Witness: SIS Witness
Party: 5th Respondent
Number: 3
Exhibit: SIS exhibit
Date: 01.03.2017

Case No. IPT/15/110/CH

IN THE INVESTIGATORY POWERS TRIBUNAL
BETWEEN:

PRIVACY INTERNATIONAL

Claimant

and

(1) SECRETARY OF STATE FOR FOREIGN AND COMMONWEALTH AFFAIRS
(2) SECRETARY OF STATE FOR THE HOME DEPARTMENT
(3) GOVERNMENT COMMUNICATION HEADQUARTERS
(4) SECURITY SERVICE
(5) SECRET INTELLIGENCE SERVICE

Respondents

WITNESS STATEMENT OF SIS WITNESS

I, SIS witness, of the Secret Intelligence Service (SIS), Vauxhall Cross, London, SE1, will say as follows:

1. I refer to paragraph 1 of my OPEN statement dated 8 February 2016 for details of my role within SIS.

2. I am authorised to make this witness statement on behalf of SIS. The contents of this statement are within my own knowledge and are true to the best of my knowledge and belief. Where matters are not within my own knowledge they are based upon documentation made available to me and from discussions with others within SIS.

3. This statement addresses the Security and Intelligence Agencies' ('SIA') position on the 'Neither Confirm Nor Deny' ('NCND') principle in relation to disclosing into open proceedings the fact of whether the three agencies have shared BPD and/or BCD material with foreign liaison and/or UK law enforcement ('LEAs'). I have shared a final draft of this statement with counterparts in GCHQ and MI5 and this statement has been agreed by them.

   This statement is an OPEN version of a CLOSED statement previously served on the Tribunal. I made it clear in the course of that earlier statement whether or not sharing of the type referred to above has in fact taken place. I have not done so in this version of the

statement, precisely because of the damage referred to below that would be caused by publicly confirming or denying these matters. With that constraint, I have outlined in this statement the same considerations in favour of maintaining a public NCND position on these issues that are described in the earlier statement. I have also responded in this statement to some points raised by the Claimants in their skeleton argument and at paragraph 27 of their RFI dated 17 February 2017 challenging the justification for the NCND response in this factual context.

Impact of breaching 'NCND principle' in relation to sharing

4. I am aware that the Tribunal is familiar with the essential purpose of the NCND principle, and the standard means by which it is applied. I do not therefore propose to rehearse those points in any detail. The NCND principle is that as a general rule, HMG will adopt a position of NCND when responding to questions about whether the SIA: are or have carried out an operation, investigation or activity into a particular person or group; have a relationship with a particular person or group; or have shared information or a capability with a particular agency whether within the UK or elsewhere. I understand that law enforcement agencies and police forces in England and Wales adopt a similar position in relation to sensitive matters, applying the NCND principle when responding to questions about operations, investigative techniques and methods and in relation to information about individuals, be they officers, or informants, or suspects.

5. In order to be effective the NCND response must be applied consistently, including where no activity has taken place and a denial could otherwise properly be made. If the government denied a particular activity in one instance, the inference might well be drawn that the absence of a denial in another amounted to confirmation of the alleged activity.

6. Whether or not the SIA in fact share BPD / BCD with either LEAs or foreign liaison is an operational matter from which inferences might be drawn about the capabilities, methods and approach used by the SIA / LEAs / liaison and the nature of their relationships. As set out in paragraph 5, the principle of NCND is that matters pertaining to operations, capabilities and relationships cannot be disclosed into the public domain without damage to National Security. In the context of data, that means NCND as to what specific data we have, whom we obtain it from, how we get it, the specific use that we make of it, how long we keep it for and whom we share it with. Just as NCND applies to whether we share with foreign liaison, so as a matter of principle, it should apply to sharing with LEAs. There is no material distinction between the two.

7. To confirm whether or not we share BPD/BCD with LEAs has the potential to cause direct damage to the wider public interest by revealing intelligence capabilities (or lack of), methods and the nature of relationships. Confirmation by the SIA of sharing or not sharing with LEAs would also undermine the NCND position of those LEAs - we would be commenting on and potentially compromising LEAs' technical capabilities and investigative methods. This would have the potential to undermine the fight against organised crime by revealing that LEAs either do or do not have access to a particular type of capability for investigative purposes. Were a hostile individual or group to become aware that LEAs have

(or, depending on the factual position, do not have) a particular capability or access to a particular type of data, they might be able to take steps to shape their criminality to avoid detection or investigation.

8. A further problem would arise if confirmation was given now as to whether sharing does or does not take place only for that position to change in due course. For example, were we to confirm in these proceedings that we do not share at present with LEAs (assuming that to be the current position), only to begin sharing with LEAs at a subsequent date, (and were requested again to answer this question) we would then have to confirm that we do now share with LEAs. This subsequent confirmation would reveal a change in position that enables inferences to be drawn as to our capability (and also of course the capability of the LEAs) and how we are carrying out our National Security function and what the National Security reasons may be for the change. Similar difficulties would arise if confirmation was given now that sharing does take place, with a denial having to be given in due course because sharing had for some reason ceased in the meantime.

9. More generally, putting either a confirmation or a denial of sharing with LEAs into the public domain now could be of use to hostile individuals / groups / States in unexpected and unquantifiable ways in the months and years to come, possibly having been put together with other pieces of information about the agencies' work which have found their way into the public domain. The cumulative impact of disclosing individual pieces of information relating to our capabilities and relationships which can then be assembled by criminals or hostile groups therefore has the potential to cause damage to both current and future operations and impact on the sustainability and utility of capabilities going forward.

10. In addition, there is a real risk given the sensitive nature of certain relationships that, should the SIA be forced to disclose for example (either now or in the future) the fact that it shares BPD with LEAs, individuals, organisations or other parties who have previously supplied BPD/BCD to the SIA (or may consider doing so in the future) may then cease to cooperate further and become unwilling to share information with the SIA going forward. The undermining of the NCND principle in this case could therefore have a significant impact on our ability to acquire certain types of data and information in the future.

11. To confirm whether or not we share BPD/BCD with LEAs also has the potential to cause damage to wider public interests indirectly. If agency sharing of BPDs / BCD was publicly confirmed or denied, this would undermine the strength of the NCND position maintained in respect of other areas of agency collaboration with third parties. That is why NCND must be applied consistently even where the direct damage may initially appear less significant.

<u>Damage to Liaison Relationships</u>

12. It is a fundamental principle of liaison with foreign intelligence and security agencies ('liaison services") that material provided by, or relating to, a liaison service is to be treated in confidence and is not to be disclosed or disseminated without the consent of the relevant originating liaison service. The value of these exchanges depends on the willingness of both

parties to share intelligence from a range of sensitive, including human, sources and to trust each other to respect the sensitivity of that material.

13. The principle extends beyond this narrow application to all dealings with liaison services including, with the exception of a very small number of partners, even the fact of the liaison relationship. Any reference to the existence of a relationship or to cooperation between agencies (including the provision of intelligence from one to another) is liable to be seen as breaching this principle. So too would the release of information which is not in the public domain and which a foreign agency knew that it had provided to the UK (whether or not the UK had obtained the same information from other sources). This would undermine the confidence which underpins the willingness of foreign services to share intelligence from a range of sensitive sources with the UK.

14. The SIA rely heavily on cooperation with liaison services, in particular for the effective investigation and disruption of international terrorism and espionage.

15. It is therefore of the utmost importance that the UK protects material derived from intelligence exchanges and protects the methods by which such material is obtained. The extent and value of the exchanges would be severely undermined should they become public or be disclosed, including in judicial proceedings, without the consent of the liaison service concerned.

16. Further, disclosing current liaison relationships and information shared would have far-reaching repercussions far beyond those particular liaison relationships. Damage to intelligence sharing relationships with individual states has the capacity to cause damage to all such intelligence sharing relationships. If the UK is seen to be unable to protect the confidentiality of its exchanges with overseas intelligence partners, this will risk harming all such relationships.

17. Any OPEN disclosure in these proceedings either to the effect that the agencies do share BPD/BCD with overseas intelligence partners, or to the effect that they do not would therefore be likely to cause all liaison services more generally to reassess their continued involvement in operations with the SIA and their provision of intelligence to the SIA. This would be exacerbated in circumstances where such liaison involvement and/or intelligence sharing would be widely reported in the media, as is very likely in respect of the current proceedings.

18. The Claimants have drawn attention both in their Request for Further Information dated 17 February 2017 and also in their skeleton argument to various references in documents. They suggest that the content of these documents undermine the justifications set out above for maintaining the NCND principle in respect of the sharing of BPD/BCD by the agencies with LEAs and/or overseas intelligence partners. I do not accept this. These documents do support two propositions that are already in the public domain, i.e.:

    a. that the agencies have intelligence sharing relationships with a number of foreign countries and also with domestic LEAs; and

b. that as part of those relationships the agencies share targeted intelligence, which may for example include sigint, about subjects of interest.

19. However, neither of those propositions are relevant to the present issue, which is whether the agencies share either BPDs or BCD with LEAs or overseas intelligence agencies. That is a detailed matter going to the precise capabilities of and relationship between the organisations in question. Those matters are not in the public domain, and they are not addressed in the documents to which the Claimants have referred. Moreover, for all the reasons that I have given above, it is the considered view of the three agencies that it would be damaging to the public interest for any public confirmation or denial to be given in respect of these matters.

20. In stating as above I have taken into account what is said at paragraph 50 of the Claimant's skeleton argument for the hearing commencing 8 March 2017. I accept that Sir Stanley Burnton's reference at paragraph 6.7 of his report of July 2016 is inconsistent with the NCND principle, and that he ought to have been asked to remove that from his report but in error was not. I am aware that colleagues at MI5 and GCHQ have confirmed this.

I believe that the facts in this witness statement are true

.....

Dated: