

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

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THE RESPONDENTS' RESPONSE TO THE CLAIMANTS' REQUEST FOR  
FURTHER INFORMATION AND DISCLOSURE DATED 10 JUNE 2016

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The Respondents set out their response to the requests in the Claimant's Supplemental Request for Further Information and Disclosure dated 10 June 2016 which relate to the scope of oversight over s.94 directions by IOCCO and the Intelligence Services Commissioner (as referred to in the Claimant's letter of 10 June 2016). The relevant requests relating to scope are 78-89.

These responses solely relate to the s.94 Regime and are therefore given on behalf of GCHQ and the Security Service only.

GCHQ Witness Statement

78. Paragraphs 133-151: Please disclose the records of the meetings, the documents discussed at the meetings and any correspondence prior to and after the meeting.

These meetings are not formally minuted by GCHQ. GCHQ keeps a file note for internal purposes, and there is an agreed list of actions. These cannot be disclosed in OPEN without damaging National Security. The documents discussed were the s.94 Directions themselves, the applications to the Secretary of State for those Directions, and the correspondence with the organisations on whom the Directions were served. These cannot be disclosed in OPEN without damaging National Security. Correspondence after the meetings covers progress against any actions agreed during the inspection. This cannot be disclosed in OPEN without damaging National Security.

79. Generally on BCD: Please state the precise scope and extent of oversight provided by the Interception of Communications Commissioner, including disclosure of the actual terms of the agreed non-statutory scrutiny of Sir Swinton Thomas. Is Sir Anthony May's July 2015 report correct that such oversight was limited to only certain aspects of safeguards? What were the express terms on which the Intelligence Services Commissioner provided oversight? Please disclose all of the relevant documents.

**Prior to the Prime Minister's request to Sir Anthony May in 2015, section 94 oversight had been conducted:**

- (i) At GCHQ, by IOCCO (Sir Swinton Thomas) between 2004 and 2006, and by the Intelligence Services Commissioner (Sir Peter Gibson, and subsequently Sir Mark Waller) between 2006 and 2015; and
- (ii) At MI5, by IOCCO (Sir Paul Kennedy, and subsequently Sir Anthony May) from 2007 to 2015.

The reference at paragraph 4.7 of Sir Anthony May's July 2015 Report is to IOCCO's oversight of section 94 material held at MI5.

With regard to the position at GCHQ from 2004 to 2015, the Commissioner's oversight was not provided on express, agreed, terms. However, as a matter of practice, in advance of each inspection visit the Commissioner was provided with a list setting out details of all the extant s.94 Directions and any that had been cancelled since the previous inspection (these lists cannot be disclosed without damaging National Security). On the basis of the list the Commissioner selected one or more Directions. During the visit the Commissioner examined the relevant Direction or Directions, the applications to the Secretary of State for those Directions (which included the necessity and proportionality justifications), and the correspondence with the organisations on whom the Directions were served. As noted above, these cannot be disclosed without damaging National Security. Sessions were scheduled to give him the opportunity to question those members of GCHQ involved in applying for the relevant Direction or Directions, those responsible for putting them into effect, and analysts who made use of the data obtained under them. The Commissioner was also provided with information on the extent to which s.94 data contributed to intelligence reporting.

The position in respect of the Security Service is addressed in response to request 88 below.

80. Paragraphs 133-135, 137: Please state what steps Sir Swinton Thomas and Sir Peter Gibson carried out by way of non-statutory scrutiny of section 94 directions. In particular, was any audit ever carried out of the granting of section 94 directions or

the use (in particular proportionality) of section 94? Did the 'review' simply consist of reading a briefing and receiving a presentation?

**See the responses to requests 78 and 79 above.**

81. Paragraph 139: Was Sir Mark Waller informed about the MILKWHITE programme, under which section 94 data is made available outside the security and intelligence agencies? What audit did Sir Mark Waller carry out of the use of section 94 data?

**The existence of "the MILKWHITE programme" is neither confirmed nor denied.**

**In respect of audits of the use of section 94 data:**

- (i) **Bulk communications data obtained by means of a section 94 direction is and was held alongside communications data obtained by means of interception under a section 8(4) warrant.**
- (ii) **As the combined data includes communications data obtained by means of interception under a section 8(4) warrant, use of the combined data would have fallen to be overseen by the Interception of Communications Commissioner.**
- (iii) **For the avoidance of doubt, the Interception of Communications Commissioner would not know, without additional work, whether it had been obtained by means of a section 8(4) warrant or pursuant to a section 94 direction.**
- (iv) **In addition, the Intelligence Services Commissioner also considered the safeguards put in place to identify and address potential abuse of GCHQ's systems. Those systems included, but were not restricted to, those holding section 94 data.**

82. Paragraph 140: Please disclose the records of this meeting in full. The gist is inadequate, in particular as Sir Mark Waller does not appear to have carried out any audit of use, and there does not appear to have been certainty as to whether he had authority to do so.

**See the responses to requests 78 and 81 above.**

83. Paragraph 141: Did Sir Mark Waller carry out any audit of the use of section 94 data?

**See the responses to requests 78 and 81 above.**

84. Paragraph 142. Did the Secretary of State approve the request for continued use of the section 94 directions after the end of the pilot? Please disclose the relevant

documents. Did Sir Mark Waller audit the use of the material obtained? What did his review consist of? What documents were made available to him?

**The Secretary of State did approve the request for continued use of the section 94 Directions after the end of the pilot. The relevant documents cannot be disclosed in OPEN without damaging National Security.**

**In respect of audits of use, see the response to request 81 above.**

85. Paragraph 144: What is the basis of saying that "Sir Mark Waller appeared reassured"? Please explain the statement about acquiring private information. All information obtained under section 94 is private. Was Sir Mark Waller's attention drawn to Articles 5 and 6 of the e-Privacy Directive? Please disclose the minutes of the meeting.

**During the December 2012 inspection Sir Mark Waller's request for further clarifying information and his subsequent comments indicated that he was reassured. During the June 2013 inspection Sir Mark Waller requested that future submissions seeking section 94 Directions show due consideration into the level of intrusion into privacy, risk of collateral intrusion and associated proportionality considerations and safeguards. Articles 5 and 6 of the e-Privacy Directive were not discussed during the inspection.**

**See also the response to request 78 above.**

86. Paragraphs 145, 146, 147 and 148: Did Sir Mark Waller carry out any audit of the use of section 94 data? What did his review consist of in each case?

**See the responses to requests 79 and 81 above.**

87. Paragraphs 150-151: Please state what steps the Inspectors took on each occasion. Did the Inspectors audit the use of the BCD obtained under section 94? Did the Inspectors examine a sample of the queries made, or examine whether they were proportionate and necessary?

**The inspection visits by staff from the Interception of Communications Commissioner's Office were conducted exactly as if the Commissioner had been present, although GCHQ provided fewer additional briefings outside the formal inspection sessions.**

#### **Security Service Witness Statement**

88. Paragraph 136: Please state what steps the Commissioners took on each occasion a review was carried out. Did the Commissioners audit the use of the BCD obtained

under section 94? Did the Commissioners examine [*sic.* ; presumably “examine”] a sample of the queries made, or examine whether they were proportionate and necessary?

#### Oversight by Sir Paul Kennedy

The Commissioner reviewed samples of requests for authorisation (for access to the database) and the related authorisations. He did not carry out any additional audit of the use of the CD obtained.

The practice, in relation to his inspections, was that the Commissioner would (prior to his inspection) select the requests/authorisations that he wished to review and MI5 would then provide to the Commissioner the paperwork for those requests/authorisations. That paperwork would describe, in particular, the necessity and proportionality of the proposed request of the database. At his inspection the Commissioner would then review those requests/authorisations he had selected.

MI5 confirm that requests/authorisations were reviewed by the Commissioner at each of his 6 monthly reviews over the period from June 2007 until October 2012 (Sir Paul Kennedy’s last inspection as Interception of Communications Commissioner).

The inspections of the database would take place at the same time as the Commissioner was inspecting interception warrants.

#### Oversight by Sir Anthony May

Sir Anthony May (in his role as Interception of Communications Commissioner) received an initial briefing in relation to the database at his first interception inspection undertaken in May 2013. At this inspection the Commissioner also reviewed requests / authorisations that he had, previously, selected.

In February 2014, Sir Anthony May received a detailed briefing in relation to the database and carried out an inspection of requests / authorisations of the database. Sir Anthony May determined that future oversight of the database should be carried out during the annual communications data inspections undertaken by IOCCO inspectors.

#### Oversight following the appointment of Sir Stanley Burnton

In December 2015, IOCCO inspectors were provided with full access to the MI5 electronic system that processes authorisations for access to the database (and communications data requests made to CSPs) and they undertook query based

searches and random sampling of the MI5 system for authorising access to the database and reviewed requests / authorisations relating to the database.

89. Paragraphs 137-139: Please provide a copy of the briefings referred to and the further explanation given to Sir Stanley Burnton.

The briefings referred to were provided orally. The Security Service is, accordingly, unable to provide of copy of them.

20 June 2016

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