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Also by email

29 March 2017 (2nd letter)

Dear Sirs

Privacy International v The Secretary of State for Foreign and Commonwealth Affairs and Others, IPT/15/110/CH

We refer to the Respondents' Response to the RFI of 7 March 2017. We consider the response is inadequate. Further, it is unhelpful that the response has not been provided in the ordinary format, indicating each question and the answer side by side. This has only been done in relation to BCD (Part I), not in relation to sharing (Part II). There appears to be a reluctance to actually engage with the questions asked. As with the searches RFI, the Tribunal is invited to direct that the Response to the RFI be re-served in the proper format, answering each question put.

We understand that a closed response has also been served. We therefore invite Counsel to the Tribunal to seek disclosure of the following matters. If this cannot be agreed, the Claimant wishes to make submissions in support of disclosure in due course.

Question 1(d): No information whatsoever has been supplied as to the nature and extent of the processing that takes place to extract BCD. The nature and extent of the processing carried out is relevant to the case. The Claimant does not accept the factual assertion that the only processing that takes places is transfer. Extraction and retention also appears to take place. The cost of such work is a reasonable proxy for the extent of the processing, which should therefore be disclosed in aggregate form. Similarly, negotiations with the PECNs are relevant because there will have been discussions about the nature and extent of the processing required by them, which will explain what is (and is not) being done by them.

Questions 3-5: These questions concern the delegation of powers to the Director of GCHQ. The Response says that "it is denied that either paragraph 2 or any other provision of the direction creates a power on the part of the Director of GCHQ or any other official either to select (i.e. to reduce) or to alter the specified communications data that the named PECN is required to provide". Further, it is said that "neither the Director of GCHQ nor any other official has ever sought to exercise such a power". This statement cannot be reconciled with Sir Stanley Burnton's report on BCD at §8.42 which explains that MI5's section 94 directions were "highly detailed" and "stated that any amendment to an existing data requirement required a new section 94 direction to be given by the Secretary of State". In contrast, GCHQ's directions were "very broad and provided a general description... which was far wider than the requirement actually made of the PECN". A ccordingly, GCHQ's section 94 directions are in a form that permits an official "to reduce" the scope of the Direction. This conflict requires a proper explanation in the response and the service of evidence.

Further, it is suggested that the words "but are not limited" is an equivalent to section 5(6) of RIPA. Please provide any internal contemporaneous document which evidences that this is the proper interpretation of the wording, including any relevant part of any submission to Ministers.

On sharing, the position appears to be that GCHQ requires a recipient to adopt equivalent standards, but MI5 and MI6 do not. Further, many of the 'arrangements' are not in writing and have never previously been recorded. The key absence from the responses is information about what oversight the Commissioners have *in fact* carried out in respect of sharing. That the Commissioners in theory have oversight is not in dispute. The problem is that historically there is no evidence there has been any audit or meaningful review. The quality of the actual oversight is relevant to whether a scheme is in accordance with the law. This is what the Claimant has asked. T he question has not yet been answered. If the Respondents are unable to answer it, the IPT is invited to request assistance from the Commissioners.

Yours faithfully

Bhatt Murphy

c.c. Government Legal Department