

IN THE INVESTIGATORY POWERS TRIBUNAL
BETWEEN:

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

THE RESPONDENTS' RESPONSE TO THE CLAIMANTS' REQUEST FOR
FURTHER INFORMATION AND DISCLOSURE DATED 15 JANUARY 2016

The Respondents set out their Response to the Claimants' Request of 15 January 2016 below. For the avoidance of doubt, where a Request relates to the past, the Respondents have responded in accordance with the date range directed by the Tribunal at the directions hearing on 15 January 2016, namely from 1 June 2014, except where otherwise indicated.

Responses to Requests concerning the Intelligence Services which solely relate to the s.94 Regime are given on behalf of GCHQ and the Security Service only.

Of paragraph 22

"Directions have been issued under section 94 of the Telecommunications Act 1984 requiring communications service providers ("CSPs") to provide bulk communications data ("BCD"), which has subsequently been stored and accessed by the Intelligence Services ("the Section 94 regime")

0.1 Was the Section 94 regime (i.e. that section 94 TA had been used to acquire bulk communications data from UK CSPs in relation to UK customers, outside the section 8(4) regime) disclosed to the Investigatory Powers Tribunal in CLOSED in *Liberty/Privacy* [2015] 3 All ER 142, or in any other claim before the Tribunal?

Whilst an express response to this request cannot be provided in OPEN because it concerns matters relating to CLOSED proceedings, the Respondents' position with regard to the *Liberty/Privacy* proceedings, as it is with the other proceedings referred to at §57 of the Re-Amended Statement of Grounds, is that the existence of the s.94 directions was not relevant to the issues in those proceedings.

0.2 If so, please provide a copy of the CLOSED written submissions, CLOSED transcripts and any part of the Tribunal's CLOSED judgment dealing with the section 94 regime.

See response to Request 0.1.

0.3 Do the Respondents contend that the section 94 regime could lawfully be used to (a) obtain the content of a communication from a CSP; (b) require a CSP to carry out or assist in the carrying out of equipment interference or any other type of property interference/

See Amended Open Response, §198.

Of paragraph 17

"Among the range of information collected are sets of data that contain personal information about a wide range of individuals, the majority of whom are unlikely to be of any intelligence interest. Typically these datasets are very large, and of a size which means they cannot be processed manually. Such datasets have generally been referred to within the Intelligence Services as 'Bulk Personal Datasets'.

1. Prior to the publication of the Intelligence and Security Committee Report on 12 March 2015, had it been acknowledged to the public that the Respondents obtained Bulk Personal Datasets? If yes, when and how?

Prior to the publication referred to it had not been expressly acknowledged to the public that the Respondents obtained Bulk Personal Datasets.

2. Please identify each of the Bulk Personal Datasets that the Respondents have obtained, the power or powers (or combinations thereof) used to obtain such Datasets (identifying statutory title and section/regulation etc.) the date on which collection began and its scale and extent.

The Respondents consider that this request is both unnecessary for the resolution of the issues in the claim and disproportionate in its scope and in the level of detail sought. Further, and in any event, the Respondents cannot respond to this request in OPEN as to do so would be damaging to the interests of national security.

Of paragraph 22

"Directions have been issued under section 94 of the Telecommunications Act 1984 requiring communications service providers ("CSPs") to provide bulk communications data ("BCD"), which has subsequently been stored and accessed by the Intelligence Services ("the Section 94 regime")."

3. Prior to the publication of the section 94 "Arrangements" on 4 November 2015, had it been acknowledged to the public that the Respondents have used section 94 to obtain BCD? If yes, when and how?

Prior to the publication referred to it had not been expressly acknowledged to the public that the Respondents have used section 94 to obtain BCD.

4. Prior to the publication of the section 94 "Arrangements" on 4 November 2015, had it been acknowledged to the public that BCD obtained under section 94 have been stored and accessed by the Intelligence Services? If yes, when and how?

Prior to the publication referred to it had not been expressly acknowledged to the public that BCD obtained under section 94 have been stored and accessed by the Intelligence Services.

5. When was section 94 first used to require provision of BCD?

See Amended Open Response, §196.

6. How many section 94 directions requiring provision of BCD have been in force at any time since the coming into force of the Human Rights Act 1998?

See Response to Request 2 above.

7. For each such direction, please state:
- (a) which Secretary of State issued it;
 - (b) the date on which it was issued;
 - (c) the date on which BCD began to be provided;
 - (d) the categories of BCD which it required to be provided;
 - (e) the CSPs to which it was addressed;
 - (f) whether it remains in force;
 - (g) if it does not remain in force, the date on which it was cancelled;
 - (h) the date on which the Intelligence and Security Committee was informed of the direction; and
 - (i) the date on which the (i) Intelligence Services Commissioner; and (b) Interception

of Communications Commissioner were each informed of the direction.

See Response to Request 2 above.

Of paragraph 55

"By s.28(2) of the DPA, a Minister may certify that exemption from the data protection principles is so required. Copies of the ministerial certificates for each of the Intelligence Services are available on request."

8. Please supply copies of such ministerial certificates as exist for each of the Intelligence Services, as varied from time to time.

The ministerial certificates are served with this Response.

Of paragraph 60

"Both sets of Handling Arrangements apply to each of the Intelligence Services...They came into force on 4 November 2015. They are mandatory and are required to be followed by staff in the Intelligence Services. Failure by staff to comply with the Handling Arrangements may lead to disciplinary action, which can include dismissal and prosecution..."

9. Why was each set of Arrangements introduced?

When the Investigatory Powers Bill was published on 4 November 2015, new arrangements covering the handling of BPDs and BCD across the SIA were published at the same time. The introduction of these handling arrangements reflected the intention of the SIA to make the acquisition and use of BPD and BCD more transparent and subject to clearly articulated safeguards. It was also a response to recommendations made by the ISC in its Privacy and Security Report and by David Anderson QC in his review of investigatory powers.

10. What arrangements were in place prior to 4 November 2015? Please provide copies of all arrangements that were previously in place for the handling of Bulk Personal Datasets.

Copies of arrangements for the period 1 June 2014 to the present are served with this Response: see tabs 1, 4, 7-10, 13-17, 21, 34-35 and 43-46 and associated forms at tabs 2, 5, 6, 18-20 and 36-42.

11. Has the Intelligence Services Commissioner and/or the Interception of Communications Commissioner approved either set of Arrangements? If yes, when?

The Commissioners have not approved either set of Arrangements.

12. For each of the Intelligence Services and each set of Handling Arrangements, please state:
- (a) The number of instances of non-compliance that have been detected;
 - (b) The number of staff members identified as responsible;
 - (c) The number of staff who have been (i) prosecuted; (ii) dismissed; and (iii) otherwise disciplined for non-compliance; and
 - (d) The means by which the instances of non-compliance were detected.

The Respondents cannot respond to this request in OPEN without damaging the interests of national security.

Of paragraph 69

"A formal procedure must be followed prior to any acquisition or use as set out at §§4.6 to 4.7:

'...

4.7 Staff in each Intelligence Service must always complete the formal internal authorisation procedure before the dataset is loaded into an analytical system for use..."

13. What authorisation, if any, is required before a new dataset is obtained (whether or not it is later loaded into an analytical system)?

Copies of relevant authorisation procedures for the period 1 June 2014 to the present are served with this Response: see tabs 1, 4, 7-8, 10, 13, 15-17, 21, 34-35, 43 and 45 and associated forms at tabs 2, 5-6, 18-19 and 36-37.

14. Please supply copies of any relevant authorisation procedures which have been in force at any time since the coming into force of the Human Rights Act 1998, stating the dates of each version's applicability.

See Response to Request 13.

15. What authorisation, if any, is required before a dataset which has not been loaded into an analytical system may be used?

See Response to Request 13.

16. Please supply copies of any relevant authorisation procedures which have been in force at any time since the coming into force of the Human Rights Act 1998, stating the dates

of each version's applicability.

See Response to Request 13.

17. Do the provisions of any Code of Practice apply to the acquisition or use of any dataset, in particular any dataset of bulk communications data?

Where any Bulk Personal Dataset, or part thereof, is acquired using a statutory power to which a Code of Practice applies, the provisions of that Code of Practice will apply to the acquisition of that dataset or part.

GCHQ handles all operational data as if it had been obtained under RIPA, and accordingly applies the provisions of the Safeguards section of the Interception of Communications Code of Practice to all BCD datasets.

The Codes of Practice (for the time being) relating to communications data did not apply, as a matter of law, to the Security Service's acquisition of BCD (further to section 94 directions) or its access to the BCD.

Although not required to apply the Codes of Practice the Security Service's policy and practice in relation to its access to the BCD was to apply the substantive safeguards and protections in the Code when following the authorisation process set out at sections 22 and 23 of RIPA. The Claimant is referred to the internal guidance served in response to the requests regarding s.94 BCD below.

Of paragraph 75

"Specific, detailed measures are also set out which are designed to limit access to data to what is necessary and proportionate, to ensure that such access is properly audited, and to ensure that disciplinary measures are in place for misuse:

'5.2 In relation to information in bulk personal datasets held, each Intelligence Service is obliged to put in place the following additional measures:' ..."

18. Has each Intelligence Service put in place all the measures listed in paragraph 75? If yes, please state for each Intelligence Service the date by which the measures had been put in place, and supply copies of any documents recording or evidencing the procedures established. If no, please state for each Intelligence Service which measures have been put in place since which date(s), and supply copies of such procedures as have been established.

Each Intelligence Service has put in place all the measures listed in paragraph 75.

Copies of relevant measures for the period 1 June 2014 are served with this Response: see tabs 1, 4, 10, 13, 15-17, 21, 38-40 and 43-46 and forms at tabs 41-42.

19. What authorisation, if any, does a staff member need to access or use BPD which have been loaded onto an analytical system?

See the documents referred to in the Response to Request 18.

20. Please supply copies of any relevant policies in force since the coming into force of the Human Rights Act 1998, stating the dates between which each version has been in force.

See the documents referred to in the Response to Request 18.

21. What arrangements, if any, are in place to record access to and use of BPD? Please supply copies of any relevant policies in force since the coming into force of the Human Rights Act 1998, stating the dates of each version's applicability.

Copies of relevant arrangements for the period 1 June 2014 to the present are served with this Response: see tabs 1, 4, 10, 13, 15-17, 21, 38-40 and 43-46.

Of paragraph 80

"Disclosure of the whole or subset of any BPD is subject to internal authorisation procedures in addition to those that apply to an item of data..."

22. What internal authorisation procedures apply to disclosure of an item of data? Please supply copies of any relevant policies in force since the coming into force of the Human Rights Act 1998, stating the dates of each version's applicability.

Copies of relevant procedures for the period 1 June 2014 to the present are served with this Response: see tabs 4, 8, 10, 13, 15-17, 21 and 46. For the avoidance of doubt, the Respondents do not set out here details of their safeguards which apply to disclosure of information more generally, but only those which relate specifically to disclosure of BPD.

Of paragraph 101

"...each Intelligence Services is obliged to put in place the following additional measures:

- Access to BCD must be strictly limited to those with an appropriate business requirement to use these data and managed by a strict authorisation process;*

...

- *Where Intelligence Service staff intend to access BCD relating to the communications of an individual known to be a member of a profession that handles privileged information or information that is otherwise confidential (medical doctors, lawyers, journalists, Members of Parliament, Ministers of religion), they must give **special consideration** to the necessity and proportionality justification for the interference with privacy that will be involved;’...*

23. Has each Intelligence Service put in place all the measures listed in paragraph 101? If yes, please state for each Intelligence Service the date by which the measures had been put in place, and supply copies of any documents recording or evidencing the procedures established. If no, please state for each Intelligence Service which measures have been put in place from which date(s), and supply copies of such procedures as have been established.

Copies of relevant measures for the period 1 June 2014 are served with this Response: see tabs 4, 11 and 22-32.

24. Where Intelligence Staff access BCD relating to the communications of professionals who handle privileged or otherwise confidential information, do the Agencies have specific policies to govern the use and/or dissemination of such BCD as are accessed? If yes, please supply copies of the policies which have been in force since the coming into force of the Human Rights Act 1998, stating the dates of each version.

Yes, GCHQ and the Security Service have specific policies in the circumstances described. The relevant policies for the period 1 June 2014 to the present are served with this Response: see tabs 4, 9, 11, 25-26 and 29-32.

25. What arrangements, if any, are in place to record access to and use of BCD? Please supply copies of any relevant policies in force since the coming into force of the Human Rights Act 1998, stating the dates of each version.

Copies of relevant arrangements for the period 1 June 2014 to the present are served with this Response: see tabs 4, 11, 22-26, 29 and 31-32.

Of paragraph 102

“The disclosure of BCD outside the Agency which holds it can only occur if certain conditions are complied with...

‘4.4.1 ...The disclosure of an entire bulk communications dataset, or a subset, outside the Intelligence Service may only be authorised by a Senior Official or the Secretary of State’...”

26. For each Intelligence Service, please state how many times since the coming into force of

the Human Rights Act 1998 (i) an entire BCD dataset; (ii) a subset of a BCD dataset; and (iii) an individual piece of data from a BCD dataset has been disclosed to:

- (a) Another UK Intelligence Service.
- (b) A recipient in the UK other than an Intelligence Service (and, if applicable, please specify generically the type of recipient, e.g. an external data analysis contractor).
- (c) A recipient outside the UK (again specifying generically the type of recipient).
- (d) A foreign intelligence service.

The Respondents do not answer this Request, as it is unnecessary and disproportionate. Further, and in any event, it would damage the interests of national security to respond to such a request in Open.

27. What authorisation procedures, if any, apply for disclosure? Please supply copies of any relevant policies in force since the coming into force of the Human Rights Act 1998, stating the dates of each version's applicability.

Copies of relevant authorisation procedures for the period 1 June 2014 to the present are served with this Response: see tabs 4, 8, 11 and 32.

28. What level of 'Senior Official' has and currently can authorise the disclosure of (a) an entire bulk communications dataset; and (b) a subset.

A Senior Official at the level of a civil servant in the Senior Civil Service.

Of paragraph 110

"§§4.6.4 to 4.6.7 address oversight by the Interception of Communications Commissioner..."

29. When was the Interception of Communications Commissioner first notified that section 94 had been used to require CSPs to provide BCD?

In July 2004 Sir Swinton Thomas, the Interception of Communications Commissioner from 2000 to 2006, was informed during a visit to GCHQ that BCD had been obtained by GCHQ pursuant to a section 94 direction.

Sir Swinton Thomas was made aware prior to the issue, in 2005, of section 94 directions for BCD for the Security Service of the proposed acquisition by the Security Service of BCD.

In November 2006 Sir Paul Kennedy, the Interception of Communications Commissioner from 2006 to 2012, was briefed about the section 94 directions relating to BCD which had been issued on behalf of the Security Service, and that BCD that had been acquired by the

Security Service pursuant to those directions.

The Interception of Communications Commissioner has had oversight of the Security Service's access to the BCD (that access having followed the authorisation process set out at sections 22 and 23 of RIPA) since 2007.

From December 2010 until February 2015 responsibility in respect of oversight for section 94 directions in relation to BCD made in respect of GCHQ rested with the Intelligence Services Commissioner.

On 23 February 2015 the Interception of Communications Commissioner's oversight was extended to cover the necessity and proportionality of section 94 directions made by the Secretary of State and the retention, storage and destruction arrangements for the BCD.

Since February 2015 the Interception of Communications Commissioner's oversight remit has been as set out in paragraph 110 of the Amended Open Response. As the Claimant has noted at §17 of their Re-Amended Statement of Grounds, in IOCCO's report for March 2015 the Commissioner explained that he would *"require extra staff (and possibly technical facilities) to be able to carry out this oversight properly"*.

In November 2015 GCHQ made Sir Stanley Burnton, the Interception of Communications Commissioner from 4 November 2015 to date, aware of the full set of section 94 directions issued on behalf of GCHQ. On 3 December 2015 the Security Service provided to the Commissioner copies of the section 94 directions relating to BCD which concern the Security Service.

30. Has the Commissioner been notified of all section 94 directions which have been issued? If yes, since when has this been the case?

See Response to Request 29.

31. Does the Interception of Communications Commissioner currently discharge all of the oversight functions set out in paragraph 110? If yes, since when has this been the case? If no, which of the functions listed does he currently discharge, and since when has he done so?

See Response to Request 29.

32. Please provide copies of all oversight reports produced by the Interception of Communications Commissioner relating to BCD.

The oversight reports produced by the Interception of Communications Commissioner's Office belong to that office. Those reports classified at OFFICIAL are available at the publications section of the IOCCO website (www.iocco-uk.info). Any reports published in CLOSED cannot be disclosed in OPEN.

Of paragraph 119

"Prior to the Direction being issued, the Intelligence Services Commissioner had overseen the acquisition, use, retention and disclosure of BPD on a non-statutory basis."

33. When was the Intelligence Services Commissioner first notified that the Agencies acquire and use bulk personal datasets?

Formal notification was given in 2010.

34. When did the Commissioner begin to oversee the acquisition, use, retention and disclosure of BPD on a non-statutory basis?

In October 2010.

35. Why was the Direction issued?

The Intelligence Services Commissioner had previously recommended that his oversight of the Agencies' use of BPD be put on a statutory footing. The Privacy and Security Report issued by the Intelligence Services Committee in March 2015 also made this recommendation, and so the Direction was issued by the Prime Minister on 12 March 2015 to put this into effect.

36. How, if at all, did the nature and/or scope of the Commissioner's oversight change as a result of the Direction?

The nature and scope of the Commissioner's oversight did not change as a result of the Direction.

37. Please provide copies of all oversight reports produced by the Intelligence Services Commissioner relating to BPD.

The oversight reports produced by the Intelligence Services Commissioner's Office belong to that office. Those reports classified at OFFICIAL are available at publications section of the website www.intelligencecommissioner.com. Any reports published in CLOSED cannot be disclosed in OPEN.

Of paragraph 139

"In addition, the ISC plays an important part in overseeing the activities of the Intelligence Services. In particular, the ISC is the principal method by which scrutiny by Parliamentarians is brought to bear on those activities."

38. When was the ISC first notified that the Agencies acquire and use bulk personal datasets?

Formal notification was given in March 2014.

39. When was the ISC first notified that section 94 has been used to require CSPs to provide BCD?

The Security Service formally notified the ISC in October 2012. GCHQ formally notified the ISC in March 2014.

40. Has the ISC been notified of all section 94 directions which have been issued? If yes, since when has this been the case?

The ISC was formally notified in October 2012 as to the extent of the Security Service's capability further to section 94 directions relating to BCD.

The ISC was formally notified in November 2014 of all section 94 directions in respect of BCD which have been issued in respect of GCHQ.

Of paragraph 179

"For the avoidance of doubt the Respondents additionally contend that the BPD Regime satisfied both elements of the 'in accordance with law' requirement prior to the date on which the Handling Arrangements came into force. Prior to that BPD was handled in accordance with internal guidance or practice which was similar to the Handling Arrangements, and was sufficiently foreseeable."

41. Is it the Respondents' case that the BPD Regime was "in accordance with law" at all times prior to the date on which the Handling Arrangements came into force?

Yes.

42. Was adherence to the "internal guidance" mandatory? Please supply copies of all versions of the "internal guidance" applicable at any time since the coming into force of the

Human Rights Act 1998, stating the dates of each version's applicability. Where previous versions have been amended or repealed, please explain in each case why they were amended or repealed.

Yes, such adherence was mandatory. Copies of the guidance referred to for the period 1 June 2014 to the present are served with this Response, as set out in the responses to requests regarding BPD above. The request to explain why in each case a version of guidance was amended or repealed is unnecessary and disproportionate.

43. Was the "practice" codified prior to the drawing up of the Handling Arrangements? If yes, please supply copies of all versions of the codifying documents applicable at any time since the coming into force of the Human Rights Act 1998, stating the dates of each version's applicability. Where previous versions have been amended or repealed, please explain in each case why they were amended or repealed.

Yes: see response to Request 42.

44. Was the "practice" subject to any form of external scrutiny, for instance by the Intelligence Services Commissioner, the Interception of Communications Commissioner, the ISC or otherwise; and if so, by whom?

The practice was subject to the scrutiny of the Intelligence Services Commissioner from October 2010.

45. On what basis do the Respondents contend that unpublished guidance or practice was "sufficiently foreseeable"?

The Respondents reserve the right to set out their case in relation to foreseeability more fully in their skeleton argument, but contend that the BPD Regime satisfied the requirement of foreseeability because, *inter alia*, (i) the Respondents' powers to obtain information (e.g. as set out at §45 of the Amended Open Response) clearly extended to obtaining personal data; (ii) the acquisition of such personal information in "bulk" was also foreseeable, albeit subject to statutory requirements of necessity and proportionality; and (iii) the inclusion within such bulk personal data of information relating to individuals who were unlikely to be of intelligence interest (which would include, for instance, a telephone directory or electoral roll) was also foreseeable, again subject to the requirement that any acquisition of such data was necessary and proportionate.

The Respondents will rely on the Tribunal's judgment in *Privacy International and Greennet Ltd and Others v (1) The Secretary of State for Foreign and Commonwealth Affairs (2) The Government Communications Headquarters* [2016] UKIP Trib 14_85-CH in this regard.

Of paragraph 189

"For the avoidance of doubt the Respondents additionally contend that the Section 94 Regime satisfied both elements of the 'in accordance with law' requirement prior to the date on which the Section 94 Handling Arrangements came into force. Prior to that BCD was handled in accordance with internal guidance or practice which was similar to the Section 94 Handling Arrangements, and was sufficiently foreseeable."

46. Is it the Respondents' case that the Section 94 Regime was "in accordance with law" at all times prior to the date on which the Handling Arrangements came into force?

Yes.

47. Was adherence to the "internal guidance" mandatory? Please supply copies of all versions of the "internal guidance" applicable at any time since the coming into force of the Human Rights Act 1998, stating the dates of each version's applicability. Where previous versions have been amended or repealed, please explain in each case why they were amended or repealed.

Yes, adherence was mandatory. Copies of the guidance referred to for the relevant period is served with this Response, as set out in the responses to the requests regarding s.94 BCD above. The request to explain why in each case a version of guidance was amended or repealed is unnecessary and disproportionate.

48. Was the "practice" codified prior to the drawing up of the Handling Arrangements? If yes, please supply copies of all versions of the codifying documents applicable at any time since the coming into force of the Human Rights Act 1998, stating the dates of each version's applicability. Where previous versions have been amended or repealed, please explain in each case why they were amended or repealed.

Yes: see response to Request 47.

49. Was the "practice" subject to any form of external scrutiny, for instance by the Intelligence Services Commissioner, the Interception of Communications Commissioner, the ISC or otherwise; and if so, by whom?

See Response to Request 29.

50. On what basis do the Respondents contend that the "internal guidance or practice" was "sufficiently foreseeable"?

The Respondents reserve the right to set out their case in relation to foreseeability more fully in their skeleton argument, but contend that the Section 94 Regime satisfied the requirement of foreseeability because, *inter alia*, (i) the Respondents' powers under s.94 Telecommunications Act 1984 clearly extended to requiring CSPs to provide BCD; and (ii) s.94 contained express safeguards in that the Secretary of State had to consider that a direction was both necessary, *inter alia*, in the interests of national security and proportionate, and was also required to consult with the relevant CSP before issuing it.

The Respondents will rely on the Tribunal's judgment in *Privacy International and Greenmet Ltd and Others v (1) The Secretary of State for Foreign and Commonwealth Affairs (2) The Government Communications Headquarters* [2016] UKIP Trib 14_85-CH in this regard.

4 March 2016

JAMES EADIE QC
ANDREW O'CONNOR QC
RICHARD O'BRIEN

