

IN THE EUROPEAN COURT  
OF HUMAN RIGHTS

PRIVACY INTERNATIONAL

- and -

THE UNITED KINGDOM

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SUBMISSIONS OF THE APPLICANT TO ACCOMPANY  
THEIR APPLICATION FORM

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## **INTRODUCTION**

1. This document provides the submissions of the Applicant in the above matter, organised according to the Application Form.

## **STATEMENT OF THE FACTS [Box E]**

- (i) Background – GCHQ and the Applicant
2. The Government Communications Headquarters (“GCHQ”) is an intelligence service of the United Kingdom Government, operated under the control of a Director appointed by the Foreign Secretary.<sup>1</sup>
3. The Applicant, Privacy International, is a UK registered charity. It was founded in 1990 as the first organisation to campaign at an international level on privacy issues. The organisation’s mission is to defend the right to privacy across the world, and to fight unlawful surveillance and other intrusions into private life by governments and corporations. Privacy International routinely publishes its research in reports and analyses. It engages in a wide range of public debate on these issues.
4. Recent cases brought by Privacy International include a challenge to the lawfulness of the surveillance practices of Britain’s security services (*Privacy International v The Secretary of State for Foreign and Commonwealth Affairs and Ors*)<sup>2</sup> and a judicial review related to the export of surveillance technologies by a British company to

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<sup>1</sup> Intelligence Services Act 1994ss3(1), 4(1). The Intelligence Services Act 1994 provides the statutory basis for GCHQ and sets out that its functions are (a) to monitor or interfere with electromagnetic, acoustic and other emissions and any equipment producing such emissions and to obtain and provide information derived from or related to such emissions or equipment and from encrypted material; and (b) to provide advice and assistance about—(i) languages, including terminology used for technical matters, and (ii) cryptography and other matters relating to the protection of information and other material, to, inter alia, the armed forces or the United Kingdom Government.

<sup>2</sup> IPT/13/92/CH

repressive regimes in Bahrain and Ethiopia (R (*on the application of Privacy International*) –and– *The Commissioner for HM Revenue and Custom*).<sup>3</sup>

5. Privacy International also regularly intervenes as a third party in this Court, for example in the cases of *S. & Marper v United Kingdom*,<sup>4</sup> *Hannes Tretter and Others v Austria*,<sup>5</sup> *Ringler v Austria*<sup>6</sup> and *Sultan Sher and Others v United Kingdom*.<sup>7</sup>

(ii) The refusal of Privacy international’s request for information from GCHQ

6. On 4 March 2014 Privacy International wrote to Sir Iain Lobban, the Director of GCHQ, making the following request:

*“Pursuant to section 1 of the Freedom of Information Act 2000, we kindly request copies of any and all records consisting of or relating to:*

- 1) *An organisational chart(s) of the departments within GCHQ.*
- 2) *The number of people who work for GCHQ, broken down by departmental classifications that GCHQ uses in its normal course of business.*
- 3) *The current menu and price list for any restaurants, canteens, cafes or other food service providers that operate within any GCHQ controlled building.*
- 4) *Copies of all indoctrination declarations, official secrets act declarations, oaths, or other declarations GCHQ employees sign to receive confidential information.*
- 5) *A hierarchical list of the levels of security clearance and/or levels of access to classified information in use by GCHQ.*
- 6) *Documents describing the process and requirements a person must fulfill in order to obtain each level of security clearance and/or access to classified information, including but not limited to, counter-terrorism check, security check and developed vetting.*
- 7) *The number of people working for GCHQ who have obtained, respectively, each level of security clearance and/or access to classified*

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<sup>3</sup> [2014] EWHC 1475 (Admin)

<sup>4</sup> (Application Nos: 30562/04 and 30566/04)

<sup>5</sup> (Application No. 3599/10)

<sup>6</sup> (Application No. 29097/08)

<sup>7</sup> (Application No. 5201/11)

*information, including but not limited to counter-terrorism check, security check and developed vetting.*

8) *Documents, internal policies, or memoranda provided to new GCHQ employees regarding the legality of actions undertaken by GCHQ.*

9) *Documents provided to GCHQ employees setting out ways in which employees can raise concerns regarding the legality or ethical nature of activities undertaken by GCHQ.*

10) *Documents provided to GCHQ employees relating or regarding compliance with the Official Secrets Act.*

11) *Documents provided to GCHQ employees relating to compliance with section 4(2)(b) of the Intelligence Services Act 1994 (ISA).*

12) *Between 2000 and the present, the number of warrants issued pursuant to RIPA on which GCHQ has relied to carry out its activities, broken down by year and by the section of RIPA that authorized the warrant.*

13) *Between 1994 and the present, the number of warrants issued pursuant to the ISA on which GCHQ has relied to carry out its activities, broken down by year and by the section of the ISA that authorized the warrant.*

14) *A document index, including document title and number of pages, or similar inventory provided to the Interception of Communications Commissioner pursuant to the requirements of the Regulation of Investigatory Powers Act 2000 (RIPA) section 58.*

15) *A document index, including document title and number of pages, or similar inventory provided to the Intelligence Services Commissioner pursuant to the requirements of the RIPA section 60.*

16) *Number of instances, broken down by year, when the Director of GCHQ has refused to disclose information to the Intelligence and Security Committee pursuant to Schedule 3, sub-paragraph 3(1)(b)(i) of the ISA; and, the same information as regards sub-paragraph 3(1)(b)(ii) of the ISA.*

17) *Number of violations of any of the Codes of Practice promulgated under RIPA, broken down by year and section of the code violated.*

18) *The British-United States Communications Intelligence Agreement (now known as the UKUSA Agreement, also referred to as the Five Eyes Agreement) and subsequent instruments or other documents constituting agreements regarding the exchange of communications intelligence between the UK government and the United States, New Zealand, Australia and Canada.*

19) *Any other intelligence sharing agreements between the UK government and any other government, aside from the agreements described in request number 18.*

20) *Documents describing the process and requirements a foreign intelligence or security agency must fulfill in order to receive access to information classified by GCHQ.*

21) *The number of foreign intelligence or security agencies who currently have access to information classified by GCHQ.*

22) *The number of employees in foreign intelligence or security agencies, who currently have access to information classified by GCHQ, broken down by agency.”*

7. The Head of Information Rights at GCHQ replied by email on 4 March 2014 at 16:36, noting their decision to refuse the request (“the GCHQ refusal decision”). That email referred to the request, stating:

*“It has been passed to me, as GCHQ's Information Legislation authority, for a response. The Freedom of Information Act 2000 ("the Act") does not apply to GCHQ by virtue of s.84, which provides that GCHQ is not a government department for the purposes of the Act. This means that GCHQ is excluded from the list of public authorities listed in Schedule 1 and to which the Act does apply. As such we are not obliged to comply with the provisions and requirements of the Act and we cannot assist you further.*

*I regret that we are unable to be of assistance in this matter.”*

(iii) The reason for the GCHQ refusal decision

8. The Freedom of Information Act 2000 (“FOIA”) is the primary regime in UK law governing the disclosure of information held by public authorities.
9. The basis on which GCHQ refused to provide the information to Privacy International is that it is excluded from the freedom of information regime established by FOIA.<sup>8</sup>

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<sup>8</sup> Section 1(1) FOIA provides for rights of access to information held by ‘public authorities’. Section 3(1) FOIA provides that ‘public authorities’ are those listed under Schedule 1, from which GCHQ is omitted. Although Schedule 1 provides generally that any ‘government department’ is a public authority, Section 84 clarifies that GCHQ is not a ‘government department’. GCHQ is thus not a ‘public authority’ subject to the freedom of information regime established under the Act.

10. As such, the Head of Information Rights of GCHQ was correct to determine that under FOIA, GCHQ was not obliged to comply with Privacy International's request for information.
11. In fact, FOIA precludes any government authority from disclosing information if it was directly or indirectly supplied by GCHQ, by providing an absolute exemption to any duties of disclosure in relation to such information.<sup>9</sup>
12. Further, the Intelligence Services Act 1994 purports to prevent GCHQ from disclosing to Privacy International information that it has obtained in the course of pursuing its functions. There is a statutory requirement on the Director of GCHQ to ensure that no information obtained is disclosed by GCHQ except so far as is necessary for the proper discharge of its functions or for the purpose of criminal proceedings.<sup>10</sup>

(iv) The aims of Privacy International in requesting the information from GCHQ

13. Privacy International was pursuing both general and specific objectives in seeking a broad range of information from GCHQ. Had the information requested been provided to Privacy International, it could have enabled the exercise its established watchdog function in relation to a number of facets of the operation of GCHQ, not least by enabling it to:
  - 13.1. review the lawfulness of GCHQ activities and legal advice, including in relation to mass surveillance;
  - 13.2. assess the basis on which GCHQ are instructed as to the ethics of their operations;
  - 13.3. understand the interaction and compliance of GCHQ with oversight mechanisms;

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<sup>9</sup> See, Sections 2(2)(a), 2(3)(b), 23(1), 23(2)(c).

<sup>10</sup> See, Section 4(2)(a) Intelligence Services Act 1994. The functions of GCHQ are set out at Section 3(1) and (2) of that Act and are referred to at Footnote 1 above.

- 13.4. inform public debate about the information requested;
- 13.5. inform its expert submissions on privacy and surveillance issues when engaging with parliamentary and government committees, other international bodies and in litigation;
14. A specific objective of Privacy International was to obtain access to the instruments or other documents constituting agreements regarding the exchange of communications intelligence between the UK government and the United States, New Zealand, Australia and Canada, which together form the UKUSA Agreement (known as the Five Eyes Agreement).
15. The Five Eyes alliance is the largest and most highly integrated communications intelligence partnership in the world. Established in the aftermath of the Second World War, the alliance provides for extensive acquisition, transfer and analysis of signals intelligence (“SIGINT”) between the intelligence services of the Five Eyes member states. The original agreement, declassified by the UK and US governments in 2010, establishes the conditions for collaboration between the agencies and contemplated that all intercepted communications material would be shared amongst Five Eyes states by default. The modern alliance is grounded in and sustained by an unknown number of bilateral and multilateral instruments, agreements, memoranda of understanding and contracts which stipulate in detail the objectives, modes, means, and confines of signals intelligence gathering by the five countries, which documents and instruments are collectively referred to as the Five Eyes Agreement.
16. Information provided by NSA whistleblower Edward Snowden assisted in developing understanding of the current capabilities, scope and reach of the Five Eyes alliance, and confirmed that the alliance is more highly advanced and integrated than ever. For example, Snowden leaked a February 2012 strategy document published by the US National Security Agency and released to its Five Eyes partners,

which noted “we have adapted in innovative and creative ways that have led some to describe the current day as ‘the golden age of SIGINT.’ ”<sup>11</sup> Privacy International takes the position that the Five Eyes Agreement seriously implicates the rights and interests of individuals and it should be taken to assume the status of a legally-binding instrument, and reside in the public domain.

17. In November 2013 Privacy International launched its Eyes Wide Open campaign, advocating for greater transparency and scrutiny of the Five Eyes alliance. As one part of that campaign, it published an extensive report drawing together the disparate information in the public domain pertaining to the Five Eyes Agreement.<sup>12</sup>
18. In seeking to obtain the information requested, Privacy International, therefore, sought generally to bring greater accountability and transparency to the surveillance practices of GCHQ. In seeking to obtain information about the Five Eyes Agreement, Privacy International sought to bring greater accountability and transparency to a critically important international alliance that wields significant power, and which has been insulated from public and legal scrutiny for most of its history. None of the information sought would have damaged any genuine or legitimate national security interest.

(v) Summary of the Facts

19. On 4 March 2014, Privacy International requested information from GCHQ in a legitimate effort to gather information of public interest with the intention of, inter alia, imparting that information to the public and contributing to public debate.
20. On 4 March 2014, GCHQ refused to provide the requested information as it was not required to do so. It is excluded from the regime of the Freedom of Information Act 2000 (FOIA). A FOIA request to any other public authority supplied with the requested

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<sup>11</sup> See, *Eyes Wide Open*, Privacy International, Version 1.0 – 26 November 2013, at p.1.

<sup>12</sup> *Eyes Wide Open*, Privacy International, Version 1.0 – 26 November 2013.

information by GCHQ also could not have led to its disclosure. The public authority would have been absolutely prevented by the terms of FOIA from disclosing it to Privacy International, irrespective of the content of the requested information.

21. The refusal of Privacy International's request for information was as a result of a legislative scheme that made no provision for the disclosure of such information. There was with no consideration by GCHQ as to whether the refusal was necessary in a democratic society.

### **STATEMENT OF ALLEGED VIOLATIONS OF THE CONVENTION AND RELEVANT ARGUMENTS [Box F]**

22. For the reasons set out below, the right of Privacy International to freedom of expression guaranteed under Article 10 of the European Convention of Human Rights ("the Convention") has been violated and there is no effective remedy for that violation, in violation of their rights under of Article 13 of the Convention.

- (i) Interference with the right of access to information under Article 10

23. Article 10(1) of the Convention provides that the right to freedom of expression includes the freedom to receive information. It is a qualified right, subject to formalities, conditions and restrictions as set out in Article 10(2).

24. As set out below, the approach of the ECtHR in applications alleging breach of Article 10 in relation to the freedom to receive information held by a government body has evolved since *Leander v Sweden*<sup>13</sup> and *Guerra v Italy*.<sup>14</sup> The current leading decision, *Társaság a Szabadságjogokért v Hungary*,<sup>15</sup> reflecting a careful but necessary extension of the *Leander* approach.<sup>16</sup> The Applicants submit that the

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<sup>13</sup> Application No. 9248/81, (1987) 9 E.H.H.R 434

<sup>14</sup> Application No. 14967/89, (1998) 26 E.H.R.R. 357

<sup>15</sup> Application No. 37374/05, (2009) 53 E.H.R.R. 130

<sup>16</sup> See, dissenting opinion of Lord Wilson JSC in *Kennedy v Charity Commission*

jurisprudence of the European Court of Human Rights (“ECtHR”), as set out below, now correctly identifies that the right to receive information under Article 10(1) includes the right to require an unwilling public authority in some circumstances to disclose information.

25. In *Leander*, as applied *Gaskin v United Kingdom*,<sup>17</sup> *Guerra and Roche v United Kingdom*,<sup>18</sup> the ECtHR held:

*“The right to freedom to receive information basically prohibits a Government from restricting a person from receiving information that others wish or may be willing to impart to him. Article 10 does not, in circumstances such as those of the present case, confer on the individual a right of access to a register containing information on his personal position, nor does it embody an obligation on the Government to impart such information to the individual.”*<sup>19</sup>

26. In *Guerra*, the ECtHR added that the freedom to receive information did not impose on the State, in the circumstances of the case, positive obligations to collect and disseminate information of its own motion.<sup>20</sup> That conclusion was repeated in *Roche*, an application by a former serviceman for records relating to his exposure to chemicals said to have damaged his health.<sup>21</sup>
27. The approach in *Leander* was recently endorsed *obiter* by a majority of the United Kingdom Supreme Court in *Kennedy v Charity Commission*.<sup>22</sup>
28. The Applicant adopts the analysis of Lord Wilson JSC in *Kennedy* where, in his dissenting judgment, he reasoned that the Supreme Court should “confidently conclude” that a right to require an unwilling public authority to disclose information can arise under article 10.<sup>23</sup> Indeed, the evolving recognition of the right of access to information has been gradual, but since *Társaság* the ECtHR has

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[2014] UKSC 20, [2014] 2 WLR at [188].

<sup>17</sup> Application No. 10454/83, (1990) 12 E.H.R.R. 36

<sup>18</sup> Application No. 32555/96, (2006) 42 E.H.R.R. 30, at [172].

<sup>19</sup> At [74].

<sup>20</sup> At [53].

<sup>21</sup> At [172] – [173].

<sup>22</sup> [2014] UKSC [2014] 2 WLR.

<sup>23</sup> At [189].

consistently moved towards recognition of that right: In *Társaság* the ECtHR noted the position in *Leander* but reasoned that “the Court has recently advanced towards a broader interpretation of the ‘freedom to receive information’ and thereby towards the recognition of a right of access to information.”<sup>24</sup> It considered that obstacles created in order to hinder access to information of public interest may hinder those working as ‘public watchdogs’ from pursuing such matters. Any barrier to the exercise of those functions called for ‘the most anxious scrutiny’. In the circumstances of that case, where there was an ‘information monopoly’ preventing access to data was otherwise readily available. The Court found that the State had an obligation not to impede the flow of information sought by the applicant.<sup>25</sup> In *Kenedi v Hungary*<sup>26</sup> the applicant historian wished to publish a study concerning the functioning of the Hungarian State Security Service and requested that the Ministry of the Interior provide him access to documents deposited with it. He complained that the Ministry’s protracted reluctance to grant him unrestricted access to those documents prevented him from publishing an objective study on the functioning of the Hungarian State Security Service. The ECtHR emphasised that “access to original documentary sources for legitimate historical research was an essential element of the exercise of the applicant’s right to freedom of expression”, citing *Társaság*. The ECtHR found that Article 10 was engaged (a position accepted by Hungary) and, in the circumstances, that it had been violated. In *Gillberg v Sweden*<sup>27</sup> the Grand Chamber referred to the prevention of access to certain documents (such access had been granted by the Administrative Court of Appeal) as impinging the right under Article 10 to receive information.<sup>28</sup> In *Shapovalov v Ukraine*<sup>29</sup> the ECtHR relied on paragraph 38 of *Társaság*,

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<sup>24</sup> At [35].

<sup>25</sup> At [38], citing *Goodwin v United Kingdom* (1996) 22 E.H.R.R. 123 at [39].

<sup>26</sup> (2009) 27 BHRC 335

<sup>27</sup> Application No. 41723/06, (2012) 34 BHRC 247

<sup>28</sup> At [92] to [93].

<sup>29</sup> Application No 45835/05 (2012) 34 BHRC 247.

in which the Court referred to the adverse impacts on ‘public watchdogs’ where obstacles were created to hinder access to information of public interest.<sup>30</sup> In *Youth Initiative for Human Rights v Serbia*<sup>31</sup> the ECtHR cited a number of relevant international documents regarding the right to access information held by public bodies.<sup>32</sup> It found a breach of Article 10 arising from the refusal of the intelligence agency of Serbia to provide the applicant NGO with certain information about electronic surveillance, notwithstanding a binding decision of the Information Commissioner in its favour. Citing *Társaság and Kenedi*, the ECtHR found that: “as the applicant was obviously involved in the legitimate gathering of information of public interest with the intention of imparting that information to the public and thereby contributing to the public debate, there has been an interference with its right to freedom of expression”.<sup>33</sup> In *Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung v Austria*<sup>34</sup> the applicant association complained that its right to receive information had been violated as it was refused access to decisions of a property transactions Commission. The Commission was an authority that approved or refused transfers of land under an Act that aimed to preserve land for agricultural and forestry use and the proliferation of second homes. Those aims, the ECtHR found, were subjects of general interest. The aim of the applicant association was to research the impact of transfers of ownership of agricultural property and forest land on society.<sup>35</sup> Citing *Társaság and Kenedi*, the court found: “The applicant association was therefore involved in the legitimate gathering of information of public interest. Its aim was to carry out research and to submit comments on draft laws, thereby contributing to public debate. Consequently, there has been an interference with the applicant association’s right to receive and to

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<sup>30</sup> At [68].

<sup>31</sup> Application No 48135/06 (unreported) given 25 June 2013.

<sup>32</sup> At [13] to [15].

<sup>33</sup> At [24].

<sup>34</sup> Application No 39534/07 (unreported) given 28 November 2013.

<sup>35</sup> At [35].

impart information as enshrined in Article 10 § 1 of the Convention”.<sup>36</sup> In *Rosiianu v Romania*<sup>37</sup> (decided by the ECtHR several months after the decision of the United Kingdom Supreme Court in *Kennedy*) the applicant journalist requested information relating to the use of funds by city authorities. The ECtHR noted that the application concerned access by the applicant to information of a public nature that was necessary in the exercise of his profession, such access being an essential element in the exercise of the applicant’s freedom of expression. The court noted that the applicant sought information of general importance. Further, the applicant intended to communicate that information to the public and thus contribute to the public debate on good public governance. The Court found that it was clear that he was deprived of his right to impart information. Citing *Társaság, Kenedi* and *Youth Initiative for Human Rights*, the Court found that there had been an interference with the rights enshrined in Article 10(1). The aims of Privacy International in gathering the information are set out above at **[Error! Reference source not found.]**. It is submitted that Privacy International, as a pre-eminent watchdog engaging with issues of significant public interest regarding privacy and surveillance, has a qualified right under Article 10 to access information held by public authorities, especially when engaged, as it was, in gathering that information to contribute to the public debate on such issues. Privacy International was denied all access to such information by reason of the refusal of GCHQ to provide it. In any event, they are prevented from accessing the information, as set out above at [8] to [12].

29. In the circumstances, there was an interference with the rights of Privacy International to access the requested information under Article 10(1) of the Convention.

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<sup>36</sup> At [36].

<sup>37</sup> Application No 27329/06, unreported, judgment in French only.

(ii) Whether the interference was justified

30. The interference with the Applicant's rights under Article 10(1) will infringe the Convention if it does not meet the requirements of paragraph 2 of Article 10, which provides:

*"2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."*

31. The Applicant submits that the interference with its rights was not necessary in a democratic society.

32. The infringement of the right of the Applicant to access the requested information prevented it from engaging with the public and authorities about information of substantial public interest. Naturally, the importance of the public interest in the information requested varies with each request. Similarly, if disclosure of the information requested posed a risk to national security, public safety or engaged other restrictions under Article 10(2), that risk also varies with each request.

33. The FOIA scheme precluded any consideration of the balance between the Applicant's freedom to receive the information requested and any competing interest identified by Article 10(2). The Applicants note that ECtHR jurisprudence confirms that interference with the rights under Article 10 can only be justified by "imperative necessities" and that any exceptions to freedom of expression must be interpreted narrowly<sup>38</sup>; the Court has taken the position that, even where an interference with freedom of expression is based on considerations of national security and public safety and is part of a State's fight against terrorism, the interference can be regarded as

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<sup>38</sup> See: *Vereinigung Demokratischer Soldaten Österreichs and Gubi v Austria*, Application No. 15153/89 (1995) 20 E.H.R.R. 56.

necessary only if it is proportionate to the aims pursued.<sup>39</sup> As set out below, the Applicant submits that, in the circumstance, there was an unnecessary interference with its rights. First, without consideration by GCHQ of the necessity and proportionality of secrecy in relation to each of their requests, the restriction on the Applicant's rights to access the information was arbitrary and there was no safeguard against it being disproportionate.

34. Second, the absolute restriction on their access to information, held only by GCHQ, was without reference to the value of the Applicant's right to freedom of expression, and amounts to a fundamental and insurmountable obstacle to the exercise of that freedom. As the ECtHR noted in *Társaság*, such barriers should be subject to 'the most anxious scrutiny'.<sup>40</sup> Third, further, the Applicant notes that the denial of access to the requested information restricted its political expression. The Court has long held that "political expression", including expression on matters of public interest and concern, requires a high level of protection under Article 10.<sup>41</sup> The Applicant submits that this should have weighed heavily in a decision as to whether or not to restrict its freedom to access the information. GCHQ was prevented by the FOIA scheme from giving any weight to this factor.

35. Fourth, the Applicant notes that the issues arising from the requested information, on which it wishes to inform the public and engage with national and international institutions, are issues of exceptional public concern given the development of mass surveillance using modern technologies and the recent public revelation of the same by Edward Snowden and media organisations in a number of Council of Europe states. The ECtHR has recognised the role of civil society organisations as a public watchdog akin to the press in safeguarding

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<sup>39</sup> *Ceylan v Turkey*, Application No 23556/94, 30 E.H.R.R. 73 at [41]

<sup>40</sup> See above at [33]

<sup>41</sup> See: *Steel and Morris v UK* Application No.68416/01 (2005) 41 E.H.R.R. 22, at [88] to [89], citing, inter alia, *Thorgeir Thorgeirson v Iceland* ( A/239): (1992) 14 E.H.R.R. 843

democracies.<sup>42</sup> This was recently articulated in relation to Privacy International by Mr Justice Green in *R (on the application of Privacy International) –and– The Commissioner for HM Revenue and Customs*<sup>43</sup> as follows: “Pressure groups share many similarities with the press. They can act as guardians of the public conscience. As with the press their very existence and the pressure they bring to bear on particular issues and upon those who are responsible for governance of those issues, is one of the significant checks and balances in a democratic society. They have, therefore, a significant role to play.”<sup>44</sup>

36. In this context, the Applicants submit that their ‘watchdog’ function should also have been afforded great weight in any decision relating to the disclosure of the requested information; in fact, it was given no weight.
37. Finally, the Applicant notes that in a modern democracy there are many ways open to government to secure to Privacy International and other public watchdogs their qualified right to access to information, including sensitive information. An absolute restriction on access to all information held by GCHQ means that in every instance, regardless of the public interest in favour of disclosure or the absence of any genuine national security risk, disclosure will never be provided. It is submitted that this has caused in this case a disproportionate restriction on the right of the Applicant to freedom of access to information.

(iii) Article 13

38. The Applicant submits that there is no effective domestic remedy capable of dealing with the substance of the alleged violation of its

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<sup>42</sup> See, e.g., *Vides Aizardzibas Klubs v Latvia* Application No. 57829/00.

<sup>43</sup> [2014] EWHC 1475 (Admin)

<sup>44</sup> At [77]. The ECtHR has also stated that it considers that in a democratic society “even small and informal campaign groups [...] must be able to carry on their activities effectively and that there exists a strong public interest in enabling such groups and individuals outside the mainstream to contribute to the public debate by disseminating information and ideas on matters of general public interest [...]”: *Steel and Morris v UK* at [88] to [89].

rights, nor is appropriate relief available.<sup>45</sup> As GCHQ is excluded from the FOIA scheme, there was no appeal or other remedy against the refusal decision available to the Claimant.

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<sup>45</sup> See, e.g. *Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung v Austria*, at [54]: “As the Court has held on many occasions, Article 13 of the Convention guarantees the availability at national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they may happen to be secured in the domestic legal order. The effect of Article 13 is thus to require provision of a domestic remedy to deal with the substance of an “arguable complaint” under the Convention and to grant appropriate relief. The scope of the Contracting States’ obligations under Article 13 varies depending on the nature of the applicant’s complaint; however, the remedy required by Article 13 must be “effective” in practice as well as in law...” . The Applicant also notes, to the extent that any legislation may be incompatible with Convention rights, that Grand Chamber in *Burden and Burden v UK* (2008) 47 EHRR 38 did not, at that time, consider a declaration of incompatibility to be an effective remedy for the purposes of Article 13.