

Witness: GCHQ Witness
Party: 3rd Respondent
Number: 10
Exhibit: N/A
Date: 15.12.17

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

TENTH WITNESS STATEMENT OF GCHQ WITNESS

I, GCHQ WITNESS, Deputy Director in the Government Communications Headquarters (GCHQ), Hubble Road, Cheltenham, Gloucestershire, GL51 0EX, WILL SAY as follows:

- 1) I am Deputy Director Mission Policy at GCHQ. In that role, I am responsible for drawing up the operational policies that underpin GCHQ's intelligence gathering activities and for ensuring that they are complied with. I have been in this role since 5 January 2015, having previously served as Deputy to my predecessor. I have worked for GCHQ in a variety of roles since 1997.
- 2) I am authorised to make this witness statement on behalf of the Respondents. 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 the department.
- 3) This statement responds to a request made by the Tribunal on 16 November 2017 to provide further detail relating to s.94 directions, namely:
 - a) The date of the direction;
 - b) The date of the "trigger letter" to the CSP;

- c) Information on whether the "trigger letter" in any case requested materially less data than referred to in the direction; and
 - d) Confirmation as to whether the "trigger letter" always annexed the direction.
- 4) The information that the Tribunal has requested is provided (so far as it is available) in this statement (so far as it can be stated in OPEN) and in a CLOSED schedule which is provided to the Tribunal only. In the course of making enquiries for the purposes of preparing this statement, it has become apparent to me that some of the information given in my statement dated 16 June 2017 was inaccurate. Those matters have been clarified and corrected in this statement.
- 5) I should make it clear at the outset that this statement, and the schedule referred to above, only refer to s.94 directions made for the purposes of acquiring communications data. Section 94 directions made for other purposes are not relevant to this litigation.
- 6) GCHQ obtained its first s.94 direction in respect of what was then referred to as "call associated data", but which is now known as communications data, in 1998. This direction (which was signed by the then Foreign Secretary on 23 March 1998) was of a general nature. In the submission to the Foreign Secretary seeking this direction, while reference was made to the general nature of the data that would be obtained, *i.e.* that it would be communications data, there was no reference to the precise (and more limited) data that were subsequently referred to in the trigger letter. A trigger letter specifying the precise (and more limited) data to be provided to GCHQ was sent to the PECN provider on 27 March 1998 with a copy of the direction being enclosed. This direction was replaced in 1999 by a direction again signed by the then Foreign Secretary. In the submission to the Foreign Secretary seeking this direction reference was made to the specific type of data that would be obtained. A trigger letter specifying the precise the data to be provided to GCHQ was sent to the PECN provider with a copy of the direction being enclosed. In the case of both of these directions, the data that were requested by way of the respective trigger letters comprised a subset of the data to which the directions themselves related.
- 7) In early 2001, GCHQ sought a number of new directions. These directions were signed by the then Foreign Secretary on 15 March 2001. In the submission to the Foreign Secretary seeking these directions reference was made to the specific type of data that would be obtained. Trigger letters relating to these directions were sent to the PECN providers on 8 May 2001. It is to be noted that in another letter (which was sent at the same time as the trigger letter) to one of the PECN providers reference is made to the directions having been "delivered" to that PECN. It is believed that this took place sometime before the date of the trigger letter, but no further information is available as to when it happened. For each of these directions, the data to be provided and referred to in the trigger letter are identical to the data to which the directions themselves related.
- 8) Following the events of 11 September 2001, and in the context of seeking to establish the nature and scale of the threat from international terrorism, GCHQ sought a number of

new directions. All of these directions were signed on 29 November 2001 by the then Secretary of State and were in the "standard" form as referred to in paragraph 5 of my June statement. In the submission to the Foreign Secretary seeking these directions, while reference was made to the general nature of the data that would be obtained, *i.e.* that it would be communications data, there was no reference to the precise (and more limited) data that were subsequently referred to in the trigger letters.

- 9) Trigger letters were sent to a number, but not all, of PECN providers to which the 29 November 2001 directions related on 17 January 2002. It is not now known why there was a delay between the issuing of the directions and the sending of these trigger letters, however, it should be noted that in another letter (which was sent at the same time as the trigger letter) reference is made to the directions having been "delivered" to the PECN providers. It is believed that this took place sometime before the date of the trigger letter, but no further information is available as to when it happened. The trigger letters specified the precise data to be provided to GCHQ, these data being a subset of the data to which the directions themselves related.
- 10) In relation to a number of the directions signed by the Foreign Secretary on 29 November 2001, no copy of any trigger letter can now be found. For one of the PECN providers, it is believed that while the direction itself was sent to them, no trigger letter was ever sent because, following the provision by the provider of a sample of data, it was established by GCHQ that it was unable to process that PECN provider's data and so the direction was not pursued further with them. As for the remaining directions, it is not known why copies of the trigger letters cannot now be found. It is possible that such letters were issued in relation to all of these directions, but that any record of them has since been deleted from GCHQ's corporate record. However, given that some trigger letters in relation to the directions issued on 29 November 2001 have been found, it is equally possible that in some cases no trigger letters were ever sent, possibly because of an inability on the part of these PECN providers to hold highly classified documentation at their offices. However, it is worth noting that, with the exception of the one PECN provider referred to above, all of the PECN providers to which the directions related subsequently provided data to GCHQ and in each case these data were a subset of the data to which the directions themselves related. It is therefore clear that even if no trigger letter was sent to a given PECN provider, they would have been otherwise informed of both the existence of a direction in relation to them and also the precise data that they were required to provide to GCHQ.
- 11) The then Foreign Secretary signed two new directions in 2006. These directions were sought through a single submission to the Foreign Secretary and were in the "standard" form as referred to in paragraph 5 of my June statement. In relation to one these directions, the submission referred to the specific type of data that would be obtained. For the other direction, the submission referred only to the general nature of the data that would be obtained, *i.e.* that it would be communications data.

- 12) In the case of one of the directions issued in 2006 (the submission in relation to which referred to the specific type of data that would be obtained), no trigger letter was sent because at the time the PECN provider in question had no secure communications and was unable to hold classified material at their offices. Rather, one of the members of GCHQ staff with whom the provider had a relationship would have orally notified them that the direction had been signed and would have shown them the direction at the earliest opportunity, however, no record can now be found as to when this happened. This PECN provider subsequently provided data to GCHQ, these being a subset of the data to which the direction itself related. It is therefore clear that in this case, even in the absence of a trigger letter, the PECN provider was otherwise informed both of the existence of a direction in relation to them and also of the precise (narrow) set of data that they were required to provide to GCHQ.
- 13) In the case of the other of these directions, information that has been made known to me since I made my previous statement suggests that no trigger letter was ever sent. This is because there were a number of set-backs in the initiative involving this PECN provider following the signing of the direction. This direction was replaced with a direction issued by the then Foreign Secretary in 2007. In the submission to the Foreign Secretary seeking this direction, while reference was made to the general nature of the data that would be obtained, *i.e.* that it would be communications data, there was no reference to the precise (narrower) set of data that was subsequently referred to in the trigger letter. A trigger letter in relation to the 2007 direction specifying the data to be provided to GCHQ was sent eight days after the direction was signed.
- 14) Also in 2007 the then Foreign Secretary signed a new direction which was in the "standard" form as referred to in paragraph 5 of my June statement. In the submission to the Foreign Secretary seeking this direction, reference was made only to the general nature of the data that would be obtained, *i.e.* that it would be communications data. While no copy of any trigger letter can be found and it is not known whether one was ever sent, the PECN provider to which this direction related did provide data to GCHQ, these data being a subset of the data to which the direction itself related. It is therefore clear that even if no trigger letter was sent to this PECN provider, they would have been otherwise informed of both the existence of a direction in relation to them and the precise (narrow) set of data that they were required to provide to GCHQ.
- 15) In 2010 the then Foreign Secretary signed a new direction which was in the "standard" form as referred to in paragraph 5 of my June statement. In the submission to the Foreign Secretary seeking this direction reference was made to the specific (*i.e.* narrow) type of data that would be obtained. While no copy of any trigger letter can be found and it is not known whether one was ever sent, the PECN provider to which this direction related did provide data to GCHQ, these data being a subset of the data to which the direction itself related and reflective of the specific (*i.e.* narrow) type of data referred to in the submission to the Foreign Secretary. It is therefore clear that even if no trigger letter was sent to this PECN provider, they would have been otherwise informed of both the existence of a

direction in relation to them and the precise (narrow) set of data that they were required to provide to GCHQ.

- 16) In 2011 the then Foreign Secretary signed a new direction. This direction replaced a number of those issued on 29 November 2001 and was obtained for administrative reasons. This direction was in the "standard" form as referred to in paragraph 5 of my June statement. In the submission to the Foreign Secretary seeking this direction reference was made to the specific (*i.e.* narrow) type of data that would be obtained. No copy of any trigger letter can be found and it is not known whether one was ever sent. However, given that this direction replaced previous ones and GCHQ continued to receive the same data under these new directions, these data being a subset of the data to which the directions themselves related, it is clear that even if no trigger letter was sent to this PECN provider, they would have been otherwise informed of both the existence of a direction in relation to them and the precise (narrow) set of data that they were required to provide to GCHQ.
- 17) In 2012 the then Foreign Secretary signed a number of new directions. One of these was in the "standard" form as referred to in paragraph 5 of my June statement. In the submission to the Foreign Secretary seeking this direction reference was made to the specific (*i.e.* narrow) type of data that would be obtained. No trigger letter was sent because at the time the PECN in question had no secure communications and was unable to hold classified material at their offices. Rather, one of the members of GCHQ staff with whom the provider had a relationship would have orally notified them that the direction had been signed and would have shown them the direction at the earliest opportunity. No record can now be found as to when this happened. The PECN provider subsequently provided data to GCHQ, these being a subset of the data to which the direction itself related and reflective of the specific (*i.e.* narrow) type of data referred to in the submission to the Foreign Secretary. It is therefore clear that in this case even in the absence of a trigger letter the PECN provider was otherwise informed of both the existence of a direction in relation to them and of the precise (narrow) set of data that they were required to provide to GCHQ.
- 18) Another new direction signed by the Foreign Secretary for GCHQ in 2012 replaced one of those issued on 29 November 2001 and was obtained for administrative reasons. This direction was in the "standard" form as referred to in paragraph 5 of my June statement. In the submission to the Foreign Secretary seeking this direction, reference was made only to the general nature of the data that would be obtained, *i.e.* that it would be communications data. While no copy of any trigger letter can be found and it is not known whether one was ever sent, the PECN provider to which this direction related did provide data to GCHQ, these data being a subset of the data to which the directions themselves related. It is therefore clear that even if no trigger letter was sent to this PECN provider, they would have been otherwise informed of both the existence of a direction in relation to them and the precise (narrow) set of data that they were required to provide to GCHQ.

- 19) A further new direction signed by the Foreign Secretary in 2012 was in the "standard" form as referred to in paragraph 5 of my June statement. In the submission to the Foreign Secretary seeking this direction reference was made to the specific (*i.e.* narrow) type of data that would be obtained. No trigger letter was sent because at the time the PECN in question had no secure communications and was unable to hold classified material at their offices. Rather one of the members of GCHQ staff with whom the provider had a relationship would have orally notified them that the direction had been signed and would have shown them the direction at the earliest opportunity, however, no record can now be found as to when this happened. The PECN provider subsequently provided data to GCHQ, these being a subset of the data to which the direction itself related and reflective of the specific (*i.e.* narrow) type of data referred to in the submission to the Foreign Secretary. It is therefore clear that in this case even in the absence of a trigger letter the PECN provider was otherwise informed of both the existence of a direction in relation to them and of the precise (narrow) set of data that they were required to provide to GCHQ.
- 20) Following the Tribunal handing down its judgment on the lawfulness of the s.94 regime on 11 October 2016, GCHQ obtained a number of new directions, these being intended to replace all GCHQ's extant s.94 directions relating to the acquisition of communications data. All the directions were signed by the Foreign Secretary on 14 October 2016 and all were hand delivered to the PECN providers to which they related the same day together with a trigger letter. The submission to the Foreign Secretary seeking these directions made it clear why they were being sought, *i.e.* as replacements, and also that the new directions would carry greater specificity on their face as to the data types that would be sought. The trigger letters did not themselves refer to the specific data types being sought, rather they referred expressly to the greater specificity contained in the new directions.
- 21) Turning now to the inaccuracies I have identified in my June statement, specifically,
- a. at paragraph 9, I stated that, "initial requests ... were made immediately following the making of a direction by the Foreign Secretary". Further investigation has revealed this to be inaccurate and it is apparent that in a number of cases either the trigger letter was not sent until some time after a direction was issued, or there is no evidence that a trigger letter was sent at all.
 - b. at paragraph 10, I stated that, "the categories of data to be provided ... are and always have been determined by the Foreign Secretary". Further investigation has revealed that in the case of a number of the directions, for example, those made on 29 November 2001, the Secretary of State issued directions of a very general nature with the specific categories of data to be provided by the PECN providers subsequently being specified by GCHQ in the trigger letters.
 - c. at paragraph 12(a), I stated that, "the data sets to be provided were routinely set out in submission to the Foreign Secretary". It has now been established that this was not always the case in that while the submissions to the Foreign Secretary always made it clear that the directions being sought were in relation to

communications data, they did not always contain the details of what specific data might be sought under the directions.

- d. at paragraph 12(d), I stated that, "no selection ... of the data to be provided ... has ever been made unilaterally by the Director of GCHQ or any other official". It has now been established that this was not always the case and that in a number of cases the directions given by the Secretary of State were of a general nature with the specific data to be provided by the PECN provider being specified in the trigger letters (where such letters were sent), or orally by a member of GCHQ staff.

22) When I made my previous statement I drew on my own knowledge and understanding and relied upon information provided to me by others from a number of areas within GCHQ. Following the request by the Tribunal dated 16 November 2017 further searches were carried out to identify the underlying documentation which is relevant to the historic position. That documentation was then subjected to detailed analysis. This resulted in information of which I was previously unaware being brought to my attention. It is now clear to me that some aspects of the position as I believed it to be when I made my statement in June were not in fact so. However, in light of the detailed searches and analysis which have now been undertaken, I am content that the information now contained in this statement is an accurate statement of the position.

Statement of Truth

I believe that the facts stated in this witness statement are true.

GCHQ Witness
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Dated: 15 December 2017

