

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

SKELETON ARGUMENT
ON BEHALF OF THE RESPONDENTS
For hearing on 12 March 2018

[References are to the OPEN bundle prepared for the October 2017 hearing ("October HB"); the OPEN bundle prepared for the December 2017 hearing ("December HB"); and the first OPEN bundle prepared for the cross-examination of the GCHQ witness at the February 2018 hearing ("February HB")]

Introduction

1. These submissions are served for the purposes of the OPEN hearing in these proceedings listed to take place on 12 and 13 March 2018. The submissions address the issues identified in the Tribunal's email to the parties dated 28 February 2018:
 - a. Section 94
 - b. Sharing
 - c. Proportionality
 - d. Reopening the Tribunal's October 2016 judgment on oversight.

Section 94

2. Unlawful delegation focuses on the relationship between the Secretary of State and GCHQ. Power that is required by statute to be exercised by the Secretary of State must in fact be exercised by GCHQ.

3. **First**, the direction is given to the CSP by the Secretary of State ("*I give you a direction...*" and see §3 of the direction [October HB / TAB 4i]). The relevant relationship to which the direction goes is thus that between the CSP and the Secretary of State. It is for the Secretary of State to decide how, and on what terms, the direction to the CSP should be given. The Secretary of State is entitled to involve a third party (here GCHQ) in the operation of the direction. That involvement is simply an incident of what is for present purposes the relevant relationship: that between the CSP and the Secretary of State.
4. **Secondly**, the power in question is to give a direction. The direction is not given by GCHQ. It is given to the CSP by the Secretary of State.
5. **Thirdly**, the direction indicates the terms on which the Secretary of State was content to direct the CSP. The fact that the direction contains wording such as 'if requested to do so by GCHQ' does not establish or support the proposition that GCHQ are giving the direction or that the power to do so has been delegated to them. The Secretary of State has decided that the direction should be given in those terms. That the terms allow for GCHQ to make a request in this way is a decision for the Secretary of State. It does not in effect make the direction a direction of GCHQ. The Secretary of State is simply directing the CSP that his direction is they need to react on request by GCHQ. These words thus describe the nature of the direction that had been given by the Foreign Secretary to the CSP.
6. **Fourthly**, the Secretary of State could, without unlawful delegation, direct the CSP to provide a category of data with subsets of that data being in effect called off from time to time by GCHQ (or not). The fact that that mechanism for operating the data provision involved decision making by GCHQ does not entail unlawful delegation by the Secretary of State. The provision of the subset and this mechanism was authorised by the Foreign Secretary; and the production of the data in this way was the subject of the direction made by the Foreign Secretary to the CSP. The authorisation of the greater (all categories of data referred to in the direction) encompassed authorisation of the lesser (eg sub-sets of it from time to time called off by GCHQ).
7. **Fifthly**, under s.94 it is of course for the Secretary of State to conclude that a direction is necessary in the interests of national security and that the conduct required of the CSP by the direction is proportionate to what is sought to be achieved by that conduct. However, there is nothing whatever to prevent the Secretary of State concluding that it was both necessary and proportionate to make a direction of this kind and with this mechanism built into it. Such a conclusion is not inconsistent with decision making by GCHQ as part of the mechanism.
8. The relevant power is the power to direct, as already noted. That power vis a vis the CSP is exercised by the Secretary of State and is on no view delegated. Nor even has the Secretary of State failed to make or passed over decision making under s.94 on necessity and proportionality.
 - a. The Secretary of State in issuing a direction in this form has evidently concluded that it is necessary in the interests of national security for the

breadth of the categories of data referred to in it to be provided. That is plainly so, and there appears to be no dispute about that.

- b. The Secretary of State has also evidently decided that it would be proportionate for the CSP to take the action required by the direction. That is to provide data up to that limit, but in sub-sets as called off by GCHQ. That does not involve unlawful delegation. GCHQ is simply, and at most, deciding the timing and sub-sets of data which the Secretary of State has already concluded it would be proportionate to provide. The Secretary of State has also decided that it is proportionate for it to be provided in this way – by sub-set. The authority provided on this hypothesis to GCHQ does not involve them usurping powers of the Secretary of State. The limits of that authority, and the controls upon it, are for the Secretary of State.
9. Nor can this argument be dressed up in different clothing by asserting that the Secretary of State must have made a disproportionate decision because he authorised GCHQ to call only for a sub-set of the data. That is not the way the case has ever been put. But it would be wrong in any event. The inference does not follow. The Secretary of State could, entirely lawfully, be satisfied that it would be proportionate to require the CSP to produce the entirety of the data referred to in the direction. The fact that sub-sets may be called off over time does not undermine the validity of that judgement or decision. It simply indicates that particular types or sets may be needed over time; and that the system would work better (in the sense both of more effectively and in a more targeted way) with that flexibility built into it.
10. **Finally**, it is necessary to address the sufficiency of protection in Article 8 terms in circumstances in which such a mechanism, involving some decision making by GCHQ is authorised under the direction. It is submitted that there is no deficiency in protection. The involvement of the Secretary of State is very important to the safeguarding regime; and is relied upon by the Respondents as such. That safeguard is not undermined in principle by the existence within the direction of some scope for decision making by GCHQ:
 - a. There is no Article 8 authority to suggest that the fact of any such decision making by anyone other than the Secretary of State is in principle fatal to, or even likely significantly to undermine, the Article 8 lawfulness of a regime. The ECtHR, as the Tribunal's own earlier jurisprudence makes clear, takes a more flexible and practical approach – in essence, examining all the elements of safeguarding both in principle and in their practical operation and then asking the overall question as to whether they are sufficient to prevent arbitrary conduct.
 - b. The Secretary of State was on any view, and at the lowest, intimately involved in the processes. He authorised decision making by GCHQ as part of the mechanisms referred to on the face of the direction. Indeed, that authorisation is the positive premise on which the Claimant's delegation arguments proceed. He was satisfied that the breadth of the data the subject of each direction was necessary and proportionate to be called for. He was plainly aware that GCHQ would then liaise with CSPs to call off either all of or sub-sets of the data. The Secretary of State remained throughout in control

of the process and the mechanisms under which data was called off. If not satisfied that they were working properly he could, and no doubt would, have altered matters. It is submitted that Article 8 would not insist, in those circumstances, on the Secretary of State needing specifically to authorise each sub-set before it was called off.

11. All of the above proceeds on the basis that there was in the past some element of independent GCHQ decision making. The Tribunal will be well aware of the state of the evidence on that issue. However, it is important to note two matters.
12. The first is that the corrections that have been made to the GCHQ evidence do not affect the replacement section 94 directions made in October 2016. The factual position relating to those directions is set out at paragraph 20 of the Tenth Statement of the GCHQ Witness [**February HB / TAB 10**]. The submission to the Foreign Secretary (dated 13 October 2016) inviting him to make these directions is at **TAB 41** of the same bundle. As will be seen, in the case of these directions:
 - a. Because (following Sir Stanley Burnton's Report) the data to be provided was specified on the face of each direction, the question of 'selection' of data by GCHQ did not arise - the trigger letters simply referred to the data specified on the direction.
 - b. The Foreign Secretary was aware that the new directions were to be triggered "immediately" (see §5 of the submission), and that is what happened - the directions and accompanying trigger letters were delivered to the CSPs on the day that the directions were made (see Tenth Witness Statement, §20).
13. The second is that, even in relation to the earlier directions, the extent of the change in the corrected factual position needs to be borne in mind. It is accepted that, as the evidence now shows, in some cases GCHQ requested categories of data to be provided that were narrower than those set out on the face of the relevant direction, and to which reference had not been made in the submission to the Foreign Secretary. But there are other cases:
 - a. where the data requested was the same as that set out in the direction - see Tenth Statement of the GCHQ Witness at §7; and
 - b. where, although the GCHQ trigger letter requested datasets that were narrower than those identified on the face of the direction, the submission to the Foreign Secretary had stated that GCHQ would be making this narrower request - see the Tenth Statement of the GCHQ Witness at §§6 (the second direction described), 12, 15-17, and 19.

Sharing

14. The Respondents do not at present have anything to add to the submissions previously made on this subject.

Proportionality

15. The Respondents do not at present have anything to add to the submissions previously made on this subject. They will respond if appropriate to any submissions made on behalf of the Claimant.

Reopening the Tribunal's October 2016 judgment on oversight

16. The Claimant's application for the Tribunal to re-open the findings that it made concerning Commissioner oversight of BPD / BCD in its October 2016 judgment was dated 10 November 2017 and is to be found at [December HB / TAB 12].
17. The Respondents provided their outline response to the Claimant's application at §§6 to 12 of their skeleton argument for the December hearing [December HB / TAB 2]. In summary:
 - a. The Respondents did not argue that the Tribunal lacked *vires* to re-open its judgment.
 - b. The Respondents submitted that the Tribunal should not consider the application until after it had considered and ruled on the question of the oversight of sharing.
 - c. The Respondents reserved their right, in the event that the Tribunal did decide to re-open factual issues, to file further evidence and make further submissions going to those issues.
18. It is submitted that, although it is accepted that the Tribunal has the power to re-open its findings, the threshold must be a demanding one. The matters relied upon in the Claimant's application do not come close to passing this threshold.
19. The Claimant's application relies heavily on what is said in the IPCO correspondence about the lack of any previous inspection or audit of industry sharing. Factually, however, this is an extremely narrow point. Set in the context of all the other aspects of the Commissioners' work relating to the BPD and BCD regimes, this factual issue is not capable of dislodging the broad conclusions that the Tribunal has already reached. As to the narrowness of the issue:
 - a. The evidence is that the Commissioners were aware of GCHQ's work with industry, albeit that they had not been informed of the fact of sharing of BPD / BCD with industry partners. See §§41 and 42 of the Amended Fifth Witness Statement of the GCHQ Witness at [February HB / TAB 5].
 - b. The failure to inform the Commissioners of this sharing must be seen in the context of the extremely limited sharing of this sort that has in fact taken place. In the entire period since 2010 (a) there was only one instance of sharing of BPD, involving a single database containing non-sensitive BPD being accessed remotely by a small number of individuals (fewer than 20); and (b) there was only one instance of possible sharing of BCD, when a

sample of operational data that may have contained BCD was transferred to industry partners (see §§29 and 33 of the Amended Fifth Statement).

- c. The fact that the Commissioners were unaware of one actual and one possible instance of sharing of this nature over a period of several years cannot possibly amount to a failing of sufficient magnitude to warrant re-opening the Tribunal's earlier findings. Indeed, the Respondents do not accept that these facts disclose any 'failings' at all by the Commissioners.
20. The Claimant also places weight for the purposes of its application on the 'amber' recommendation made in the BCD GCHQ Inspection Report [**February HB / TAB 32**]. It will be recalled that there is a factual issue here between IPCO and GCHQ relating to the provision of audit logs and search terms relating to BCD searches at the IOCCO April 2017 inspection. GCHQ's most recent account of this episode, to which IPCO has not responded, is at §4 of the Ninth Witness Statement of the GCHQ Witness [**February HB / TAB 9**]. This issue (which even in IOCCO's view only merited an amber recommendation) could not justify re-opening the Tribunal's previous findings.
 21. Finally, the Claimant relies for the purposes of its application on the Commissioners' alleged lack of resources and/or technical understanding. The Tribunal has heard the Respondents' OPEN submissions on this point. There is also now the letter from Sir Adrian Fulford dated 28 November 2017 [**December HB / TAB 20**], which provides valuable context for the reference in IPCO's earlier letter of 28 September 2017 to Sir Mark Waller's reluctance to use inspectors within his oversight regime.
 22. Taking all these points together, it is submitted that they fall far short of meeting the high threshold for a re-opening of the Tribunal's judgment. The application should be dismissed.

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ANDREW O'CONNOR QC
RICHARD O'BRIEN

8 March 2018.