordered to enable the Claimant's individual complaint (not its systemic claim) to be determined. The totality of the information contained in the response to the Searches RFI, and the OPEN and CLOSED reports, provides the Tribunal with a sufficient basis to reach a conclusion whether or not to make a determination in the Claimant's favour on that individual complaint. It is clear from the Claimant's letter that that is what the Claimant ultimately wishes to ensure. The Claimant's request for yet further information seeks substantially more than is needed for that purpose and is thus by definition disproportionate.

The Respondents have also sufficiently addressed the Claimant's request about steps taken in relation to the duty of candour and preservation of relevant evidence, a request clearly designed to establish whether material which would normally fall for deletion under the Respondents' (lawful) deletion policies has been preserved or deleted. The Respondents' response could not have been plainer: "*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.*" The Claimant is well aware that no attempt was made at an early stage of this litigation to identify BPD / BCD relating to the Claimant – the Respondents made it quite clear in the discussions leading to these searches that they had never previously conducted searches of raw BPD or BCD for litigation purposes, whether in this case or any other. In those circumstances, the Claimant's questions about steps taken by the Respondents and their advisers with respect to the duty of candour have been sufficiently answered.

The Claimant's request for a response in a different format from that provided is also unnecessary. The Respondents are perfectly entitled to respond in a proportionate (and, the Respondents contend, entirely

coherent and clear) manner to the Claimant's multiple requests. That is particularly so in circumstances where the Claimant has served several requests for further information in these proceedings, each with numerous individual requests and sub-requests. The Respondents ought not to be criticised for responding in a proportionate manner.

Finally, the Respondents would add that the extent and nature of the analysis that the Tribunal will need to conduct on the search results may yet change, depending on its ruling as to the EU law and other outstanding issues. That is a further reason why requiring the Respondents to do yet further work in relation to the search results at this stage would be disproportionate. Indeed, the Respondents understood this to be the reason why the Tribunal indicated at the last hearing that it did not wish to hear further argument on any issues relating to searches until after it has determined the outstanding substantive issues.

In the circumstances, the Tribunal should decline the Claimant's invitation to direct the re-service of the Response to the searches RFI. The Tribunal should also decline to make an order directing the production of a closed response, answering any question which the Respondents contend cannot be answered in open. The Respondents have already provided the Tribunal with their full search reports in CLOSED. The Respondents have answered the Claimant's requests in OPEN and do not in the circumstances consider that it is necessary or appropriate to provide any further CLOSED response.

Claimant's second letter of 30 March 2017

In its second letter the Claimant deals with the Respondent's Open Response of 28 March 2017 to the Claimant's Request for Further Information and Disclosure dated 7 March 2017 ("the 7 March RFI").

The Respondents do not accept that their response to the 7 March RFI was inadequate. That 12-page response demonstrates no reluctance to answer the questions put, but rather engages with those questions in a proportionate but nonetheless detailed way. The Claimant's complaint about the format of the Response is again not justified. The Respondents have provided lengthy, informative and clear responses to the requests. The format enables the Tribunal and the Claimant to see the Respondents' detailed position in one place (see pages 6-10) rather than piecemeal in a series of answers to individual questions. It is thus not only entirely proportionate but also more helpful than the format for which the Claimant has expressed a preference. As stated in respect of the response to the Searches RFI, the Claimant's request for a different format is simply unnecessary, and risks unnecessarily adding to the disproportionate work already caused by the numerous requests made by the Claimant in these proceedings.

In relation to Request 1(d), the Claimant's second letter fails to identify any proper basis for objection to the response. In particular, the Respondents have already confirmed in response to Requests 1(a)-(c) that it accepts that (were the Data Protection Directive and/or e-Privacy Directive to be engaged, which is denied) the disclosure by transmission from the PECN to the SIA of BCD, taken with any minimal adaptation or alteration to separate or retrieve that data from the PECN's other data holdings, would amount to "data processing" within the meaning of Article 2(b) of the Data Protection Directive. The Respondents have also made clear that no storage or retention requirements are imposed upon the PECN by a s.94 direction. In answer to Request 1(d), a CLOSED response has been served.

In answer to the specific points raised by the Claimant in its second letter, the Respondent confirms:

(i) The Respondent has not asserted that the only processing that takes place is transfer. It has accepted that a s.94 direction may also require a PECN to adapt or alter its data in order to separate or retrieve the data which is required to be transmitted from that which is not. However, the Respondent has described such acts of adaptation or alteration as "*minimal*".

(ii) The term "*extraction*" does not appear in Article 2(b) of the Data Protection Directive. The Respondents have already provided such particulars as can be provided in OPEN in relation to the operations which do appear, including as to "*adaptation or alteration*", "*retrieval*" and "*disclosure by transmission*".

(iii) It is unclear on what basis the Claimant asserts that "*retention also appears to take place*", in particular in the face of the Respondent's express statements that a s.94 direction does not require

the retention of data by the PECN, and that the Respondents do not request any such retention either.

(iv) The Respondents deny that the cost of such work is a reasonable proxy for the extent of the processing.

(v) The Respondents deny that disclosure of any documents recording any consultations with and any representations made by PECNs about s.94 BCD notices is required. The Respondents have already explained the nature and extent of processing required to the extent possible in OPEN.

In relation to Requests 3-5, the Claimant's second letter raises a new point concerning Sir Stanley Burnton's Report on section 94. The suggestion made by the Claimant is that Sir Stanley's report is inconsistent with the response that has been given to these Requests. That suggestion is wrong. The first point to note in response is that Sir Stanley's comments were made regarding an old form of section 94 direction that has been altered in light of those comments. The GCHQ direction that was disclosed, to which the RFI related, is in the newer form that does describe on its face the exact data that is required to be provided. The second point is that even under the old style of direction, a precise description of the communications data that was to be provided (a) was set out in a covering letter that was sent to the PECN with the direction; and (b) was approved by the Foreign Secretary. As Sir Stanley observed in the paragraph of his report (8.42) that the Claimant relies upon, any subsequent modification of the data requirement was authorised by the Secretary of State. It follows that the new point that the Claimant has raised does not take the so-called 'delegation' issue any further.

The Claimant invites Counsel to the Tribunal to seek further OPEN disclosure. The Respondents will address any such requests in the usual way.

The final paragraph of the Claimant's letter appears to amount to substantive argument, rather than a further request. The Respondents have already set out in their response to the 7 March RFI their position in relation to equivalent standards, the existence of written policies/arrangements, and the Commissioners' oversight, and do not repeat it here. It is a matter for the Tribunal whether to request assistance from the Commissioners in respect of oversight over sharing. The Respondents would only note that in circumstances where the Tribunal has already concluded that Commissioner oversight over disclosure (amongst other matters) is adequate, and has been adequate throughout (at least) the post-avowal period[1], it is difficult to see how further assistance from the Commissioners could materially advance the Tribunal's understanding.

In the circumstances, the Tribunal should decline the Claimant's invitation to direct re-service of the response to the 7 March RFI.

Yours faithfully,

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For the Treasury Solicitor

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[1] See further at page 6, §3, of the Respondents' Response of 28 March 2017.