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Sir Swinton Thomas
Interception Commissioner
Home Office
50 Queen Anne's Gate
London SW1H 9AT

GCHQ Reference: LA2/05347/6/3/19
Your Reference:

Date: 18TH October 2004

Dear Sir Swinton,

COMMUNICATIONS DATA – ACQUISITION AND DISCLOSURE

1. Following your visit to GCHQ in July 2004 and our discussion in London on 14th October 2004, this letter discusses the GCHQ procedures for handling communications data and seeks to confirm your view of their fitness for purpose.

2. Communications data is an increasingly important tool in GCHQ, especially in the fight against global terrorism and serious crime. About 250 staff are involved in its analysis and about 40% of End Product Reports are derived directly or indirectly from the analysis of communications data.

3. The communications data is stored in GCHQ databases. Huge volumes of data are acquired (about 40 million bits of data per day). There are two databases at GCHQ holding communications data acquired in 'bulk' – known as [redacted] Ideally all the material would be held on a single database, but the data is configured differently by the CSPs and resource constraints in GCHQ have meant that it is not feasible, at this point in time, to re-configure and hold all the data in a single database.

4. The [redacted] database holds computer-to-computer [redacted] communications data all of which originates from sources authorised by the RIPA 8(4) warrants. The [redacted] database contains communications data relating to telephony. About 90% of the data stored on the [redacted] database originates from sources authorised by the RIPA 8(4) external warrants and about 10% from section 94 directions.

5. The data held on the [redacted] database is not separated by reference to the legal instrument under which it was obtained for the following reasons:

- To date, GCHQ has relied on legal advice previously tendered (coupled with the requirements of the process described at para 9 below) that such separation, in legal terms, is unnecessary;

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- In the interests of security and commercial confidentiality, GCHQ prefers to keep all the telephony material together in one database (rather than separate it) to disguise its source, as the origins of some of the material is extremely sensitive;

- The combining of all telephony-related communications data in a single database makes analysis of such data much quicker and more reliable; this is particularly so with pattern analysis which relies on exploiting large quantities of data.

6. The origin of the material is not consistently flagged, so an analyst cannot tell whether a particular bit of communications data originates from a warrant or a direction.

7. Communications data is currently retained for [redacted].

8. The mechanics of facilitating access by GCHQ staff to communications data obtained by GCHQ in reliance on either its RIPA section 8(4) warrant or the section 94 directions issued to it are the same and were demonstrated to you on your recent visit to Cheltenham but, for ease of reference, are reproduced below:

9. The databases are searchable. To access the communications data databases the analyst is required to log on and an audit log is automatically created. The log records who accessed the database, the date, time on and time off. It also records the JIC requirement underpinning the request (national security, EWB and/or serious crime), a [redacted] number (which is a GCHQ system providing a higher level of granularity taken from the JIC R&P) and a specific justification. We consider that the provision of this information is sufficient to protect an individual's Article 8 rights (in that information may not be accessed unless it is for a proper purpose), and to ensure that GCHQ can respond appropriately should an individual complain to the Investigatory Powers Tribunal.

Legal analysis:

10. Communications data may be acquired under a number of different legal instruments:

- Section 8(4), or section 8(1) RIPA warrants. Section 5(6)(b) of RIPA provides that an interception warrant may authorise the obtaining of related communications data;

- Section 94 directions under the Telecommunications Act 1984 (as amended by the Communications Act 2003);

- Notices or authorisations given under sections 21 to 25 RIPA (Part 1, Chapter II).

[redacted]

[redacted]

(It is also the case that occasionally, e.g. immediately post 9/11, communications service providers voluntarily provide communications data to GCHQ for analysis.)

11. It has always been GCHQ's position that each of the three methods of acquisition listed above is equally valid in law and GCHQ presently relies upon all three types of legal instrument when acquiring communications data. This being so, we welcome the views that you express in your letter to [redacted] dated 6 July 2004.

12. We would contend (and from what you have said in your correspondence with [redacted] we believe that you concur) that the transfer of data to our databases pursuant to section 94 directions is in accordance with the law provided that the Secretary for State responsible for signing such directions is able to properly consider necessity and proportionality issues.

13. Turning now to the legal position relating to accessing the data obtained under the directions. GCHQ does not presently adopt the RIPA Part I Chapter II authorisation process to access data on its [redacted] databases. Hitherto, we have taken the view that s.94 (when coupled with the access procedures described in para 9 above) has operated in such a way so as to make the accessing of any data held on the database in accordance with the law. We are aware that you have previously expressed some reservations about this interpretation of the effect of s.94, and this brings us to the crux of this letter. Whilst we accept that it is *arguable* that s.94 is insufficiently precise so as to make the access of any data obtained pursuant to any directions issued under that section not in accordance with the law, GCHQ would favour the interpretation that it presently relies on, i.e. that s.94 operates to the effect that access to the data obtained under any direction is in accordance with the law (particularly when taken in conjunction with our current access procedures).

14. There are very real practical difficulties in GCHQ being required to obtain a RIPA Part I Chapter II authorisation in respect of accessing any data that it had obtained in reliance on section 94 directions. This is because it is not possible to identify which of the small percentage of the total communications data held on the [redacted] database has been acquired under section 94 directions. This being the case, if an authorisation was required to access any data held on [redacted] that was obtained pursuant to s.94 directions it would be necessary to obtain an authorisation in each and every case that communications data was accessed on this database – even if the data had been obtained in reliance on a RIPA section 8(4) warrant. At present, our staff make about 2,000 queries of the [redacted] database each week. In a proportion of these cases, the analyst will not have any information about the identity of the entity and may be undertaking target profiling work looking for calling patterns that are associated with known terrorist behaviour rather than a particular entity.

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15. However, taking into account the fact that the Secretary of State would have made a judgement as to necessity and proportionality when issuing the directions authorising the acquisition of the data, we believe that the requirements that have to be fulfilled by GCHQ staff when communications data is accessed by them on the [redacted] database are such that the spirit of RIPA (insofar as the tests of justification, necessity and proportionality are met) is fully adhered to. In addition, an unintended consequence of requiring the RIPA process would be to create an inconsistency between the authorisation regime for communications data and that required for intercept selected under a RIPA 8(4) warrant. A higher level of protection would be provided for communications data than for such selected material. This seems odd given that taking action on communications data is agreed to be intrinsically less intrusive into privacy.

16. Given the contents of your 6 July letter to [redacted] and the comments you made when you last visited Cheltenham (when, if we understood you correctly, you seemed to suggest that adherence to the spirit of the legislation was an important factor when considering whether the necessary legal requirements for accessing the data held on the [redacted] database had been met), and those you made when we met in London on the 14th, are you content with the processes currently adopted by GCHQ for its staff to access communications data held on its [redacted] database and that such access is in accordance with the law? If you are not content with our current interpretation of s.94 and our practices/processes, then we would welcome the opportunity to discuss this with you further.

Yours sincerely,

[redacted]

[redacted]
Legal Adviser

CC: [redacted]

[redacted]

[redacted]

From the Interception of Communications Commissioner:
The Rt. Hon. Sir Swinton Thomas
c/o Room 1022
50 Queen Anne's Gate
London SW1H 9AT

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Legal Adviser LA2
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Your ref: LA2/0534/6/3/19

Our ref: IPS/04 1/1/1

Date: 17 November 2004

Dear [redacted]

COMMUNICATIONS DATA – ACQUISITION AND DISCLOSURE

Thank you for your letter of 18th October. I do not think that the problem of accessing communications data pursuant to a Section 94 direction is altogether easy or straightforward, and I have given it considerable thought.

When the Secretary of State makes a direction under Section 94(2) of the Telecommunications Act 1984 he must be satisfied that the requirements of necessity and proportionality are satisfied in relation to the acquisition of the data. When the data is accessed then, as is recognised, an individual's Article 8 rights are engaged. Whilst it is properly arguable that the Secretary of State impliedly authorises the accessing of the data when he gives the Section 94 direction, it would be very difficult to argue that he has considered the issues of necessity and proportionality in relation to the particular individual whose data is being retrieved. Thus, GCHQ must be able to show that the individual's rights are properly protected in that the data is being retrieved for a proper purpose and is proportionate and that the decision to retrieve it has been taken at an appropriate level. You tell me that these requirements are covered by the JIC requirement underpinning the request coupled with the record kept of the nature of the requirement in relation to each retrieval. I note that GCHQ takes the view that these safeguards would ensure that they could satisfy the Investigatory Powers Tribunal in the event of a complaint.

I have, therefore, reached the conclusion, not without some difficulty, that the present system for retrieval of data pursuant to a Section 94 direction is lawful. As you say, adhering to the spirit of the legislation is an important consideration, and I am also impressed by the fact that when armed with a Section 94 direction which clearly envisages both acquisition and retrieval, the requirement of a RIPA Section 22(3) authorisation would cause real difficulties which could not have been

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envisaged by Parliament when RIPA was enacted. I am, therefore, content that you should proceed as proposed.

Yours sincerely,

Swinton Thomas.

Sir Swinton Thomas

[redacted]

[redacted]

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The Rt Hon Sir Swinton Thomas
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GCHQ Reference: LA2/0855/6/3/19
Your Reference: IPS/04 1/1/1

Date: 2nd December 2004

Dear Sir Swinton,

Re: Communications Data – Acquisition and Disclosure

Thank you for your letter of 17th November 2004. GCHQ very much welcomes the conclusion that you express in this letter.

For the sake of completeness I thought it appropriate to comment on part of your letter. You say,

"Whilst it is properly arguable that the Secretary of State impliedly authorises the accessing of data when he gives the Section 94 direction, it would be very difficult to argue that he has considered the issues of necessity and proportionality in relation to the particular individual where data is being retrieved".

Of course, whilst no particular individual whose data may be accessed is identified either in the Section 94 directions themselves or in the accompanying submission, the submission does itself contain a clear statement as to the manner in which any data obtained under the directions will be handled. The relevant extract from one of the submissions is as follows,

"Within GCHQ data will be handled in accordance with section 4 of the Intelligence Services Act 1994, and with additional safeguards designed to comply with the Human Rights Act 1998. These safeguards were included in the GCHQ Compliance Documentation ...."

This undertaking, combined with the limited purposes for which GCHQ can gather and use material and the adherence to the JIC requirements when requesting the data, we believe, allows GCHQ to demonstrate that an individuals rights are being properly protected. In addition, this extract, when coupled with the remainder of the submission, allows the Secretary of State to

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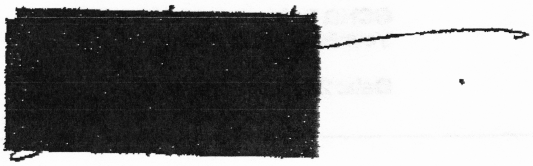
[redacted]

satisfy himself that GCHQ will obtain and subsequently handle the data in a justified and proportionate manner, notwithstanding that the individuals whose data may be accessed are not identified either in the directions themselves or in the accompanying submission.

GCHQ is not looking to re-open this issue, but I just thought it worthwhile to state our view as clearly as possible.

Yours sincerely,



[redacted]
Legal Adviser