

IN THE INVESTIGATORY POWERS TRIBUNAL

Case No. IPT/14/85/CH

BETWEEN:

PRIVACY INTERNATIONAL

Claimant

-and-

- (1) SECRETARY OF STATE FOR FOREIGN AND COMMONWEALTH AFFAIRS
(2) GOVERNMENT COMMUNICATIONS HEADQUARTERS

Respondents

IN THE INVESTIGATORY POWERS TRIBUNAL

Case No. IPT/120-126/CH

BETWEEN:

GREENNET LIMITED
RISEUP NETWORKS, INC
MANGO EMAIL SERVICE
KOREAN PROGRESSIVE NETWORK ("JINBONET")
GREENHOST
MEDIA JUMPSTART, INC
CHAOS COMPUTER CLUB

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EXHIBIT CM2-1

[Exhibit CM2-1]

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Compliance Guide – Targeting

Targeting of lawyers’ and other especially sensitive communications

The communications in question are those involving or likely to involve:

- lawyers – legally privileged information
- spiritual or religious advisers,
- medical practitioners,
- journalists,

where there is a particularly high expectation of privacy and confidentiality.

Further information on these categories and their definitions may be found in the Communications Containing Confidential Information (CCCI) section of the Compliance Guide.

If you wish to target communications that are likely to contain confidential information, you must give very careful consideration to necessity and proportionality, and your intelligence case must address the heightened sensitivity associated with targeting the communications. In addition, you must:

- Have reasonable grounds to believe that the target is participating in or planning activity that is against the interests of national security or the economic well-being of the UK, or that constitutes a serious crime.
- If you are likely to obtain confidential information (as described in the Communications Containing Confidential Information section) as a result of your targeting activities, obtain a COPA in advance.
- In the case of legally privileged information, have the COPA ratified by a senior FCO official before being signed off within GCHQ – contact the relevant team^[1] to assist with this. If a practising lawyer is the target, a COPA ratified by a senior FCO official is mandatory, whether or not you anticipate obtaining legally privileged information, and whether or not such information is of intelligence value.
- Where a lawyer/journalist/doctor/minister of religion located in the British Islands is the target, ensure that the issue of legal privilege or confidential communications is fully addressed within the relevant warrant application.

An application for a warrant or COPA that is likely to result in the interception of legally privileged communications must:

- state why it is considered necessary for the interception to take place;
- include an assessment of the likelihood that legally privileged communications will be intercepted;

¹ The underlining indicates that this phrase has been gisted for OPEN.

- state whether the purpose (or one of the purposes) of the interception is to obtain legally privileged communications; and
- if this is not one of the purposes, identify steps that will be taken to mitigate the risk of obtaining legally privileged material from those communications.

If you find that you have inadvertently targeted a selector used by a lawyer, journalist, doctor or minister of religion, or which regularly results in the collection of confidential information, and you wish to continue targeting it, you should immediately seek advice from the relevant team.^[2]

Targeting UK Parliamentarians' communications

It is Government policy, expressed in what is known as the 'Wilson Doctrine', to afford special protection to the communications of Parliamentarians (MPs and Members of the House of Lords). The rationale for the Wilson Doctrine is the protection of the communications of Parliamentarians to allow them to perform their legitimate Parliamentary and constituency duties without fear that their communications are being targeted for interception, other than exceptionally and where there is a compelling reason to do so.

History of the Wilson Doctrine

In response to questions in the House of Commons in November 1966 following the report of the Birkett Committee on interception, Prime Minister Harold Wilson stated that "there was to be no tapping of telephones of Members of Parliament. That was our decision and that is our policy. But if there was any development of a kind which required a change in the general policy, I would at such moment as seemed compatible with the security of the country, on my own initiative make a statement in the House about it". This principle became known as the 'Wilson Doctrine'. It has been maintained by successive administrations, and over the years had been clarified as applying to warranted interception of all forms of communications (where interception would need to be authorised by a Secretary of State) and to electronic surveillance by the Agencies. Subsequent clarification has confirmed that the Doctrine also applies to members of the House of Lords – but not to members of the devolved assemblies nor MEPs.

During the debate on the Data Retention and Investigatory Powers Bill in the House of Commons in July 2014, Home Secretary Theresa May stated that the Wilson Doctrine "does not absolutely exclude the use of these powers against Parliamentarians, but it sets certain requirements for those powers to be used in relation to Parliamentarians". Therefore the doctrine does not absolutely prohibit the interception (either deliberately targeted or incidental) of Parliamentarians' communications. This has always been the case but, if there was targeted interception of Parliamentarians, the Prime Minister would make a statement at the time of his choosing when national security allowed.

The importance of the Wilson Doctrine

² The underlining indicates that this phrase has been gisted for OPEN.

Any GCHQ activity involving Parliamentarians is highly politically sensitive. ISA prohibits GCHQ from furthering the interests of any political party. The targeting of any Parliamentarian's communications should therefore be regarded as exceptional.

The scope of the Wilson Doctrine

The Wilson Doctrine applies to the deliberate targeting of Parliamentarians' communications by interception or electronic surveillance. An application to the Secretary of State for a warrant which names a Parliamentarian as the subject of the interception/electronic surveillance will engage the Wilson Doctrine. So too will an application which names another person as the subject of the interception/electronic surveillance where the sole or primary purpose is to acquire intelligence about a Parliamentarian.

The Wilson Doctrine applies equally to any targeting under the 8(4) regime where there is a deliberate intention to select the communications of a Parliamentarian.

The Doctrine does not apply to:

- the interception and examination of communications of Parliamentarians as a result of targeting the other party to the communications;
- the incidental interception of Parliamentarians' communications where the intercepted material is not selected or examined;
- the interception of communications of Members of the European Parliament or devolved assemblies.

Selecting 'related communications data' obtained under the 8(4) regime, where there is a deliberate intention to acquire data related to communications to or from a Parliamentarians, while not directly engaging the Wilson Doctrine is also politically sensitive. In any case of this nature you must consult the relevant senior GCHQ official who will consult the FCO.

Requests for communications data under the provisions of RIPA Part I Chapter II do not fall within the scope of the Wilson Doctrine. However, serious consideration is required before submitting a request to acquire communications data relating to a Parliamentarian. In any case of this nature you must consult the relevant personnel.

The authorisation process

If circumstances arise where it is proposed that an MP is to be subject to any form of interception of communications and/or electronic surveillance that is subject to authorisation by a warrant signed by a Secretary of State, the normal warrant procedure should be followed. In addition, the relevant team will seek specific advice from LA and a GCHQ official of appropriate seniority will consult Director before any warrant application is submitted to FCO.

Further, the Secretary of State will also need to consult the Prime Minister, via the Cabinet Secretary, before any final decision is taken.

A similar process of authorisation will be followed where there is a deliberate intention to select for examination the communications of a Parliamentarian intercepted under the 8(4) regime. In any case of this nature you must consult the relevant team, who will initiate the required procedure.

Targeting other UK legislators

As a matter of policy, GCHQ affords special protection to the communications and communications data of UK MEPs and Members of the Scottish, Welsh and Northern Ireland Assemblies. Any case that involves targeting the communications, or seeking the communications data, of such individuals must be considered at senior levels within your area and referred to a GCHQ official of appropriate seniority, who will consult with FCO.

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EXHIBIT CM2-2

[Exhibit CM2-2]

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Compliance Guide – Communications containing Confidential Information

Principles

The RIPA Interception of Communications Code of Practice stipulates that particular consideration should be given in cases where the subject of the interception might reasonably assume a high degree of privacy, or where confidential information is involved. GCHQ must therefore take special care to ensure that the acquisition, analysis and retention of communications in these circumstances, and the dissemination of any intelligence produced from them, is necessary and proportionate.

The Human Rights Act and the European Convention on Human Rights also protect the rights to a fair trial, free press and freedom of religion.

This section of the Compliance Guide provides guidance on the handling and dissemination of certain categories of confidential information. You must follow the stipulations laid out below and in the linked policies.

For guidance on the deliberate targeting of sensitive professions, or where you intend to, or it is likely that you will, acquire confidential information, see the Targeting section of the Compliance Guide.

What is confidential?

Material that is legally privileged. This covers the provision of legal advice by any individual, agency or organisation qualified to do so. Legal Privilege does not apply to communications made with the intention of further a criminal purpose. However, the privilege does apply to the provision of professional legal advice to someone suspected of having committed a criminal offence, and is not necessarily lost when this legal advice is shared by the recipient.

Legal Privilege is fundamental to the right to a fair trial and the rule of law, as it allows an individual or entity to consult a lawyer in confidence without fear that what passes between them will be later used against them in court. The interception and reporting of legally privileged communications carries the inherent risk that it may influence the conduct of legal proceedings and adversely affect the course of justice, particularly when the Crown is party to the legal proceedings.

Confidential personal information. Confidential personal information is information held in confidence concerning an individual (alive or dead) who can be identified from it and where the information relates to his physical or mental health or to spiritual counselling. This could include consultations between a health professional and a patient, or information from a person's medical records. Spiritual counselling is defined as conversations between an individual and a minister of

religion acting in his official capacity, and where the individual being counselled is seeking or the Minister is imparting forgiveness, absolution or the resolution of conscience with the authority of the Divine Being(s) of their faith.

Confidential journalistic information. This includes material acquired or created for the purposes of journalism and held subject to an undertaking to hold it in confidence, as well as communications resulting in information being acquired for the purposes of journalism and held subject to such an undertaking. Such undertakings may be implicit or explicit.

As a matter of policy, GCHQ also includes in this category any discussions around editorial policy and management of media organisations, as analysis and dissemination of such communications may also damage the freedom of the press.

Communications of and with UK legislators, namely:

Members of the House of Commons (MPs)
Members of the House of Lords
Members of the Scottish Parliament (MSPs)
Members of the Northern Ireland Legislative Assembly (MLAs)
Members of the Welsh Assembly (AMs)
Members of the European Parliament (MEPs) representing UK constituencies.

This category includes any and all communications in which a legislator is a participant whether or not he received it. It also extends to communications to or with legislators' offices/staff in view of the likelihood that they will handle legislators' communications or communicate on behalf of legislators. The confidentiality of these communications is essential to the interests of democracy in that it protects the independence of legislators and thus their ability to hold the Executive to account.

In cases of doubt, responsibility for deciding whether target communications and reportable information contain confidential information rests with the relevant team, who will consult with the Legal Advisers as necessary.

Targeting of confidential communications

If you are likely to obtain confidential information as a result of your targeting activities, you must obtain a COPA in advance. In the case of legally privileged information, the COPA must be ratified by a senior FCO official before being signed off within GCHQ – contact the relevant team to assist with this. If a practising lawyer is the target, a COPA ratified by a senior FCO official is mandatory, whether or not you anticipate obtaining legally privileged information, and whether or not such information is of intelligence value. Full details are in the Authorisations section of the Compliance Guide.

Analysis of confidential communications

You should not transcribe, gist or otherwise analyse intercept containing confidential information unless you have reasonable grounds to believe it is necessary:

- in the interests of national security;
- for the purpose of preventing or detecting serious crime; or
- for the purpose of safeguarding the economic well-being of the UK, so far as those interests are also relevant to the interests of national security;
- for any of the other purposes mentioned in section 15(4) of RIPA.

Other than in exceptional circumstances, material subject to legal privilege must not be acted on or further disseminated unless a Legal Adviser has been consulted on the lawfulness (including the necessity and proportionality) of such action or dissemination.

Reporting/dissemination of intelligence from confidential communications

Intelligence based on the interception of confidential information may only be disseminated in accordance with the GCHQ Intelligence Sharing and Release Policy on the sensitive professions and proportionality. Any intelligence that may potentially involve confidential information must be submitted for mandatory sensi-check. Non-intelligence policy team staff are not empowered to release such information themselves.

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EXHIBIT CM2-3

[Exhibit CM2-3]

Compliance Guide – Oversight

Both Commissioners also have oversight of the Intelligence Agencies' activities in respect of communications containing confidential information; this includes material that is legally privileged, confidential personal information (such as material related to the subject's physical or mental health or to spiritual counselling), confidential journalistic information, or the communications of and with UK legislators (the Wilson Doctrine). Warrants and reporting that relate to communications containing confidential information will explicitly be brought to the attention of the relevant Commissioner during the next inspection visit. Any material containing confidential communications that is retained should be made available to the relevant Commissioner if requested, including detail of whether that material has been disseminated. For more on these communications and the associated handling arrangements see communications Containing Confidential Information.

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EXHIBIT CM2-4

[Exhibit CM2-4] – Please note that the paragraph numbers do not necessarily reflect the original document.

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GCHQ Intelligence Sharing and Release Policy (September 2013)

The RIPA Code of Practice, HRA and confidential communications

1. The GCHQ Compliance Guide explains that the RIPA Interception of Communications Code of Practice stipulates that greater regard should be had for privacy issues where the subject of the interception might reasonably assume a high degree of privacy or where confidential information is involved. This means that there are certain categories of communication where a particularly high threshold of proportionality must be applied to the release of the content, because the content of the communication would ordinarily be considered confidential (in the common sense of the word) or otherwise privileged. These categories are:

- Legally privileged communications
- Personal information held in confidence relating to physical or mental health;
- Personal information held in confidence relating to spiritual counselling;
- Confidential journalistic material;
- Confidential constituent information.

Legally privileged communications

2. The GCHQ Compliance Guide has a full explanation of Legal Privilege (LP) as it pertains to the courts of the UK. The concept of LP applies to the provision of professional legal advice by any individual, agency or organisation qualified to do so – it can include legal advice given by non-lawyers, or passed via a third party, i.e. it does not simply apply to “the communications of lawyers”. The purpose of LP is to ensure that individuals are able to consult a lawyer in confidence without fear that what passes between them will later be used against them in court. LP is therefore fundamental to the right to a fair trial and the rule of law. LP material cannot be released to a customer who may be party to the legal case in question, because this would breach the principle that a client cannot be obliged to reveal privileged material to the court, and may undermine the case. For more details see the Disclosure Policy. However, LP does not apply to communications made with the intention of furthering a criminal purpose (whether the lawyer is acting unwittingly or culpably).

Personal information held in confidence relating to physical or mental health

3. Health-related personal information is deemed to be held in confidence if it is held subject to an express or implied undertaking to hold it in confidence or it is subject to a restriction on disclosure or an obligation of confidentiality contained in existing legislation. For example, it

might include consultations between a health professional and a patient, or information from a patient's medical records.

Personal information held in confidence relating to spiritual counseling

4. Spiritual counselling is defined as conversations between an individual and a Minister of Religion acting in his official capacity, and where the individual being counselled is seeking or the Minister is imparting forgiveness, absolution or the resolution of conscience with the authority of the Divine Being(s) of their faith. As well as deriving from the presumption of privacy and confidentiality, the sensitivity of these communications relates to the protection of freedom of thought, conscience and religion bestowed by Article 9 of the Human Rights Act. Spiritual counselling is privileged even when it involves terrorists or other legitimate intelligence targets. However, communications with religious advisers or leaders are not privileged if those communications fall outside the definition of spiritual counselling.

Confidential journalistic material

5. Confidential journalistic material includes material acquired or created for the purposes of journalism and held subject to an undertaking to hold it in confidence, as well as communications resulting in information being acquired for the purposes of journalism and held subject to such an undertaking. In parallel with the case of spiritual counselling, as well as deriving from the presumption of privacy and confidentiality, the sensitivity of confidential journalistic communications relates to the protection of freedom of expression bestowed by Article 10 of the HRA. Article 10 protects the freedom to receive and impart information without interference by public authority and regardless of frontiers, acknowledging that there may be conditions or restrictions on this freedom in the interests of national security. In practice, communications meeting the criteria of confidential journalistic material are most likely to involve:

- the private communications of journalists working in their professional capacity;
- communications with their parent organisations;
- communications to obtain information for the purposes of journalism from a confidential source.

6. It is very difficult to judge whether the communications of self-described 'journalists' writing for non-established, online media may fall into the category of confidential journalistic material. In these cases the GCHQ Intelligence Policy Team carefully considers the nature of the communication in relation to the established concern for the protection of journalists' confidential sources as a factor favourable to freedom of expression within the context of Human Rights. In all cases, if journalistic communications are evidently destined for publication, there is likely to be little need to release them as intelligence reporting.

Confidential constituent information

7. Confidential constituent information is regarded as that discussed between a member of the public and a member of a legislature of the UK i.e. the UK Parliament, the Scottish Parliament, the Welsh and Northern Ireland Assemblies and the European Parliament, or a member of their staff, on constituency business. There is no definitive definition of constituency business but, for example, someone seeking assistance from an MSP on a social security issue would regard that as highly confidential. It is therefore important that all communications with legislators are treated as sensitive and that all reporting based on these is submitted for mandatory sensi-check. Members of the UK Parliament are protected by the Wilson Doctrine.

The ‘sensitive professions’

8. The judgement of whether it is proportionate to include the contents of any of these categories of communication in a GCHQ release must take account of their particular sensitivity and any associated risks. It is likely that any release deemed proportionate will be more limited, controlled and highly classified than would be the case had the same content been derived from other types of communication. The judgement of proportionality in these cases is reserved to the GCHQ Intelligence Policy Team, and all reporting containing any of the above categories of communication must be submitted for sensi-check. For the sake of simplicity, in order to ensure that all relevant material is submitted and assessed, reports featuring *any* communications by members of the following ‘sensitive professions’ must be submitted for sensi-check before issue:

- Lawyers or legal advisers
- Spiritual advisers
- Journalists
- Members of UK Parliament (House of Commons and House of Lords), devolved legislatures (Scottish Parliament, and the Welsh and Northern Ireland Assemblies) and the European Parliament, or a member of their staff.

NB: Members of the UK Parliament (i.e. the House of Commons and House of Lords) and their staff are also protected by the Wilson Doctrine.

9. Although confidential health-related personal information is also a protected category of communication, there is no specific requirement for the communications of doctors or health professionals to be submitted for sensi-check because there is a broader requirement for any provision of medical detail to be sensi-checked before issue.

10. If the GCHQ Intelligence Policy Team considers it proportionate in a particular case to release legally privileged or confidential communications, the reporter will be instructed to apply one of the following rubrics to the report, to help demonstrate that GCHQ has taken account of the communications’ sensitivity and the heightened threshold of proportionality:

This report contains material that may be subject to legal professional privilege, and onward dissemination/Action On is not to be taken without reverting to GCHQ.

This report contains material that may relate to spiritual counselling, and onward dissemination/Action On is not to be taken without reverting to GCHQ.

This report contains material that may comprise confidential journalistic information, and onward dissemination/Action On is not to be taken without reverting to GCHQ.

This report contains material that may relate to confidential constituent information, and onward dissemination/Action On is not to be taken without reverting to GCHQ.

11. The sensitivity of the protected categories of communication is not mitigated by disguising or removing the identity or occupation of the communicant. But neither is there a ‘ban’ on identifying or reporting on members of the ‘sensitive professions’ – it may well be proportionate to report these communications in certain circumstances. Reporters should also remember that the additional sensitivity attaches to the content of the communications, not to the fact of the communication having taken place. ‘Events’ reports featuring the ‘sensitive professions’ do not require mandatory sensi-check.

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EXHIBIT CM2-5

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GCHQ Reporting Policy - Sensitive Professions (December 2010)

Overview

- All reports containing intelligence involving a member of any of the sensitive professions must be submitted to the Reporting Policy Team prior to issue.

Key Points

1. The Sensitive Professions are:

- Member of any of the UK Houses of Parliament (including the regional assemblies and MEP's)
- Lawyer and other legal professionals
- Journalist
- Spiritual advisor/counsellor or Minister of Religion

2. MPs are especially sensitive and are covered by the Wilson Doctrine.

3. Reports involving lawyers require a justification and a tighter distribution than normal.

4. Confidentiality vs. privacy – all targets have a reasonable expectation of privacy with regards their communications, as set out under the Human Rights Act 1998; however, this is distinct from the additional expectation of confidentiality where a target is talking to a lawyer, spiritual advisor or journalist.

5. Content vs. events – the following rules apply only to reports containing content. A report including only the events of communications with a member of one of the sensitive professions on one end does not require mandatory sensicheck unless one end of the communications is an MP, in which case it must be sensichecked.

6. Even if you do not name or make reference to a member of the sensitive professions being on one end of the communications, if it is content it is still sensitive and must still be sensichecked.

Preparation of reports

7. It is very important that you notify the Reporting Policy Team as soon as you put a report in this category in for sensicheck, as they will almost always need to discuss such reports with GCHQ's Legal Advisers (LA). Please make it very clear in your sensicheck comments who the sensitive profession is; and always include a good justification as to why you want to report this material and what your intelligence requirement is – LA will ask for this detail. This will speed up the process for you.

8. Remember you can also consult your colleagues for advice on how the report should be written and focused.
9. When your report involves MPs, the Reporting Policy Team will need to be involved from the drafting stage, before you start working on the report.
10. Always consider whether it is necessary to report the information, and keep the level of detail and the distribution to a minimum.

Format of reports

11. Where reports include the communications of a lawyer, journalist or spiritual adviser, the Reporting Policy Team may instruct you to insert a rubric below the Key Points and above the text. Only use these rubrics when instructed. Distribution of reports should always be to the minimum number of customers necessary, but where sensitive professions are involved further consideration should be given especially if it only provides “building block” intelligence; this is particularly important for lawyers and MPs.

Details

MPs (including Regional Assemblies and MEP's)

12. There is a separately policy on how to handle any communications involving an MP (the Wilson Doctrine) – please request further details from the Reporting Policy team if required.
13. If a report mentions MPs or members of the House of Lords, the report should omit their actions, plans and comments, particularly on domestic political affairs.

Lawyers (including legal professionals, judges etc.)

14. Communications between lawyers and their clients anywhere in the world, particularly in advance of legal proceedings, are sensitive and may attract Legal Professional Privilege (LPP).
15. UK law makes it clear that the provision of legal advice by any lawyer to a client is legally privileged. This includes governmental legal advisers providing advice to governments, and may extend to legal advice provided by non-lawyers where this advice is given under the supervision of a qualified legal adviser.
16. LPP also attaches to legal advice passed via a third party (e.g. a friend passing a lawyer's advice to someone in prison; someone discussing their lawyer's advice with a family member) wherever there is an expectation of confidentiality.
17. All of the above must be sensi-checked. A good business requirement and a tight distribution will be required for the Reporting Policy Team to allow the issue of reports giving details of

discussions between lawyers and their clients. Please include a business case when you submit your report. If an item gives details that may be relevant to an individual's case where HMG is likely to be a party, it may well be difficult to provide this information to all customers, and it cannot be provided to those who are directly involved in these or future proceedings. This is because a client cannot be obliged to reveal privileged material to the court and so giving intelligence containing privileged material would breach this rule and potentially prejudice the case. Please see the Disclosure webpages for further details.

18. If your report involves a statesman who also happens to be a lawyer, please seek Reporting Policy input.

Journalists

19. Where an item involves a journalist, because of the Article 10 ECHR right of freedom of expression, sensitivities surround:

- the private communications of journalists working in their professional capacity;
- communications with their parent organisations and sources;
- communications where journalists are receiving information for the purposes of journalism from a confidential source.

20. Reporters should allow for the fact that the journalist will almost certainly publish information from the item in the media and should consider whether there is therefore any intelligence requirement to report this material.

Spiritual advisors

21. Communications that involve spiritual counseling are sensitive because of the Article 9 ECHR right of freedom of thought, conscience and religion. "Spiritual counselling is defined as conversations between an individual and a Minister of Religion acting in his official capacity, and where the individual being counselled is seeking or the Minister is imparting forgiveness, absolution or the resolution of conscience with the authority of the Divine Being(s) of their faith." (RIPA code of Practice on Interception, para 3.10)

22. This covers anyone who is seeking or giving any kind of spiritual counseling; it does not have to be for a recognised or mainstream religion. There is no exemption for individuals involved in terrorism; the sensitivity will still apply as these communications are confidential.

Additional considerations

23. Doctors are not a member of the Sensitive Professions. However, you would need an exceptional reason to target a doctor because communications between a physician and a patient regarding the latter's medical condition will necessarily be confidential. More detail on including medical information in a report is available in the Proportionality policy.

24. If you wish to target a member of the sensitive professions, please consult the relevant personnel at the earliest opportunity.

IN THE INVESTIGATORY POWERS TRIBUNAL

Case No. IPT/14/85/CH

BETWEEN:

PRIVACY INTERNATIONAL

Claimant

-and-

- (1) SECRETARY OF STATE FOR FOREIGN AND COMMONWEALTH AFFAIRS
- (2) GOVERNMENT COMMUNICATIONS HEADQUARTERS

Respondents

IN THE INVESTIGATORY POWERS TRIBUNAL

Case No. IPT/120-126/CH

BETWEEN:

GREENNET LIMITED
RISEUP NETWORKS, INC
MANGO EMAIL SERVICE
KOREAN PROGRESSIVE NETWORK ("JINBONET")
GREENHOST
MEDIA JUMPSTART, INC
CHAOS COMPUTER CLUB

Claimants

-and-

- (1) SECRETARY OF STATE FOR FOREIGN AND COMMONWEALTH AFFAIRS
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EXHIBIT CM2-6

[Exhibit CM2-6] – Please note that the paragraph numbers do not necessarily reflect the original document.

The double-underlined parts of this document indicate that it has been gisted for OPEN

REPNOTE 27: RECOGNITION OF SENSITIVE ITEMS (LAST REVISED AUGUST 1999)

KEY POINTS:

- This Repnote should be read in conjunction with Repnote 28 (Procedure for handling sensitive reports)
- From time to time, you will need to report intercept that is potentially sensitive
- This Repnote lists the types of material GCHQ considers to be sensitive
- Repnote 28 covers the actions to be carried out when you want to report sensitive material

GUIDELINES

1. Journalists. Private communications of UK journalists working for any media organisation, or of foreign journalists working for UK media organisations. Communication by such journalists of information to their parent organisations.
2. Lawyers. Communications between or mentioning lawyers and their clients anywhere in the world. Under Home Office guidelines, the provision of advice by any lawyer to any client is legally privileged.

REPNOTE 28: PROCEDURE FOR HANDLING SENSITIVE REPORTS (AUGUST 1999)

KEY POINTS:

- This Repnote should be read in conjunction with Repnote 27 (Recognition of Sensitive Items)
- From time to time, you will need to report intercept that is potentially sensitive
- Sensitive reports need to be referred to GCHQ's Intelligence Policy team's sensicheck team prior to issue.
- This Repnote covers the actions to be carried out when you want to report sensitive material
- Repnote 27 lists the types of material GCHQ considers sensitive

GUIDELINES

1. Role of the line manager. Common sense must play a major role in the identification of sensitive items, which need to be referred to GCHQ's Intelligence Policy team's sensicheck team if the reporter has doubts about an item, he should refer it to his line manager who will decide whether:

- the material meets an intelligence requirement, and
- its sensitivity requires GCHQ Intelligence Policy Team approval before issuing.

2. If both the above criteria are met the item should be forwarded to GCHQ's Intelligence Policy team's sensicheck team for guidance on how to issue ("the sensicheck procedure"). Exceptionally GCHQ's Intelligence Policy team may agree a temporary arrangement for a particular line of reporting to be issued without consultation. Where a line of traffic regularly contains the same sensitivities and can be given a standard handling, reporting areas can ask GCHQ's Intelligence Policy team for permission to issue reports without consultation. Requests should be submitted in writing.

3. Handling of minor sensitivities. Reports can handle certain sensitivities in reports by sensible drafting in consultation with their line managers:

- **Omission.** Certain sensitivities listed below in para 4 can be eliminated by omission of the sensitivity from the report, where it does not contribute to the intelligence conveyed. If the item containing the sensitivity is of low intelligence value, it may not be worth reporting.

IF YOU SUSPECT A REPORT MAY BE SENSITIVE

4. Reporting sections must not discuss the content of a potentially sensitive report with any non-GCHQ personnel before it has been sensichecked (Reptime 27). This could alert customers who should not receive the report to its existence, or precipitate action by a customer before due consideration has been given to the sensitivities at issue.

5. The possibility of redrafting reports: journalists and legislators. If a draft report is sensitive because it is based on the private communications of a UK/Second Party journalist (reptime 27), the report should omit the actions, plans and comments of UK and Second Party persons, and their comments on domestic political affairs. Where an item involves a UK/Second Party journalist, the information that it contains must satisfy a JIC requirement. Reporters should also allow for the fact that the journalist will almost certainly publish information from the item in the media.

6. Lawyers. Only in exceptional circumstances will the sensicheck team allow the issue of items giving details of discussions between lawyers and their clients (see reptime 27). There must be evidence of criminal activity by the lawyer. Even in this case, if an item gives details that may be relevant to an individual's defence in a British criminal court, it will not be sent to customers involved in his prosecution.

7. Further consultation by the sensicheck team. The sensicheck team will balance the intelligence value of the item against its sensitivity. For a report to be issued, its intelligence value must clearly outweigh its sensitivity. The sensicheck team may consult the Head of the Intelligence Policy team, the Head of Operations Policy, GCHQ's Director of Operations or customer departments for advice on how to handle certain politically sensitive items. Procedures for such consultation are set out in detail in reptime 30.

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IN THE INVESTIGATORY POWERS TRIBUNAL

Case No. IPT/120-126/CH

BETWEEN:

GREENNET LIMITED
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CHAOS COMPUTER CLUB

Claimants

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EXHIBIT CM2-7

[Exhibit CM2-7] – Please note that the paragraph numbers do not necessarily reflect the original document.

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GCHQ Sensi Checking Guide (issued in December 2013, and updated in March 2015)

Legal Privilege

1. s.98 of the Police Act 1997 (as mentioned in the Interception of Communications Code of Practice at 3.3) sets out a broad definition of legal privilege, which includes “communications between a professional legal advisor or his client or any such representative and any other person, which are made in connection with or in contemplation of legal proceedings and for the purposes of such proceedings”. The RIPA Code of Practice, cementing HRA, requires us to more carefully consider the necessity and proportionality of reporting material that is subject to Legal Professional Privilege (LPP). To ensure this additional consideration, we mandate that all reporting containing content relating to a lawyer/legal advisor is submitted for Sensi-check. Reporters and Reporting Quality Checkers are not qualified nor permitted to decide whether:
 - a. The communications are privileged – this is reserved to Legal Advisors (LA) or to Sensi-Checkers using the guidance below;
 - b. Reporting the privileged communications is necessary and proportionate – this is reserved to Sensi-Checkers (acting on Legal Advice if appropriate) and cannot be delegated back to reporters. The act of Sensi-Checking such reporting is not sufficient to meet the Code of Conduct and it is vital that the additional consideration required is given and recorded.
2. We also have to ensure that privileged material does not find its way into court or to government lawyers who may be handling the case.

Is the material privileged?

3. This can only be decided by LA so all reports that may contain LPP material must be sent to LA.
4. Criminality – if the advice is to be used to further criminal purpose, even if the lawyer is not aware of this, privilege does not attach, but such reports should be sent to LA for their guidance.

Sending reports to LA

5. When sending to LA you need to provide the report in PDF with as much information about what you're asking of them as possible relating to the caveat, requirement the report is designed to meet, how the distribution has been chosen and why the detailed content of the report is appropriate. If necessary, get more information from the reporter

and/or Reporting Quality Checker. Email all this to LA. It is good practice to include the Reporter's Sensi comments and you may be asked for these if you don't.

Reporting the material

6. The guidance of LA should be followed regarding whether the material can be reported, in what level of detail and to whom. Where they allow Sensi-Checkers to use discretion this must be exercised in accordance with their advice. LA will advise whether the following caveat should be added to the report:

This report contains material which may be subject to legal professional privilege and onward dissemination/Action On is not to be taken without reverting to GCHQ.

Sensi-Check exemptions

7. Where a target/subject happens to be a lawyer but where the material obtained from interception of them is routinely not privileged, a Sensi-Check exemption can be given with approval from the relevant GCHQ officials. Conditions of the exemption will control when reporting on such targets does or does not need to be Sensi-Checked. The exemption must be recorded.

Journalistic Privilege

8. The RIPA Code of Practice, reinforcing HRA, requires us to more carefully consider the necessity and proportionality of reporting material that is subject to journalistic privilege as we should not interfere with the operation of the press/media unless really necessary. To ensure this additional consideration, we mandate that all reporting containing content relating to journalists is submitted for Sensi-Check. Reporters and Reporting Quality Checkers are not qualified nor permitted to decide whether:
 - a. The communications are privileged – this is reserved to Legal Advisers or to Sensi-Checkers using the guidance below;
 - b. Reporting the privileged communications is necessary and proportionate – this is reserved to Sensi-Checkers (acting on Legal Advice if appropriate) and cannot be delegated back to reporters. The act of Sensi-Checking such reporting is not sufficient to meet the Code of Conduct and it is vital that the additional consideration required is given and recorded.

Is the material privileged?

9. Material involving journalists, or editors/owners, talking to or about sources, discussing journalistic activities or intentions or editorial policy, is privileged. Material is not privileged if the information is already available in Open Source, if a journalist is not working in their professional capacity, or if the person is not a journalist. Illegality should not be regarded as removing privilege if the illegal behaviour is related to the work of the journalist.

10. Writing a definition of a journalist is not easy and the boundaries are not necessary always clear regarding “citizen journalists”. The writer of a personal blog is not a journalist, nor is a regular user of social media. However, people working for established blogs such as “Drudge” are journalists and journalists do use social media (though in such cases the material will be deemed to have been published unless it has been private messaged etc). Individuals/organisations who publish CT propaganda such as Inspire or who act as PR faces for terrorist organisations are not journalists, though you need to be careful as they are likely to be talking to journalists who would be protected. If you are not certain, then discuss it with colleagues or refer to the relevant GCHQ officials.

Is reporting the material necessary and proportionate?

11. If the material is privileged then (in addition to the normal questions around establishing the requirement, who needs to know and the level of detail) the key questions to ask yourself, and the reporter/Reporting Quality Checker, are:
 - a. Is the material going to be published? If so, when?
 - b. And do customers need to know before then? If so, why?
12. It might be that some of the detail will be published but that we cannot be confident that the relevant detail will be and cannot wait to see, or that customers need to know in advance to take preparatory action/prepare a response. It may be that even if the material is published it will not be readily accessible to customers.
13. If you are not certain, then discuss it with colleagues, or refer to the relevant GCHQ officials.

Reporting the material

14. Privileged material can be reported where the tests of necessity and proportionality are met.
15. If the material is privileged you must tell the reporter to add the following rubric:

Please note that this report may contain confidential journalistic information. Recipients must contact the relevant GCHQ official if they wish to take any action.

Sensi-Check exemption

16. Where a target/subject is a journalist but where the material obtained from interception of them is routinely not privileged, a Sensi-Check exemption can be given with approval from the relevant GCHQ officials. Conditions of the exemption will control when reporting on such targets does or does not need to be Sensi-Checked.

Spiritual advice

17. The RIPA Code of Practice, reinforcing HRA, requires us to more carefully consider the necessity and proportionality of reporting material in which spiritual advice is sought or received. To ensure this additional consideration, we mandate that all reporting containing content relating to a spiritual advisor is submitted for Sensi-Check. Reporters and Reporting Quality Checkers are not qualified nor permitted to decide whether:
 - a. The communications are privileged – this is reserved to Legal Advisers or to Sensi-Checkers using the guidance below;
 - b. Reporting the privileged communications is necessary and proportionate – this is reserved to Sensi-Checkers (acting on Legal Advice if appropriate) and cannot be delegated back to reporters. The act of Sensi-Checking such reporting is not sufficient to meet the Code of Conduct and it is vital that the additional consideration required is given and recorded.

Is the material privileged?

18. Spiritual counselling includes imparting forgiveness, absolution or the resolution of conscience with the authority of the Divine Being(s) of a faith. Basically if someone is seeking approval for actions or guidance from a Divine Being or their earthly representative then this material is privileged.
19. The RIPA Code of Practice says that spiritual counselling is provided by a Minister of Religion. Our policy is to take a wide definition of Minister of Religion in which the determining factor is usually whether the individual wishes to receive spiritual counselling from the other. If you judge that material is not privileged because the person offering the counselling is not a Minister of Religion you must validate that with the relevant GCHQ officials.
20. The protection of spiritual counselling applies equally to all, including terrorists. However, the commissioning or support of terror attacks or serious crime would (1) likely not be in the tenets of the faith in which the counselling is sought and (2) be necessary and proportionate to report.

Is reporting the material necessary and proportionate?

21. The questions to consider/ask are the normal ones: does this meet a requirement, what level of detail is necessary and who needs to know?

Reporting the material

22. Privileged material can be reported where the tests of necessity and proportionality are met.
23. If the material is privileged you must tell the reporter to add the following rubric:

Please note that this report may contain confidential spiritual counselling. Recipients must contact the relevant GCHQ official if they wish to take any action.

Sensi-Check exemption

24. Where a target/subject is a spiritual advisor but where the material obtained from interception of them is routinely not privileged or is judged to be necessary and proportionate, a Sensi-Check exemption can be given with approval from the relevant GCHQ officials. Conditions of the exemption will control when reporting on such targets does or does not need to be Sensi-Checked. The exemption must be recorded.

UK Parliamentarians (Wilson Doctrine/Confidential constituent information)

NB: The Wilson Doctrine falls under Section IV of the Intelligence Sharing and Release Policy but guidance is included here alongside that for confidential constituent information

25. The Wilson Doctrine covers targeting of members of the UK Parliament (House of Lords and House of Commons) and their staff. It does not cover incidental collection of their communications, reports about them or comms data, and it does not cover members of the European Parliament or devolved legislatures (the Scottish Parliament, and the Welsh and Northern Irish Assemblies).
26. The Codes of Practice require us to give particular consideration to the necessity and proportionality of confidential constituent information i.e. comms between a Member of Parliament and another person on constituency business. This is interpreted to apply to members of the UK Parliament, as well as members of the European Parliament and the devolved legislatures (the Scottish Parliament, and the Welsh and Northern Irish Assemblies).
27. There are specific requirements stipulated by the Cabinet Office (Wilson Doctrine) and the Codes of Practice (confidential constituent information) where reports fall into these categories.
28. However, in recognition of wider political sensitivities and risks, our policy enforces a Sensi-Check on much wider categories i.e. anything that is:
- a. About a member of any of the UK legislatures or their staff
 - b. Based on comms involving a member of any UK legislature or their staff
 - c. ...regardless of how it was collected or the subject of the communication or whether it is based on comms data not content. The only exception is where the report contains references to a legislator who is a minister in the UK government acting in their ministerial capacity.
29. When a report is submitted hitting these criteria, we must:
- a. Always apply the detail in the Intelligence Sharing and Release Policy;

- b. Ascertain whether it meets the strict definition of the Wilson Doctrine and/or confidential constituency information. This must be noted in the Sensi-Comments and briefed as part of the escalation described below;
 - c. Refer reporting to the relevant GCHQ officials;
 - d. Obtain approval from the relevant senior GCHQ officials if the report is based on any communication in which a UK legislator is a participant, a UK legislator is the focus of intelligence in the report or if otherwise decided by the relevant GCHQ officials.
30. Where the report meets the definition of confidential constituent information, the following rubric must be included:

This report contains material that may relate to confidential constituent information, and onward dissemination/Action On is not to be taken without reverting to GCHQ.

IN THE INVESTIGATORY POWERS TRIBUNAL

Case No. IPT/14/85/CH

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PRIVACY INTERNATIONAL

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EXHIBIT CM2-8

[Exhibit CM2-8]

Summary of GCHQ Policy on Handling Material Derived from the Interception of Communications of Individuals Engaged on Legal Proceedings where HMG has an Interest

In exercising its statutory function under ISA section 3(1)(a) GCHQ seeks to obtain intelligence against a wide range of targets. It is possible that some of these individuals ('subjects of interest', SOIs) may be contemplating launching, parties to or have an interest in legal proceedings, or otherwise seeking legal advice that would be covered by LPP.

LPP is broadly classified under two sub-headings. First, legal advice privilege, which attaches to communications between a professional legal adviser, acting as such, and their client where the communication is made confidentially for the purpose of legal advice. Secondly, litigation privilege, which attaches to communications between the client and his legal adviser or agent, or between one of them and a third party, if they come into existence for the sole or dominant purpose of either giving or getting legal advice with regard to the litigation or collecting evidence in the litigation. This second category is wider than the first since it is possible for litigation privilege to attach to communications other than those directly between a lawyer and their client, i.e. between a lawyer and a third party in connection with legal proceedings.

In UK law, the acquisition of material by GCHQ containing LPP information is not prohibited, however, the Interception of Communications Code of Practice makes clear in relation to material collected under the authority of interception warrants issued under the Regulation of Investigatory Powers Act (RIPA) that "particular consideration should also be given in cases where the subject of the interception might reasonably assume a high degree of privacy, or where confidential information is involved...[including] matters subject to legal privilege". GCHQ applies these principles to all its collection and reporting activities.

Although all intelligence-gathering activities which may result in the acquisition of LPP material are sensitive, there is a particular sensitivity for GCHQ where such material is relevant to legal proceedings to which HMG is a party or has an interest. In such cases, it is imperative in the interests of justice that HMG does not gain, nor tries to gain, any litigation advantage from GCHQ's intelligence-gathering activities.

To avoid the risk of HMG obtaining any litigation advantage, GCHQ will always put in place appropriate controls ('information barriers') to ensure that no-one within GCHQ with a substantive role in any legal proceedings will have access to LPP material relating to those proceedings.

The following basic measures apply regardless of whether a SOI is involved in any legal proceedings:

- GCHQ legal advisers do not have access to intelligence reports or intercepted communications databases.
- Appropriate access restrictions are applied to documentation to limit access to only those staff who require it.
- Intelligence reports containing LPP material must be checked by the appropriate policy team to ensure that it is necessary and proportionate to report such material.
- If there is any uncertainty as to whether a particular piece of reportable intelligence comprises legally privileged information, advice should be sought from a legal adviser by the appropriate policy team.
- All intelligence reports containing LPP material are given a 'rubric' which allows recipients to easily identify these reports.

In relation to SOIs whom GCHQ is aware are contemplating launching, parties to or have an interest in legal proceedings to which HMG is or may become a party or otherwise has an interest, the following additional measures will be implemented on a case-by-case basis:

- The team producing intelligence on the SOI will be informed of the contemplated or on-going legal proceeding in order to ensure that they are aware of the increased possibility of intercepting LPP material. However, all reports containing LPP must still be sent to the appropriate policy team for approval.
- The Policy team will produce a list of policy staff and legal advisers who are either available to assist with intelligence production or are involved in the legal proceedings. Staff will not be engaged on both intelligence production and the legal proceedings. In general, intelligence production staff will not be involved in the legal proceedings, however, if they are, measures will be taken to ensure that they do not have inappropriate access to any LPP material.
- The intelligence production team will be provided with a list of customers who cannot receive reporting containing LPP on the SOI due to their involvement with the legal proceedings.
- The 'out-of-hours team' will be informed of any contemplated or on-going legal proceedings and the limited customer list for intelligence reports. Where possible, requests will be passed to the appropriate policy team.
- Additional access restrictions will be applied to documentation.
- Where it is known that a SOI is contemplating or engaged in two or more sets of legal proceedings involving HMG (e.g. civil litigation and an IPT complaint), information barriers will be put in place to ensure that there are separate staff (both policy and legal advisers) working on each set of legal proceedings. In addition, as appropriate such information barriers will also be put in place to ensure that staff working on the litigation do not also work on intelligence production.

GCHQ trusts that other HMG Departments in receipt of intelligence will handle it appropriately and respect the classification, markings and any additional caveats provided. A process exists for recipients to apply to GCHQ for permission to use information contained within reporting.

Intelligence reports contain a distribution list of recipients. When the distribution of a report needs to be increased, the report is 'extended' to include any additional recipients, i.e. the distribution list will be amended appropriately. This ensures that GCHQ maintains a record of who has seen the intelligence.

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EXHIBIT CM2-9

The underlined parts of this document indicate that it has been gisted for OPEN.

GCHQ – special protection afforded to legally privileged information (LPP) and other especially sensitive communications

GCHQ's policy and guidance for analysts is held in three separate places; **The Compliance Guide, The Intelligence Sharing and Release Policy and the Policy for Handling Material Derived from the Interception of Communications of Individuals Engaged in Legal Proceedings where HMG had an Interest.** Our guidance on LPP forms an integral part of the first two documents in particular, and is not held as a 'standalone' piece, as this approach would not meet the operational needs and demands of our workforce. The Compliance Guide is the first reference point for an analyst who is considering targeting an individual and the Intelligence Sharing and Release Policy is a comprehensive guide for analysts and reporters, covering all selected or analysed operational data disseminated by GCHQ. Policy and guidance on LPP is expressed in the documents as follows:

1. Communications containing confidential information

Material that is legally privileged [*requires special handling*]. Legal Professional Privilege (LPP) is broadly classified under two sub-headings. First, legal advice privilege, which attaches to communications between a professional legal adviser, acting as such, and their client where the communication is made confidentially for the purpose of legal advice. Secondly, litigation privilege, which attaches to communications between the client and his legal adviser or agent, or between one of them and a third party, if they come into existence for the sole or dominant purpose of either giving or getting legal advice with regard to the litigation or collecting evidence in the litigation. This second category is wider than the first since it is possible for litigation privilege to attach to communications other than those directly between a lawyer and their client, i.e. between a lawyer and a third party in connection with legal proceedings.

[SECTION REDACTED]

2. Targeting of lawyers and other especially sensitive communications

The communications in question are those involving or likely to involve:

- lawyers – legally privileged information
- spiritual or religious advisers,
- medical practitioners,
- journalists,

where there is a particularly high expectation of privacy and confidentiality.

If you wish to target communications that are likely to contain confidential information, you must give very careful consideration to necessity and proportionality, and your intelligence case must address the heightened sensitivity associated with targeting the communications. In addition, you must:

- Have reasonable grounds to believe that the target is participating in or planning activity that is against the interests of national security or the economic well-being of the UK, or that constitutes a serious crime.
- For a lawyer/journalist/doctor/minister of religion located in the BI, ensure that the issue of legal privilege or confidential communications is fully addressed within the relevant warrant application.
- For a lawyer/journalist/doctor/minister of religion located overseas, obtain a COPA.
- Where legally privileged information is or is likely to be involved, send the COPA to the relevant team who will seek ratification from a senior FCO official before it is signed off within GCHQ.
- If you find that you have inadvertently targeted a selector used by a lawyer, journalist, doctor or minister of religion, or which regularly results in the collection of confidential information, and you wish to continue targeting it, you should immediately seek advice from the relevant team.

3. Policy authorisations – COPAs

The Combined Policy Authorisation (COPA) is a GCHQ internal authorisation that you must obtain in certain circumstances involving sensitive targets.

[SECTION REDACTED]

A COPA must also be obtained for an overseas target where especially sensitive communications are, or are likely to be, involved.

In summary, this applies to the following categories:

- Communications containing, or likely to contain, **legally privileged information**, whether lawyer or client is being targeted. A COPA to authorise targeting of legally privileged communications must be ratified by a senior FCO official before being signed off within GCHQ - contact the relevant team to assist with this.
- **Spiritual counselling**: communications between an individual and a minister of religion acting in his capacity as a counsellor.
- **Medical information**: communications concerning the physical or mental health of an identifiable individual, living or dead.
- **Journalistic information**: communications containing material that is subject to an undertaking (explicit or implicit) to hold it in confidence for the purposes of journalism. This category also includes material relating to management and editorial policy of media organisations.

The requirement for a COPA applies both when you are specifically seeking to obtain especially sensitive communications and when there is a reasonable likelihood that you will obtain such communications while pursuing other intelligence objectives.

[SECTION REDACTED]

4. Reporting LPP

Legally privileged communications

The concept of LPP applies to the provision of professional legal advice by any individual, agency or organisation qualified to do so – it can include legal advice given by non-lawyers, or passed via a third party, i.e. it does not apply simply to “the communications of lawyers”. The purpose of LPP is to ensure that individuals are able to consult a lawyer in confidence without fear that what passes between them will later be used against them in court. LPP is therefore fundamental to the right to a fair trial and the rule of law. LPP material cannot be released to a customer who may be a party to the legal case in question, because this would breach the principle that a client cannot be obliged to reveal privileged material to the court, and may undermine the case. However, LPP does not apply to communications made with the intention of furthering a criminal purpose (whether the lawyer is acting unwittingly or culpably).

The judgement of whether it is proportionate to include the contents of any of these categories of communication in a GCHQ release must take account of their particular sensitivity and any associated risks. It is likely that any release deemed proportionate will be more limited, controlled and highly classified than would be the case had the same content derived from other types of communication. The judgement of proportionality in these cases is reserved to the relevant team, and all reporting containing [LPP] must be submitted for checking by the relevant team.

[SECTION REDACTED]

If the relevant team considers it proportionate in a particular case to release legally privileged or confidential communications, the reporter will be instructed to apply one of the following rubrics to the report, to help demonstrate that GCHQ has taken account of the communications’ sensitivity and the heightened threshold of proportionality:

This report contains material that may be subject to legal professional privilege, and onward dissemination/Action On is not to be taken without reverting to GCHQ.

[SECTION REDACTED]

The sensitivity of the protected categories of communication is not mitigated by disguising or removing the identity or occupation of the communicant. But neither is

there a 'ban' on identifying or reporting on lawyers – it may well be proportionate to report these communications in certain circumstances. Reporters should also remember that the additional sensitivity attaches to the content of the communications, not to the fact of communication having taken place. Metadata only reports featuring lawyers do not require mandatory checking by the relevant team.

5. Oversight

Both Commissioners also have oversight of the Intelligence Agencies' activities in respect of communications containing confidential information; this includes material that is legally privileged, confidential personal information (such as material related to the subject's physical or mental health or to spiritual counselling), confidential journalistic information, or the communications of and with UK legislators (the Wilson Doctrine). Warrants and reporting that relate to communications containing confidential information will explicitly be brought to the attention of the relevant Commissioner during the next inspection visit.

6. Review and retention

Material that contains legally privileged or other confidential information, or directly involve British Parliamentarians, and that are not required for intelligence reporting purposes, must be deleted as soon as practicable. Requests for exceptional retention of such material are unlikely to be approved.

7. GCHQ Policy on Handling Material Derived from the Interception of Communications of Individuals Engaged on Legal Proceedings where HMG has an Interest

In exercising its statutory function under ISA section 3(1)(a) GCHQ seeks to obtain intelligence against a wide range of targets. It is possible that some of these individuals ('subjects of interest', SOIs) may be contemplating launching, parties to or have an interest in legal proceedings, or otherwise seeking legal advice that would be covered by LPP.

LPP is broadly classified under two sub-headings. First, legal advice privilege, which attaches to communications between a professional legal adviser, acting as such, and their client where the communication is made confidentially for the purpose of legal advice. Secondly, litigation privilege, which attaches to communications between the client and his legal adviser or agent, or between one of them and a third party, if they come into existence for the sole or dominant purpose of either giving or getting legal advice with regard to the litigation or collecting evidence in the litigation. This second category is wider than the first since it is possible for litigation privilege to attach to communications other than those directly between a lawyer and their client, i.e. between a lawyer and a third party in connection with legal proceedings.

In UK law, the acquisition of material by GCHQ containing LPP information is not prohibited, however, the Interception of Communications Code of Practice makes

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clear in relation to material collected under the authority of interception warrants issued under the Regulation of Investigatory Powers Act (RIPA) that “particular consideration should also be given in cases where the subject of the interception might reasonably assume a high degree of privacy, or where confidential information is involved...[including] matters subject to legal privilege”. GCHQ applies these principles to all its collection and reporting activities.

Although all intelligence-gathering activities which may result in the acquisition of LPP material are sensitive, there is a particular sensitivity for GCHQ where such material is relevant to legal proceedings to which HMG is a party or has an interest. In such cases, it is imperative in the interests of justice that HMG does not gain, nor tries to gain, any litigation advantage from GCHQ’s intelligence-gathering activities.

To avoid the risk of HMG obtaining any litigation advantage, GCHQ will always put in place appropriate controls (‘information barriers’) to ensure that no-one within GCHQ with a substantive role in any legal proceedings will have access to LPP material relating to those proceedings.

The following basic measures apply regardless of whether a SOI is involved in any legal proceedings:

- GCHQ legal advisers do not have access to intelligence reports or intercepted communications databases.
- Appropriate access restrictions are applied to documentation to limit access to only those staff who require it.
- Intelligence reports containing LPP material must be checked by the appropriate policy team to ensure that it is necessary and proportionate to report such material.
- If there is any uncertainty as to whether a particular piece of reportable intelligence comprises legally privileged information, advice should be sought from a legal adviser by the appropriate policy team.
- All intelligence reports containing LPP material are given a ‘rubric’ which allows recipients to easily identify these reports.

In relation to SOIs whom GCHQ is aware are contemplating launching, parties to or have an interest in legal proceedings to which HMG is or may become a party or otherwise has an interest, the following additional measures will be implemented on a case-by-case basis:

- The team producing intelligence on the SOI will be informed of the contemplated or on-going legal proceeding in order to ensure that they are aware of the increased possibility of intercepting LPP material. However, all reports containing LPP must still be sent to the appropriate policy team for approval.

- The Policy team will produce a list of policy staff and legal advisers who are either available to assist with intelligence production or are involved in the legal proceedings. Staff will not be engaged on both intelligence production and the legal proceedings. In general, intelligence production staff will not be involved in the legal proceedings, however, if they are, measures will be taken to ensure that they do not have inappropriate access to any LPP material.
- The intelligence production team will be provided with a list of customers who cannot receive reporting containing LPP on the SOI due to their involvement with the legal proceedings.
- The 'out-of-hours team' will be informed of any contemplated or on-going legal proceedings and the limited customer list for intelligence reports. Where possible, requests will be passed to the appropriate policy team.
- Additional access restrictions will be applied to documentation.
- Where it is known that a SOI is contemplating or engaged in two or more sets of legal proceedings involving HMG (e.g. civil litigation and an IPT complaint), information barriers will be put in place to ensure that there are separate staff (both policy and legal advisers) working on each set of legal proceedings. In addition, as appropriate such information barriers will also be put in place to ensure that staff working on the litigation do not also work on intelligence production.

GCHQ trusts that other HMG Departments in receipt of intelligence will handle it appropriately and respect the classification, markings and any additional caveats provided. A process exists for recipients to apply to GCHQ for permission to use information contained within reporting.

Intelligence reports contain a distribution list of recipients. When the distribution of a report needs to be increased, the report is 'extended' to include any additional recipients, i.e. the distribution list will be amended appropriately. This ensures that GCHQ maintains a record of who has seen the intelligence.