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Your ref:
Our ref: **Z1718275/EAO/N1**

8 April 2019

Dear Sirs,

Privacy International & Reprieve and others v SSFCA and others

Further to the hearing in this matter on 28 February, we write regarding the inadvertent disclosure of material which is the subject of Legal Professional Privilege to the Tribunal and its counsel (CTT).

In considering CTT's opening up requests, it came to the Respondents' attention that the sections of the documents (which were highlighted at the hearing and are set out below) were inadvertently disclosed when the documents were provided. It was not our clients' intention to waive privilege in that material and we have requested that copies of the documents in the hands of the Tribunal and CTT be replaced with versions where these paragraphs are redacted.

Procedural History
The relevant sections of the documents in question are:

1. Agent Running and Participation in Criminality (Official Guidance) – Chapter 5 of Legal Compliance Manual, Tab 13, p73, second paragraph under the hearing "Does RIPA authorise criminality agents or their handlers?" This is marked as LPP on the document.
2. Security Service Guidelines on the use of Agents who Participate in Criminality, tab 19, p102, paragraph 4. This is not currently marked as LPP on the document.

Document 1 was disclosed to the Tribunal and CTT on 24 January 2018. Document 2 was disclosed on 30 November 2018. The same LPP point arises in both paragraphs.

The fact that these paragraphs contain LPP material was realised when the documents were further considered by the Respondents during the course of considering CTT's requests to open up various parts of these documents.

Respondents' Position

In adversarial litigation governed by the CPR, the position on inadvertent disclosure is as follows. If a document is inadvertently included in the list of documents for disclosure, the court will ordinarily permit the disclosing party to amend the list once its mistake has been realised (see para 16.21, Matthews and Malek on Disclosure (5th Ed)). In contrast, once the other side has inspected the document, it is generally too late for the disclosing party to claim privilege in order to correct the mistake. The test for such an application is as recently set out by the Divisional Court in Belhaj v DPP & Ors [2018] EWHC 514. In particular, it includes consideration of whether the document was made available for inspection as a result of an obvious mistake, ie where either the inspecting solicitor did appreciate the mistake or it would have been obvious to a reasonable solicitor in his position that a mistake had been made. In Belhaj, the Divisional Court also considered whether the Defendant had engaged in any tactical deployment of the legal advice for litigation advantage (and rejected that argument). The Court further held that allowing the Defendant to assert privilege at that stage favoured fairness.

In the Respondents' submission, the Belhaj principles should be modified in the present case. In particular: this is not purely adversarial litigation; there has been no disclosure to the claimants; and there has been no inspection by any solicitor (assuming that CTT is not to be treated as analogous). Those factors militate in favour of the legal test being more favourable to the Respondents, as where a document has been mistakenly included in the list of documents.

However, even if the correct test is as set out in Belhaj, the disclosure was: erroneous; a sufficiently obvious error; not done deliberately; not designed to favour one side's case; and immaterial to the matters at issue in this litigation.

Next steps

It is our understanding from the hearing that the Tribunal wished the Respondents to now notify the Claimants of the Respondents' application and our position so that the Claimant could make any submissions on the application, if they so wished. The Tribunal indicated that it could consider further submissions on the papers in the first instance, and if a hearing was required, the hearing on 25 July could be used for that purpose.

Yours faithfully,

[redacted]