

CLAIMANT’S DRAFT SCHEDULE OF AGREED FACTS

Revised draft of 19 July 2016, with changes from previous draft of 11 July 2016 tracked

The Respondents’ position in respect of the Claimant’s proposed agreed facts is set out below. The Respondents’ understanding, confirmed by the Tribunal at the directions hearing on 7 July 2016, is that in determining the preliminary issues of law the Tribunal will have full regard to all of the OPEN evidence served by the Respondents.

Bulk Communications Data (BCD)				
	Proposed Agreed Fact	Evidence	Respondents admit/deny	Respondents’ reasons
1	GCHQ collects and holds BCD	Respondents’ Amended Open Response [196]; GCHQ Witness Statement [113] – [120]	The Respondents do not take issue with this assertion, but the Tribunal is asked to have regard to the full context provided in the paragraphs of the Respondents’ pleadings and evidence cited in the “Evidence” column (the updated reference for which is §§115-122 of the GCHQ statement of 8 July 2016).	

2	MI5 collects and holds BCD	Respondents' Amended Open Response [196]; MI5 Witness Statement [108] – [114]	The Respondents do not take issue with this assertion, but the Tribunal is asked to have regard to the full context provided in the paragraphs of the Respondents' pleadings and evidence cited in the "Evidence" column (NB the reference to the MI5 statement should be to §§109-115 of the Amended statement of 8 July 2016 ¹).
3	GCHQ relies on s.94 Telecommunications Act 1984 as its legal basis for collecting BCD	Respondents' Amended Open Response [196]; GCHQ Witness Statement [113] – [120]	Not agreed. GCHQ obtains BCD by two routes. One of those routes is section 94. However, GCHQ relies on RIPA section 5 as the legal basis for collecting the great majority of its BCD as bulk RCD through warrants issued under the terms of s.8(4).
4	MI5 relies on s.94 Telecommunications Act	Respondents' Amended Open	The Respondents do not take issue with this

¹ This statement is dated 8 July 2016 on the first page, but was signed on 11 July 2016. It is referred to in this schedule as the statement of 8 July 2016.

	1984 as its legal basis for collecting BCD	Response [196]; MI5 Witness Statement [116]	assertion, but the Tribunal is asked to have regard to the full context provided in the paragraphs of the Respondents' pleadings and evidence cited in the "Evidence" column, together with §§109-116 of the MI5 Witness Statement of 8 July 2016.
5	GCHQ requires any access to BCD to be justified on the same grounds and to the same standards as access to related communications data obtained pursuant to section 8(4) of RIPA. The requirements of Part I, Chapter I of RIPA are applied. The requirements of Part 1, Chapter II of RIPA are not applied.	Respondents' Amended Open Response [197]	The Respondents do not take issue with these assertions, but the Tribunal is asked to have regard to the full context provided in (i) the Respondents' Amended Open Response, §197, (ii) the GCHQ Witness Statement of 8 July, §§123-134, (iii) the pages of the exhibit to that statement setting out relevant safeguards.
6	GCHQ treats BCD acquired under s.94 directions in the same way as it treats related	GCHQ Witness Statement [126]	The Respondents do not take issue with this assertion, but the Tribunal is asked to have

	communications obtained pursuant to s.8(4) RIPA, storing data obtained under both statutory regimes within the same databases		regard to the full context provided in §§128-134 of the GCHQ witness statement of 8 July 2016 and the exhibits setting out GCHQ's safeguards.
7	MI5's procedures include a process under RIPA Part 1 Chapter II for accessing its BCD database	MI5 Witness Statement [114] and [117] to [119]	The Respondents do not take issue with this assertion, but the Tribunal is asked to have regard to the full context provided in §§115 and 118-120 of the MI5 witness statement of 8 July, and the exhibits setting out MI5's safeguards.
8	MI5 generally retains BCD for one year	MI5 Witness Statement [129]	The Respondents do not take issue with this assertion, but the Tribunal is asked to have regard to the full context provided in §130 of the MI5 statement of 8 July.
9	BCD contains communications data in the form of "traffic data" and "service use information"	Respondents' Amended Open Response [91];	The Respondents do not take issue with these assertions at the level of principle, but

	<p>(as defined in section 21(4) of RIPA), or the “who, where, when and how of a communication”. BCD may contain subscriber information.</p>	<p>MI5 Witness Statement [25]</p>	<p>the Tribunal is asked to have regard to the full context provided in the paragraphs of the Respondents’ pleadings and evidence cited in the “Evidence” column. In particular as regards the ‘who’ issue, whilst communications data does routinely contain data that is unique to the specific user, it does not necessarily contain the subscriber information that is needed to identify the user. As a matter of fact, BCD obtained by MI5 under section 94 has never included subscriber information, and BCD obtained by GCHQ under section 94 has not included subscriber information since August 2015. See paragraph 92 of the Respondents’ Amended Open Response.</p>
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10	BCD may include locational data from mobile and fixed line telephones and internet devices	MI5 Witness Statement [25] (“where... of a communication”)	This is agreed in principle. The Respondents accept that communications data can include locational data; locational data is within the definition of ‘traffic data’ under s.21(4) of RIPA. However, whether any particular BCD held by the Respondents includes such data will depend on which CSP has been served with a direction and whether they hold such data.
11	GCHQ’s BCD collection includes bulk Internet Communications Data	GCHQ Witness Statement [120]	The Respondents do not take issue with this assertion, but the Tribunal is asked to have regard to the full context provided in §122 of the GCHQ witness statement of 8 July 2016 and the response to request 77 in the Respondents’ Amended Response to the Claimant’s Supplemental Request for

			Further Information and Disclosure.
12	Bulk Internet Communications Data includes the “who, where, when and how” of any communication on the internet, including automated communications between machines		The Respondents do not take issue with this assertion, but the Tribunal is asked to have regard to the full context provided in §122 of the GCHQ witness statement of 8 July 2016 and the response to request 77 in the Respondents’ Amended Response to the Claimant’s Supplemental Request for Further Information and Disclosure. In particular as regards the ‘who’ issue, whilst Internet communications data does routinely contain data that is unique to the specific user, it does not necessarily contain the subscriber information that is needed to identify the user, and indeed such data does not always exist in the context of Internet

			communications data.
13	S.94 directions have not and cannot be used to authorise the interception of the content of communications	Respondents' Amended Open Response [202]	This is agreed.
14	BCD contains large amounts of data, most of which relates to individuals who are unlikely to be of any intelligence interest	Respondents' Amended Open Response [23]	The Respondents do not take issue with this assertion, but the Tribunal is asked to have regard to the full context provided in the Respondents' Amended Open Response, §23, and the GCHQ witness statement of 8 July 2016, §§115-116 and 119.
15	BCD may be disclosed to persons outside the agency holding the BCD	Respondents' Amended Open Response [102]	The Respondents do not take issue with this assertion, but the Tribunal is asked to have regard to the full context provided in the Respondents' Amended Open Response, §102, the MI5 witness statement of 8 July, §133, and the safeguards relating to

			disclosure in the MI5 and GCHQ exhibits.
16	The existence of section 94 directions was not disclosed in the two Strasbourg cases of <i>Liberty v UK</i> , <i>Kennedy v UK</i> or the <i>Davis & Watson</i> proceedings in the Court of Appeal	Respondents' Amended Open Response [202]	This is agreed.
17	BCD Handling Arrangements that came into force on 4 November 2015 have not been approved by the Intelligence Services Commissioner or the Interception of Communications Commissioner	Respondents' RFI Response page 4-5	The Respondents do not take issue with this assertion, but the Tribunal is asked to have regard to the Respondents' response cited in the "Evidence" column.
18	Prior to the publication of the Investigatory Powers Bill, the use of s. 94 to collect BCD was kept secret		The Respondents accept that prior to 4 November 2015 it had not been expressly acknowledged to the public that the Respondents have used section 94 to obtain BCD.
19	There have been instances of non-compliance	GCHQ Witness Statement [152];	The Respondents do not take issue with this

	with internal procedures and safeguards in relation to access of BCD databases at GCHQ and MI5	MI5 Witness Statement [140] - [149]	<p>assertion insofar as it concerns MI5, but the Tribunal is asked to have regard to the full context provided in paragraphs 141 to 151 of the MI5 statement of 8 July .</p> <p>As regards GCHQ, it is not known whether instances of non-compliance at the access stage relate to s.94 BCD or s.8(4) RCD – see paragraph 154 of the Witness Statement of the GCHQ Witness (dated 8 July 2016).</p>	
Bulk Personal Datasets (BPDs)				
	Agreed Fact	Evidence	Respondents admit/deny	Respondents’ reasons
20	GCHQ collects and holds BPDs	GCHQ Witness Statement [7]	The Respondents do not take issue with this assertion, but the Tribunal is asked to have regard to the full context provided by the evidence cited in the “Evidence” column .	

21	MI5 collects and holds BPDs	MI5 Witness Statement [36]	The Respondents do not take issue with this assertion, but the Tribunal is asked to have regard to the full context provided in §§35 to 48 of the MI5 witness statement of 8 July.
22	SIS collects and holds BPDs	SIS Witness Statement [10] – [16]	The Respondents do not take issue with this assertion, but the Tribunal is asked to have regard to the evidence cited in the “Evidence” column.
23	BPDs are held (or are acquired for holding) on the analytical systems of the intelligence agencies	MI5 Witness Statement [36]	The Respondents do not take issue with this assertion, but the Tribunal is asked to have regard to the full context provided in §§36, 39, 41, 46 and 88-98 of the MI5 witness statement of 8 July, §§8-13 of the GCHQ witness statement, and §§18, 20, 26, 37-57 of the SIS witness statement of 8 July.
24	BPDs consist of large amounts of personal data	Respondents’ Amended Open	The Respondents do not take issue with this

		Response [17]; MI5 Witness Statement [36] and [49]	assertion, but the Tribunal is asked to have regard to the full context provided in the Respondents' pleadings and evidence cited in the "Evidence" column, together with §§7-8 of the SIS statement of 8 July and §§14 and 20 of the GCHQ statement of 8 July.
25	The majority of individuals whose personal data is contained in a BPD will be of no intelligence interest	Respondents' Amended Open Response [17] and [21]; MI5 Witness Statement [36]; GCHQ Witness Statement [14]	The Respondents do not take issue with this assertion, but the Tribunal is asked to have regard to the full context provided in the Respondents' pleadings and evidence cited in the "Evidence" column, together with §47-48 of the MI5 statement of 8 July, §20 of the GCHQ statement of 8 July and §8 of the SIS statement of 8 July.
26	Multiple BPDs are analysed together to obtain	MI5 Witness Statement [46]	The Respondents do not take issue with this

	search results	Respondents' Amended Open Response [20]	assertion, but the Tribunal is asked to have regard to the full context provided in the Respondents' pleadings and evidence cited in the "Evidence" column, together with §§8-9 and 12 of the GCHQ statement of 8 July, §§37-40 and 47 of the MI5 statement of 8 July, and §§8-9 of the SIS statement of 8 July.
27	BPD may be acquired through overt and covert channels	Respondents' Amended Open Response [63]; GCHQ Witness Statement [14] MI5 Witness Statement [45]	The Respondents do not take issue with this assertion, but the Tribunal is asked to have regard to the full context provided in the Respondents' pleadings and evidence cited in the "Evidence" column, together with §13 of the SIS statement of 8 July and §66 of the MI5 statement of 8 July.
28	GCHQ holds BPDs in the following categories:	GCHQ Witness Statement [23]	The Respondents do not take issue with this

	Commercial; Communications; Financial; Identity; and Travel.		assertion, but the Tribunal is asked to have regard to the full context provided in the Respondents’ evidence cited in the “Evidence” column, together with §24 of the GCHQ statement of 8 July and the response to request 51 in the Respondents’ Amended Response to the Claimant’s Supplemental Request for Further Information and Disclosure.
29	SIS holds BPDs in the following categories: Biographical; Communications; Financial; and Travel.	SIS Witness Statement [11]	The Respondents do not take issue with this assertion, but the Tribunal is asked to have regard to the full context provided in the Respondents’ evidence cited in the “Evidence” column, as well as §12 of the SIS statement of 8 July.
30	MI5 holds BPDs in the following categories:	MI5 Witness Statement [44]	The Respondents do not take issue with this

	LEA/Intelligence; Travel; Communications; Finance; Population; and Commercial.		assertion, but the Tribunal is asked to have regard to the full context provided in the Respondents’ evidence cited in the “Evidence” column, as well as §52 of the MI5 statement of 8 July.
31	BPDs can contain sensitive personal data as defined under section 2 of the Data Protection Act 1998	MI5 Witness Statement [50]; GCHQ Witness Statement [25] – [26]	The Respondents do not take issue with this assertion, but the Tribunal is asked to have regard to the full context provided in the Respondents’ evidence cited in the “Evidence” column.
32	BPDs can contain information covered by legal professional privilege, journalistic material and financial data	GCHQ Witness Statement [27]; MI5 Witness Statement [51]	The Respondents do not take issue with this assertion, but the Tribunal is asked to have regard to the full context provided in the Respondents’ evidence cited in the “Evidence” column, together with §50(d) of

			the GCHQ statement of 8 July and §14 of the SIS statement of 8 July.
33	GCHQ, MI5 and SIS share BPDs	MI5 Witness Statement [64]; GCHQ Witness Statement [21]; SIS Witness Statement [19]	It is accepted that GCHQ, MI5 and SIS share BPDs with each other, which is the point made in the paragraphs of the witness statements to which reference is made (except that the correct reference to the MI5 statement is to §65 of the MI5 statement of 8 July).
34	BPDs may be shared with the agencies' foreign partners	GCHQ Witness Statement [21]; SIS Witness Statement [19]	The Respondents do not take issue with this assertion, but the Tribunal is asked to have regard to the full context provided in the Respondents' evidence cited in the "Evidence" column, together with §65 of the MI5 statement of 8 July.
35	MI5, GCHQ and SIS each acquire BPDs from	MI5 Witness Statement [45] and [65];	The Respondents do not take issue with this

	other Government departments	GCHQ Witness Statement [22]; SIS Witness Statement [13]	assertion, but the Tribunal is asked to have regard to the full context provided in the Respondents' evidence cited in the "Evidence" column (save that the correct reference to the MI5 statement of 8 July is to §66, not §65).
36	BPDs may be disclosed to persons outside the agencies	Respondents' Amended Open Response [77]	The Respondents do not take issue with this assertion, but the Tribunal is asked to have regard to the full context provided in the Respondents' pleadings as cited in the "Evidence" column.
37	GCHQ, SIS and MI5 do not currently hold, and have never held, a BPD of medical records	SIS Witness Statement [12]; MI5 Witness Statement [52], Response to RFI	The Respondents do not take issue with this assertion, but the Tribunal is asked to have regard to the full context provided in the Respondents' pleadings and evidence as

			cited in the “Evidence” column, together with §24 of the GCHQ statement of 8 July and (as may be intended by the reference to “Response to RFI” the response to request 51 in the Respondents’ Amended Response to the Claimant’s Supplemental Request for Further Information and Disclosure.
38	Medical data may appear in BPDs	GCHQ Witness Statement [24] SIS Witness Statement [12] MI5 Witness Statement [52]	It is accepted that information which relates to health or medical conditions may appear in BPDs. See for example witness statement of GCHQ witness, paragraph 24
39	BPD Handling Arrangements that came into force on 4 November 2015 have not been approved by the Intelligence Services Commissioner or the Interception of Communications Commissioner	Respondents’ RFI Response p. 4-5	The Respondents do not take issue with this assertion, but the Tribunal is asked to have regard to the full context provided in the Respondents’ pleadings cited in the “Evidence” column.

40	There have been instances of non-compliance with BPD safeguards at GCHQ, MI5 and SIS	GCHQ Witness Statement [100] – [102]; MI5 Witness Statement [102] – [103]; SIS Witness Statement [60] – [62]	The Respondents do not take issue with this assertion, but the Tribunal is asked to have regard to the full context provided in §§102-104 of the GCHQ statement of 8 July, §§103-104 of the MI5 statement of 8 July and §§61-63 of the SIS statement of 8 July, together with the Intelligence Services Commissioner’s Confidential Annexes to his reports in the period 2010-2014.
41	There are no publically available rules governing the international transfer of datasets	Claimant’s Re-Amended Statement of Grounds [47]	At all material times there have been publicly available rules governing the international transfer of datasets acquired by RIPA / ISA powers: see the relevant RIPA / ISA Codes of Practice. From November 2015, there have been additional publicly available rules governing the international

			transfer of datasets in the form of the BPD Handling Arrangements.
42	There was no statutory oversight of BPDs by the Intelligence Services Commissioner prior to the ISC report	Claimant's Re-Amended Statement of Grounds [47]	The Respondents do not take issue with this assertion, but the Tribunal is asked to have regard to the full context provided in the Respondents' pleadings cited in the "Evidence" column, together with §§99-102 of the MI5 statement of 8 July, §§58-60 of the SIS statement of 8 July and §§67-99 of the GCHQ statement of 8 July, and the Respondents' response to request 56 in the Amended Response to the Claimant's Supplemental Request for Further Information and Disclosure.
43	Prior to the publication of the ISC report, the holding of BPDs was kept secret. There was no	Claimant's Re-Amended Statement of Grounds [47]	It is accepted that, prior to 12 March 2015 it had not been expressly acknowledged to the

	public or parliamentary consideration of them.		public that the Respondents obtained BPDs.
44	There is no procedure to notify victims of any misuse of BPD so that they can seek a remedy before the Tribunal.	Claimant's Re-Amended Statement of Grounds [47]	It is accepted that there is no procedure under which individuals are informed that data relating to them held by one or more of the Respondents on a BPD has been the subject of an incident of non-compliance with internal arrangements.

CLAIMANT’S DRAFT SCHEDULE OF ASSUMED FACTS

Bulk Personal Datasets (BPDs)			
Assumed Fact	Evidence	Respondents admit/deny	Respondents’ reasons
It is to be assumed for the purposes of the preliminary hearing that the aggregation of multiple BPDs enables the Respondents to generate profiles and/or examine the activities of all of the individuals whose information is contained in the BPDs.	Claimant’s Re-Amended Statement of Grounds [50]	This assumed fact is agreed.	
Bulk Communications Data (BCD)			
Assumed Fact	Evidence	Respondents admit/deny	Respondents’ reasons
A Programme exists to enable		The Respondents propose the following assumed facts:	

<p>other Government agencies to access BCD obtained under s.94 and held by GCHQ</p>		<p>"It is to be assumed for the purposes of this hearing:</p> <ul style="list-style-type: none"> (a) that a Programme exists by which GCHQ discloses information to domestic law enforcement agencies; and (b) that this disclosure might take place either <ul style="list-style-type: none"> (i) by GCHQ permitting the LEAs to access and search data that it holds, including communications data obtained pursuant to section 94 directions; or (ii) by GCHQ providing the LEAs with information derived from the data that it holds, including communications data obtained pursuant to section 94 directions."
<p>The Programme allowed HMRC, SOCA and the NCA to access BCD relating to people's usage of social media and internet messaging services</p>		

Respondents' position added - 13 July 2016