

Witness: GCHQ Witness
Party: 3rd Respondent
Number: 4
Exhibit: GCHQ [9-11]
Date: 16/06/17

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

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 GCHQ and MI5. 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 GCHQ and MI5.
- 3) I make this statement in order to describe the different forms of directions that have been made under section 94 of the Telecommunications Act 1984 for the benefit of

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GCHQ, as well as the processes by which such directions have been made and communicated to the CSPs to which they relate.

Background

- 4) Since 2001, a number of section 94 directions have been made by the Foreign Secretary of the day requiring CSPs to provide communications data to GCHQ. As the Tribunal is aware, similar (but differently worded) directions have been made by the Home Secretary relating to the provision of communications data to MI5.
- 5) Between 2001 and 2016, a standard form of direction was used for the Foreign Secretary's section 94 directions referred to above (hereafter "the old form of direction"). A new form of direction ("the new form of direction") was first used on 14 October 2016.
- 6) Redacted copies of the old form of direction, the new form of direction and the form of direction that has been used by the Home Secretary are attached to this statement and marked as, respectively, Exhibits 9, 10 and 11. Unredacted copies of these documents have been disclosed to the Tribunal in CLOSED.

The role of senior GCHQ officials under the old and new forms of direction

- 7) It will be seen that, as a result of the way in which paragraph 1 of the old form of direction was drafted, the requirement on the CSP to provide communications data under the direction was only triggered when, following the making of the direction, a request was made either by the Director of GCHQ or by someone authorised by him to make such requests. The new form of direction is drafted in the same way. Both are in contrast to the Home Office direction, where the requirement to provide communications data arises directly from the direction.
- 8) I understand that this element of the drafting of the GCHQ directions reflects the fact that the CSPs in question have always dealt with a very limited number of individuals within GCHQ; similarly the number of individuals within the CSPs aware of the relationship with GCHQ has always been very limited. When these directions were first drafted, the view was taken that, because the CSPs had an existing working relationship with these individuals, it would be preferable for the section 94 directions to be triggered by a request from one of them.
- 9) Since 2001, it has been the practice for the provision of data under section 94 directions to be triggered initially by a request from the Director of GCHQ, but for any subsequent changes to the precise data to be provided under the direction to be communicated by one of a very small number of senior GCHQ officials nominated by the Director as points of contact and notified to the CSP as being authorised for this purpose (the practice of altering the data to be provided during the currency of a direction has now ceased - see further below). These senior GCHQ officials also

communicated with each CSP on a six-monthly basis to confirm that the direction was still in place and that the data provided under it was still required. These initial requests, and subsequent changes, were always made immediately following the making of the direction by the Foreign Secretary, or his authorising a variation in the data to be provided under a direction.

- 10) As will be apparent, the part that the senior points of contact play in this process has always been a purely formal one. Their role is important, because they are usually the only people at GCHQ with whom the CSPs have any contact. But in the context of section 94 directions they act simply as a conduit. They have no discretion, either as to whether or not to make a request under the direction, or as to when to do so, or as to the categories of data that are to be provided – in practice all those matters are and always have been determined by the Foreign Secretary.

The data specified on the old form of direction

- 11) As will be seen from the unredacted text in the second half of paragraph 1 of the old form of direction, the direction required the CSP to provide both communications data and data concerning the topology and configuration of the CSP's public telecommunications system. There is then a redacted passage which gave more detail of the generic categories of data sought.
- 12) CSPs have only ever been asked to provide communications data in respect of particular datasets relating to GCHQ's intelligence requirements. These datasets were not specified on the old form of direction. However:
 - a) The datasets to be provided were routinely set out in the submission to the Foreign Secretary that invited the making of the direction, and then communicated to the CSP in correspondence after the direction was made.
 - b) The CSPs would in fact have been aware of which datasets were needed from previous discussions with their relevant senior official.
 - c) In the event that GCHQ wished to change those datasets during the currency of the direction, the Foreign Secretary's approval had to be sought and obtained before a notification was sent to the CSP.
 - d) For the avoidance of doubt, no 'selection' or 'alteration' of the data to be provided pursuant to section 94 directions has ever been made unilaterally by the Director of GCHQ or any other official. This has always been a matter for the Foreign Secretary.

The 2016 IOCCO Review of s.94 directions

- 13) In 2016, Sir Stanley Burnton conducted a review of section 94 directions. He published a Report in July 2016. Paragraphs 8.42 to 8.44 of the Report read as follows:

"8.42 The form and content of the actual section 94 directions issued for bulk communications data by the Security Service and GCHQ differed in the following ways:

- Security Service section 94 directions (given by the Home Secretary) were:
 - highly detailed and contained specific information about the data sought, either by description or the technical naming of the data; and
 - stated that any amendment to an existing data requirement required a new section 94 direction to be given by the Secretary of State to supersede the existing section 94 direction.
- GCHQ section 94 directions (given by the Foreign Secretary)
 - were very broad and provided a general description of communications data which was far wider than the requirement actually made of the PECN; and
 - the supporting documentation accompanying the section 94 direction then gave the specific details of the *actual data sought* including either by description and/or by the technical naming of the data; and
 - the supporting documentation containing the specific data requirements has from time to time been modified to amend a data requirement (i.e. to extend or to cease certain data). Each modification has been submitted to the Foreign Secretary for authorisation, but the section 94 directions themselves have not been amended or re-issued.

8.43 There is no doubt that the lack of a codified process in or under the Telecommunications Act 1984 relating to the application process and to the form and content of a section 94 direction for bulk communications data has led to these two different processes.

8.44 Section 94 of the Telecommunications Act 1984 enables the Secretary of State to give a direction of a "general character". In our view any legal requirement given to a PECN for bulk communications data should indicate the *specific communications data* that is required to be disclosed. It is unsatisfactory to have a direction which provides a general description that is broader than the communications data that the PECN is actually being required to disclose. Furthermore the fact that a new section 94 direction has not been given each time a data requirement has been modified made the process more disjointed and difficult to audit."

- 14) At paragraph 8.45 of his Report, Sir Stanley made a recommendation, in the following terms:

"Recommendation 3: All section 94 directions for bulk communications data should indicate the specific communications data that is required to be disclosed by the PECN. When a requirement is amended (i.e. modified) a new direction should be given."

The new form of direction

- 15) GCHQ was quite happy to accept the recommendation set out above. It was recognised that this would involve adopting a new standard form of direction and re-issuing all extant directions using that form. This step was not, however, taken immediately. That was because very shortly after the publication of Sir Stanley's Report, this Tribunal commenced hearings of the legal challenge to the section 94

regime that was one component of the present litigation. A decision was taken that, because the Tribunal's ruling might lead to further changes being made to the section 94 direction (or might bring an end to the directions altogether), the proposed changes to the form of direction would be implemented after the Tribunal had given judgment on the legal challenge.

- 16) The Tribunal's judgment on the legality of the section 94 regime was made available to the parties on 11 October 2016 (and was formally handed down and published on 17 October 2016). In the event, the judgment did not require any further changes to the standard form of direction. The extant section 94 directions were therefore reissued using the new form of direction on 14 October 2016.
- 17) I would add that an additional reason for re-issuing the directions was to allay any concerns that existing directions were void and/or had no prospective effect as a result of the Tribunal's finding that the section 94 regime was not 'in accordance with the law' prior to avowal in November 2015. We did not consider that there would be any merit in any argument to that effect, but the new directions put the position going forward beyond doubt. I am aware that the Home Office section 94 directions were reissued at this time for this reason.
- 18) It will be seen that the new form of direction retains (at paragraph 2) the mechanism for the direction to be triggered by a request from a senior official. That aspect of the procedure remains precisely as described above. As before, the role of the senior official is a purely formal one in passing on a direction that has already been made by the Secretary of State.
- 19) The new form of direction differs from the old form of direction in two important respects.
- 20) First, the generic categories of communications data that were specified under paragraph 1 on the old form of order are described in more detail below paragraph 2 of the new form of order.
- 21) Second, the details of the precise dataset(s) to be provided are specified on the face of the direction, rather than (as previously) only being identified in accompanying correspondence. Where they exist, the direction specifies cover name(s) with which the CSPs are familiar for one or more particular dataset(s).
- 22) I can confirm that, following Sir Stanley Burnton's recommendation referred to above, any modification to these details would be made by issuing a fresh direction.

Statement of Truth

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

GCHQ Witness

Dated: 16 June 2017

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EXHIBIT GCHQ 9

OFFICIAL

Directions to [Name of CSP] under section 94(1) of the Telecommunications Act 1984

After consultation with you, and in pursuance of section 94(1) of the Telecommunications Act 1984, I hereby give to you the following directions, being directions which appear to me to be requisite or expedient to protect the United Kingdom from terrorist threat in the interests of national security: -

1. [Name of CSP] shall, if requested to do so by the Government Communications Headquarters (GCHQ), *acting through the Director of GCHQ or any person authorised by him to make such requests and previously notified to [Name of CSP] as being so authorised*, provide to GCHQ as requested data generated by or available to [Name of CSP] and associated with communications being or that have been conveyed by means of a Public Telecommunication System (PTS) and data concerning the topology and configuration of [Name of CSP]'s PTS. The data provided will relate to -

[Categories of communications data]

2. I am of the opinion that disclosure of these directions is against the interests of national security.
3. I believe that this direction is necessary in the interests of national security and that the conduct directed is proportionate to what is sought to be achieved by that conduct, in particular having regard to the arrangements currently in place for meeting the requirements of section 4(2)(1) of the Intelligence Services Act 1994.

One of Her Majesty's Principal Secretaries of State

Date:

OFFICIAL

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EXHIBIT GCHQ 10

OFFICIAL

DIRECTION UNDER SECTION 94(1), TELECOMMUNICATIONS ACT 1984 AS AMENDED BY SCHEDULE 17, COMMUNICATIONS ACT 2003

[NAME OF CSP]

1. In pursuance of section 94(1) of the Telecommunications Act 1984 and following consultation with [Name of CSP], I hereby give to [Name of CSP] the following direction, being a direction which appears to me to be necessary in the interests of national security: -

2. [Name of CSP] shall, if requested to do so by the Government Communications Headquarters (GCHQ), acting through the Director of GCHQ or any person authorised by him to make such requests and previously notified to [Name of CSP] as being so authorised, provide to GCHQ communications data (as defined in sections 21(4)(a) and (b) of Chapter II of Part I of the Regulation of Investigatory Powers Act 2000) generated by or available to [Name of CSP] in connection with its normal business operations and associated with communications being, or that have been, conveyed by means of a Public Telecommunication System (PTS). The specified categories of communications data relate to:

[Categories of communications data]

The data will include but are not limited to:

[Nature of the data]

These categories of data are required in respect of the communications data which is known as:

[Cover name(s) of communications data set(s)]

3. In addition to the communications data described above [Name of CSP] is also required to provide GCHQ with data concerning the topology and configuration of [Name of CSP]'s PTS.

4. I believe that this direction is necessary in the interests of national security and that the conduct directed is proportionate to what is sought to be achieved by that conduct, in particular having regard to the arrangements currently in place for meeting the requirements of section 4(2)(a) of the Intelligence Services Act 1994. I will receive from GCHQ at six monthly intervals a summary of the use made of the data in order that I may satisfy myself that their acquisition of it continues to be necessary in the interests of national security and proportionate to what it seeks to achieve.

5. For the purposes of section 94(4) of the Telecommunications Act 1984, I am of the opinion that disclosure of these directions is against the interests of national security:

One of Her Majesty's Principal Secretaries of State

Date:

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EXHIBIT GCHQ 11

**DIRECTION UNDER SECTION 94(1), TELECOMMUNICATIONS ACT 1984 AS
AMENDED BY SCHEDULE 17, COMMUNICATIONS ACT 2003**

[REDACTION]

After consultation with you, and in pursuance of section 94(1) of the Telecommunications Act 1984, I hereby give to you the following directions, being directions which appear to me to be necessary in the interests of national security.

1. (CSP) shall provide to the Security Service communications data falling within the definition in Part I Chap II Section 21(4)(a) and (b) of the Regulation of Investigatory Powers Act (2000) generated by or available to (CSP) in connection with its normal business operations and associated with all communications conveyed by means of a public telecommunications system ("PTS") on or after the date of this Direction. The data provided will relate to - [REDACTION]
2. I believe that the conduct required by this direction is proportionate to what is sought to be achieved by that conduct. I will receive from the Security Service at six monthly intervals a summary of the use made of the data in order that I may satisfy myself that their acquisition of it continues to be necessary in the interests of national security and proportionate to what it seeks to achieve.
3. For the purposes of section 94(4) of the Telecommunications Act 1984, I am of the opinion that disclosure of this direction is against the interests of national security.

[REDACTION]

SECRETARY OF STATE

[REDACTION]