

IN THE INVESTIGATORY POWERS TRIBUNAL
BETWEEN:

PRIVACY INTERNATIONAL

Claimant

and

(1) THE SECRETARY OF STATE FOR FOREIGN AND COMMONWEALTH AFFAIRS

(2) THE GOVERNMENT COMMUNICATIONS HEADQUARTERS

Respondents

IN THE INVESTIGATORY POWERS TRIBUNAL
BETWEEN:

GREENNET LIMITED

RISEUP NETWORKS, INC

MANGO EMAIL SERVICE

KOREAN PROGRESSIVE NETWORK ("JINBONET")

GREENHOST

MEDIA JUMPSTART, INC

CHAOS COMPUTER CLUB

Claimants

and

(1) THE SECRETARY OF STATE FOR FOREIGN AND COMMONWEALTH AFFAIRS

(2) THE GOVERNMENT COMMUNICATIONS HEADQUARTERS

Respondents

RESPONDENTS' RESPONSE TO CLAIMANTS' AGENDA

1. The Respondents have recently received the Claimants' Agenda for the forthcoming directions hearing. This short note sets out the Respondents' response to the issues identified in that Agenda. It should be read in conjunction with the Respondents' Note for the hearing served on 13 May 2015.

Preliminary legal issues

2. The Respondents are carefully considering the formulation of issues recently proposed by the Claimants and maintain their position that it is appropriate for further discussions to be held between the parties to see if final agreement can be reached on these issues. The Respondents Leading Counsel (James Eadie QC) is away this week and the Respondents would like to have the opportunity to discuss the proposed issues with him before making any final decisions on this.
3. However the Respondents' preliminary view at this stage is that Items 1(b) and 1(c) are issues which are not properly pleaded in the Complaints and that, if these are to be raised, will require further articulation by the Claimants.
4. On Item 1(b), it is to be noted that the Computer Misuse Act 1990 was amended on 3 May 2015¹, such that, for example, section 10 now applies to sections 1 to 3A of the Act and it includes express language which makes clear that sections 1 to 3A are without prejudice to any other enactment by virtue of which the conduct is authorised. Those changes supersede the submissions made in paragraph 37 of Privacy's Statement of Grounds Complaint (repeated in paragraph 50 of the Greenet Statement of Grounds), at least insofar as the current regime is concerned.
5. As to Item 1(c), it is to be noted that nowhere in the two Statements of Grounds supporting the complaints are these issues raised; there is no mention of the Criminal Justice Act 1948 in those submissions. It is inadequate simply to raise this issue in a request for further information without a proper case being articulated about it in the complaints. If this issue is to be raised then it ought to be properly set out in the Claimants' Statement of Grounds. For that reason it would also be inappropriate for the Tribunal to direct that the Respondents expand its case on these legal provisions at this stage (see Item 3 of the Claimants' Agenda).
6. Further the Respondents would question whether it is appropriate for the Tribunal to consider pronouncing on the circumstances giving rise to criminal liability under the CMA 1990, in a vacuum. The Respondents maintain the position that any question of *prima facie* domestic criminal liability under the CMA 1990, read with the CJA 1948, would depend on the facts of a particular individual case. To determine such legal issues in the abstract may be neither appropriate nor helpful.

NCND

7. As to Item 2 of the Claimants' Agenda, the Respondents have responded and, where appropriate, clarified their position in the letter dated 13 May 2015 (which has been

¹ Those amendments were introduced by the Serious Crime Act 2015.

copied to the Tribunal). In those circumstances any further direction of the Tribunal is unnecessary, particularly where the directions which have been proposed include the exchange of witness evidence in due course.

Disclosure of the arrangements governing CNE and dates of Commissioner reviews

8. On Item 4 of the Claimants' Agenda, the below the waterline rules, requirements and arrangements which regulate any equipment interference activities which may be conducted by GCHQ cannot be disclosed because to do so would be damaging to the public interest or prejudicial to national security, the prevention or detection of serious crime and the continued discharge of the functions of the intelligence services (see Rule 6(1) of the Investigatory Powers Tribunal Rules). The Respondents are content to address the reasons for this in its evidence in due course, as occurred in the *Liberty/Privacy* proceedings (see paragraphs 55-61 and 100 of the witness statement of Charles Farr and eg. paragraph 43-44 of the Tribunal's judgment in those proceedings dated 5 December 2014).
9. As to Item 5 and the dates of the Commissioner reviews, the Respondents are content to provide this information in closed to the Tribunal, but do not agree to this information being put into open on Rule 6(1) grounds.

Timetable

10. As is evident from Item 6 of the Claimants' Agenda, it is clear that the parties are agreed on a time estimate for the preliminary issues hearing of 3 days. The Respondents would invite the Tribunal to make detailed directions for that hearing as set out in the Respondents' main Note for this hearing.

13 May 2015

**KATE GRANGE
RICHARD O'BRIEN**