

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 DRAFT LIST OF ISSUES

for the hearing commencing on 5 June 2017

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*The Claimant has prepared this draft List of Issues pursuant to paragraph 7(a) of the Tribunal's order dated 9 March 2017 (the 'Order').*

*Pursuant to paragraph 7(b) of the Order, the Claimant requests the Tribunal's permission to pursue issues 13 to 16 below.*

**KEY MATTERS OF AGREEMENT**

1. Both GCHQ and MI5 acquire BCD from communications service providers ('CSPs') pursuant to Directions under section 94 Telecommunications Act 1984 ('TA 1984').
2. If a Direction under section 94 of the TA 1984 falls within the scope of EU law, the CSPs' activities under such a direction amount to "data processing" as defined by Article 2(b) of the Data Protection Directive.

**MATTERS IN DISPUTE**

**A. EU LAW**

**Jurisdiction of the CJEU**

1. Did the Court of Justice of the EU in deciding the issues it did in *Watson*, in relation to retention of and/or access to databases, for the purposes of national security, have jurisdiction in the light of Article 4 TEU?

2. In the light of Article 4 TEU, what is the effect of its judgment in *Watson* on the Tribunal's decision in this case?
3. What is the effect, if any, on issues 1 and/or 2 and/or on the European Court's jurisdiction of the fact that BCDs and/or BPDs may be used for the prevention or detection of crime?

### **Scope of EU law and the interpretation of *Watson***

4. Does a Direction under section 94 of the TA 1984 and/or the obtaining of BCD/communications data under a direction engage EU law? Or do Article 4(2) TEU and/or Article 1(3) of the e-Privacy Directive render such a Direction outside the scope of EU law?
5. Does the obtaining of BPDs engage EU law? Or do Article 4(2) TEU and/or Article 3(2) of the Data Protection Directive render the obtaining of BPDs outside the scope of EU law?
6. Does the reasoning in *Watson* apply where data (whether communications data or otherwise) is obtained and/or used for the purpose of protecting national security?

### **Safeguards**

7. In the event that a Direction under section 94 of the TA 1984 engages EU law and/or the obtaining of BPDs engages EU law, are some or all of the following safeguards required under EU law:
  - a. Mechanisms to ensure that BCD acquired under s. 94 of the TA 1984 is used only for the purpose of fighting serious (as opposed to minor) crime.
  - b. Requirement for prior independent authorisation for access.
  - c. Procedures for notification of use of the data.
  - d. Adequate controls on how BCD acquired under s. 94 of the TA 1984 is shared.
  - e. Prohibition on transfers of BCD outside of the EU.

8. Do the Respondents comply, and have the Respondents complied, with the safeguards required under issue 7 above?

### **B. PROPORTIONALITY**

9. Is and/or was the section 94 TA 1984 regime a disproportionate interference with rights under Article 8 ECHR and/or under Article 7 of the EU Charter?
10. Is and/or was the bulk personal datasets regime a disproportionate interference with rights under Article 8 ECHR and/or under Article 7 of the EU Charter?

### **C. TRANSFER OF DATA**

11. What safeguards are required by law (including by reference to Article 8 ECHR and EU law) to be imposed on the SIAs when sharing bulk data with third parties?
12. To what extent do the Respondents comply, and have the Respondents complied, with the safeguards required?

### **D. SECTION 94 DELEGATION**

13. Under domestic law, is a Secretary of State permitted to delegate to GCHQ and/or MI5 the power to request information or categories of information from Public Electronic Communications Networks ('PECNs') under section 94 TA 1984?
14. Has the Secretary of State delegated to GCHQ and/or MI5 the power to request information or categories of information from PECNs under section 94 TA 1984?
15. What is the consequence of the Respondents' delegation of the power under section 94 TA 1984 to the compliance of the section 94 TA 1984 regime with (a) EU law; (b) Article 8 ECHR; and (c) domestic law?

### **E. TIMING OF ARTICLE 8 BREACH**

16. Did the Respondents' actions in collecting BCD become 'in accordance with law' for the purposes of Article 8 ECHR first upon avowal of the BCD regime, or only upon

their collection pursuant to the authority conferred by the revised section 94 Directions issued on 14 October 2016 (after the Tribunal's judgment had been provided to the parties in draft), since Directions made before avowal were, by dint of the Tribunal's reasoning, *ultra vires* and so void *ab initio*?