

Gists are shown by: [GIST: xxx]
Redactions are shown by: [REDACTION]

BULK PERSONAL DATA:

CLOSED EVIDENCE HEARING
ON 10 JANUARY 2018

This is a combined note of the evidence given at the hearing of 10 January 2018 based on notes taken by members of staff of the Respondents and their legal representatives present at the hearing.

It is not a verbatim note, and is not comprehensive. Known gaps are indicated (by "[...]" or other means). However, there are very likely to be other gaps which cannot be specifically identified. [REDACTION].

[Words in square brackets, underlined and in italics are taken from a summary of MI5's evidence prepared by the MI5 legal advisor present at the hearing. The summary was drafted on 15 January 2018 with assistance from other MI5 officers present at the hearing, including the witness.]

Evidence given by:

[GIST: GCHQ WITNESS] – for GCHQ - affirmed

[GIST: MI5 WITNESS] - for MI5 - sworn

[GIST: SIS WITNESS] - for SIS - sworn

Hearing began at 10.45.

President: This is an opportunity without the problems of Neither Confirm Nor Deny ("NCND") or Rule 7 just to tell us how it is in Closed.

On the subject of documents, we don't feel that we have all of the section 94 documents. In particular we don't have an example of a new direction by GCHQ or MI5. There is also a dearth of documents relating to industry sharing.

We would like to know about how the errors in the evidence of GCHQ WITNESS came about.

Gists are shown by: [GIST: xxx]
Redactions are shown by: [REDACTION]
[REDACTION]

[REDACTION] Industry sharing by GCHQ

AOC: Tab 3. There is a difference between Access at premises (“Contractors”); remote access; and transfer.

Contractors – where contractors who are working at GCHQ have access to BPD/BCD – do you regard that as sharing?

GCHQ WITNESS: No. Contractors are treated as GCHQ staff. Contractors are for all purposes except pay the same as GCHQ staff. The same rules apply, there is the same access to data, and they have to complete the same necessity and proportionality justifications.

AOC: Mr. Snowden was a contractor?

GCHQ WITNESS: Yes, at the NSA. [REDACTION]

President: Do contractors report back?

GCHQ WITNESS: [REDACTION], they work for us when they are here. The same rules apply to them. [GIST: They] are GCHQ tasked, not by their ‘head’ employer. They are not reporting back to anyone. [REDACTION] They work for us not for industry’s benefit, but for ours. A [GIST: company] contractor is working for us, not for [GIST: their company]. A more general point regarding industry is it is to meet our objectives and benefit GCHQ. It is not for their benefit. Primary reason for use of Industry is number of people.

Charles Flint QC: So the project management is carried out in GCHQ. They are not going back to an outside project board with what they are doing?

GCHQ WITNESS: They will be working on a GCHQ project. They may report back to e.g. [GIST: their home company], but they are not allowed to use operational data. They can understand where GCHQ is going i.e. they’re looking for a capability of a particular sort, and come back to their employer and alert them to this potential opportunity. Usually they have a

Gists are shown by: [GIST: xxx]

Redactions are shown by: [REDACTION]

secondary responsibility to build business with us, but they cannot use operational information to benefit themselves: they can understand we are looking for x capability, but cannot use data outside of GCHQ. The contract specifies where data is held – on accredited systems.

Charles Flint QC: So they are not permitted to take GCHQ operational data.

President: What supervision is there of that?

GCHQ WITNESS: There are contract agreements. I also believe we would be able to see if such data is being passed out. These are very small scale within the companies. It is about building capacity.

President: What about the systems administrators referred to in Mr. Hosein's evidence?

GCHQ WITNESS: [REDACTION]

Susan O'Brien QC: So someone who comes in to do systems development work – would he sign the Official Secrets Act?

GCHQ WITNESS: I believe so. He would be subject to Developed Vetted clearance.

President: What about when you send data out e.g. to Bristol University for research?

GCHQ WITNESS: The data is on GCHQ's systems so it does not leave our system. The Heilbronn Institute in Bristol is effectively GCHQ. [REDACTION] GCHQ staff and management supervise the work.

President: What supervision is there of that?

Susan O'Brien QC: I read in the evidence that a cleared courier was carrying a laptop to Bristol.

GCHQ WITNESS: In our evidence?

Gists are shown by: [GIST: xxx]
Redactions are shown by: [REDACTION]

Susan O'Brien QC: I am not sure.

GCHQ WITNESS: We sometimes have to use couriers with encrypted material. One accredited system to another.

AOC: See the 5th Open statement of GCHQ WITNESS at tab 3, paragraph 33.
[REDACTION]

President: Is the relevant form always filled out?

GCHQ WITNESS: Yes, the Raw Data Release Request Form.

President: Does this include Bristol or not?

GCHQ WITNESS: I don't think Bristol is included because data is not released to them. Bristol is for all practical purposes part of GCHQ. Access is on GCHQ systems so can audit in the normal way, but there is therefore no transfer.

[Request made for completed form – agreed it would be provided]

[...]

Susan O'Brien QC: Playing devil's advocate, you rely on scrutiny of the individuals?

GCHQ WITNESS: Yes. [REDACTION]

Susan O'Brien QC: And you encourage loyalty by your treatment?

GCHQ WITNESS: Yes. There is a short list of staff who were disloyal to their agencies [...]

President: What safeguards are there?

Gists are shown by: [GIST: xxx]
Redactions are shown by: [REDACTION]

GCHQ WITNESS: Need a basis for transfer (reasons); least intrusive material as possible – use dummy material if possible. Need real data to be sure works as intended. The minimum amount is used to satisfy that. You can only design a system using dummy data up to a point. Then you need real data.

President: Consider in the form, necessity (ie not send dummy data)?

GCHQ WITNESS: Should be considered. I think the form is more regarding security than proportionality. There is a business case in the form – it will say the reason.

AOC: For context, see paragraphs 29 and 33 of the statement at Tab 3.

[...]

AOC: Of BPD and BCD, there is only one example of transfer?

GCHQ WITNESS: There is only one example which may include s94 data as it was communications data.

AOC: And one example of remote access?

GCHQ WITNESS: Yes.

Sir Richard McLaughlin: Contractors in GCHQ are treated as employees except regarding pay. If a contractor was not there could you lose the same material by the actions of an employee? They have the same method of working?

GCHQ WITNESS: Yes. [REDACTION]

Susan O'Brien QC: Re para 33 and the laptop; looking to the future, could you say you should never allow BCD out of GCHQ?

GCHQ WITNESS: We will always need industry to assist with development. BCD is not more intrusive than intercept.

Susan O'Brien QC: [Question regarding use of BCD for non-National Security purposes.]

Gists are shown by: [GIST: xxx]
Redactions are shown by: [REDACTION]

GCHQ WITNESS: There will be the new Act. Bulk acquisition warrants will be for all purposes so there is no longer a National Security distinction.

[REDACTION]

AOC: When IPCO were asked, they said they had no record of the Commissioners knowing about sharing with industry partners. What do you say about paragraphs 41 and 42?

GCHQ WITNESS: we briefed the Commissioner of use of industry as a resource in general terms. Sir Mark was specifically briefed regarding [REDACTION] (not relevant to this case) and was aware that we have contractors in the building and that we work with industry.

President: Is there any documentation which can satisfy us that any Commissioner knew about transfer to industry partners prior to April 2017?

GCHQ WITNESS: There is no evidence that the Commissioner inspected the transfer of data form. He did not ask to see it. [REDACTION]

President: But did you not specifically say 'come see this'? What did you tell Sir Mark?

GCHQ WITNESS: We told Sir Mark Waller that we had [REDACTION] contracts with industry and that one thing he did know was we tasked them to do work for us. One of the activities conducted under the contracts was [REDACTION].

President: Is there anything from which you can invite us to infer that they knew of transfer of data out of your possession to Industry Partners?

GCHQ WITNESS: No. No information to suggest that he specifically examined that.

President: [Question about the scale of BCD/BPD shared with industry partners
[REDACTION]]

[REDACTION]

Gists are shown by: [GIST: xxx]
Redactions are shown by: [REDACTION]

President: Since looking at it and/or before, have any slip ups been identified?

GCHQ WITNESS: No

[REDACTION]

GCHQ WITNESS: The statement is meant to show the generality of the work with industry partners. It is not about bulk data. [GIST: Sir Mark Waller] was briefed in general terms.

Susan O'Brien QC: When Sir Mark Waller says he wasn't told about industry partner sharing, that's correct?

GCHQ WITNESS: That's correct.

[REDACTION]

SHORT ADJOURNMENT BEGAN AT 1.05 PM

AFTERNOON SESSION STARTED AT 1.38 PM

[REDACTION] Proportionality

MI5 WITNESS: [REDACTION] there is the threat. The evidence in the first closed statement was a good statement of the threat at the time. But 2017 realised the risks referred to there. It was the worst year on record for Islamist extremism. We are now doing c.500 investigations, involving just over 3,000 SOIs, in relation to the Islamist threat. [REDACTION] That's our 3,000 pot of counter-terrorism targets in [REDACTION] branch. [REDACTION] There are also about 20,000 people on the corporate record previously thought to be a national security risk. [REDACTION]

President: We are very conscious of the operational needs. We want to know whether you look for alternative means. David Anderson said he hoped you were continuing to consider alternative means. Are you?

Gists are shown by: [GIST: xxx]
Redactions are shown by: [REDACTION]

MI5 WITNESS: Yes. [REDACTION]

Mr. Justice Edis: To put it in other words, a disproportionate investigation is a waste of time?

MI5 WITNESS: Yes, and inefficient, [REDACTION]

Sir Richard McLaughlin: Is there some other way of getting this information?

MI5 WITNESS: Given the scale this is the only reasonable way of getting the information. For BCD, we could make a RIPA application. So, rather than get it in [REDACTION], we could go to the provider – but for example it used to take one provider [REDACTION] to respond.

President: And if you didn't use this system, you might have to go six or seven routes which would be more intrusive?

MI5 WITNESS: Yes. [...] We are following a "golden thread" of intelligence.

President: How many "failed searches" do you have?

MI5 WITNESS: That is not a term that I recognised until I saw that the Claimant had used it. If I don't get any results that suggests we've got the wrong name – or he's undocumented.

Charles Flint QC: A failed search in that sense has no intrusion into privacy.
[...]

[REDACTION]

MI5 WITNESS: Terrorism is very rare. The prevalence of extremism is low. To be effective, we need an approach that gives more wheat than chaff. [REDACTION]

[Reason for searching across all datasets.]

Gists are shown by: [GIST: xxx]

Redactions are shown by: [REDACTION]

- This was a conscious decision in the design of the system which involved an assessment of the N and P case of doing so.
- We recognise the proportionality issue, but the over-riding aim is not to miss a potentially important piece of intelligence (from [REDACTION] database say, showing [REDACTION]).
- As a manager of investigators/analysts, MI5 WITNESS said that he needed to know, for assurance, that all possible BPDs have been searched. If individual investigators are expected to decide what to search then the searches will be different depending on who has searched. That would not be a reliable/acceptable way to proceed.]

AOC: Have you reconsidered whether you are taking a proportionate approach?

MI5 WITNESS: Yes.

[REDACTION]

AOC: No technical assistance of previous Commissioners has been raised. How much involvement did you have with them?

MI5 WITNESS: I have met every Commissioner in MI5 in the last 10 years. Usually my role is to explain the process. In my experience, they have asked good questions and understood and asked questions until they are satisfied. It might be helpful to have technical advice, but I am not sure I agree that it is unsatisfactory without it.

President: In relation to oversight of the privacy footprint, did the Commissioners consider whether what you were doing could have been less intrusive? And if what you did included consideration of proportionality? Was it proportionate?

MI5 WITNESS: It was certainly the latter. Also I recall we discussed with Sir Mark Waller how we could minimise intrusiveness. We had discussions around how it could be less intrusive. We re-ran searches that had been done and discussed doing them without BPD and agreed that was the least intrusive method available.

President: What consideration do you give to proportionality and what oversight is there?

Gists are shown by: [GIST: xxx]
Redactions are shown by: [REDACTION]

SIS WITNESS: We are very alive to the intrusiveness of BPD. We addressed proportionality. It is reinforced in the forms, training and disciplinary measures. There are three specific areas where we consider proportionality – like a triangle of proportionality of compliance- having bulk data as a capability, acquiring a particular dataset and every time we use the data for searches. Where data is specifically sensitive there will be additional focus on proportionality. Staff are encouraged to consider less intrusive means such as open source searches – this is reinforced by audit.

[...]

GCHQ WITNESS: In relation to the Commissioners, the consistent message from Sir Mark Waller and Sir John is that our paperwork must show consideration of proportionality. They have always been satisfied that we have done, but have said that it should be set out more clearly, and separately from the necessity case; they wanted to see it in the paperwork. The words I hear more than any other is “What’s the intrusion into privacy?” and “What consideration has there been of proportionality?”

[REDACTION]

[REDACTION] Delegation

GCHQ WITNESS: I apologise for the inaccuracies in my statement regarding delegation. I believed that my evidence was correct at the time, and had no intention to mislead. I discovered that it contained material inaccuracies and addressed them in my tenth witness statement.

Sensitive relations are held tightly in GCHQ, [REDACTION]. I do not have responsibility for that team. The Directions remain in effect without need for renewal, although there is a six monthly statement of continued need for data, but that is not handled in a warrantry way. My team therefore has less knowledge of this area.

Susan O’Brien QC: Then why were you the witness? Why wasn’t it someone else?

Gists are shown by: [GIST: xxx]

Redactions are shown by: [REDACTION]

GCHQ WITNESS: We've always taken the view we should have a single, corporate witness. I didn't know what I didn't know.

President: Sir Stanley's report set out that submissions were highly detailed (which was good), but the directions were very narrow (which was bad) – they were broad brush directions.

GCHQ WITNESS: the directions were not detailed. I originally said that the submissions were detailed and the trigger letter was detailed. I corrected that: in some cases (November 2001) the submissions were not always detailed.

I have not double checked Sir Stanley's position. Both of us did not notice that the November 2001 submissions were not detailed.

Trigger letters are in hard copy and I did not have access to them. I had examples of them. Until we did more investigation I did not know that there was no such letter in some instances or they have been destroyed.

It seems that either we would show the letter and take it away, or we decided instead to do it orally.

The Directions are wider than the trigger letters.

In 2001, after 9/11 [REDACTION] Previously data had been taken under s45. We decided it would be more appropriate to use s94 for the material [REDACTION]

President: MI5 system is different? Always was direction in the same terms. Direction told provider to give MI5 specific data, no trigger letter?

[...]

President: Secretary of State gave more than proportionate – does that matter? Then CSP on asked [...]

Gists are shown by: [GIST: xxx]
Redactions are shown by: [REDACTION]

JG: Deal with in open. But not who the CSPs are or the data that was sought.

President: What was the position in fact is set out in the schedule.

AOC: The open statement is a gist of the schedule

[GIST: There was then a discussion about the detail of the CLOSED schedule]

GCHQ WITNESS: The 2016 Directions used codewords.

[GIST: There was then a discussion about the unredacted versions of these directions.]

President: Your belief is that the October 2016 Directions reflect the submission and the trigger letter as per [...]? Before 2016, the submission [...], Direction was broader, trigger letter less than direction but as per the submission and may be orally requested?

GCHQ WITNESS: Yes, but not the 2001 submission – that did not specify the type of data [REDACTION]. The Direction was broad like the submission, the request was less.

Susan O'Brien QC: but the Directions have not changed?

GCHQ WITNESS: Yes, largely. [REDACTION]

Hearing finished at 5.20 p.m.

NOTE

1. It has been agreed between the Respondents and Counsel to the Tribunal that the following further passages should be added to the OPEN Note of the January hearing.
2. Page references are to the current OPEN Note of the hearing at TAB 40 of the Cross-Examination Bundle.
3. At the top of page 2, add:

“The Tribunal heard evidence in relation to the issue of potential sharing with local authorities that had been raised by the Claimant.”

4. At the third entry on page 4, delete ‘[REDACTION]’ and replace with *“See also the Closed Annex. Paragraph 1 gives sensitive information about this. No BPD and one instance of possible BCD in closed annex.”*

5. Page 7 – delete the third entry ‘[REDACTION]’ and replace with:

“Jonathan Glasson QC (CTT): Tab 26 IPCO audit 15/09 draft report first stage of audit . Para 31 at the end. IPCO identified a concern but not yet [...] paragraphs 29 and 33.

President: “I don’t know if it refers to an event of concern or that as a matter of concern there are non UKIC staff there.

JG: All we know is it is there. The second stage audit report is likely to be produced in the next few months.

President: Nothing drawn to your attention [GCHQ witness]?

GCHQ Witness: nothing further.

President: And you are in continued contact?

[REDACTION]

JG: Sir Mark Waller’s response is at Tab 26, page 3 under the heading “Industry partners”, they checked with Sir Mark. 20/09/17.

GCHQ Witness: It was not our intention to suggest that the discussion amounted to discussion of transfer.

Charles Flint QC: What did you discuss with him?

[REDACTION]

Susan O'Brien QC: There is a misunderstanding here. The witness statement suggests he did know."

6. Page 8. After first entry (MI5 Witness) add:

"President: It's a decision point at each stage?"

7. Half way down page 9, before AOC entry "*No technical assistance...*", insert the following gist:

"There was questioning in relation to, amongst other matters, the points raised by the Claimant in its skeleton arguments for the October and December 2017 hearing, points raised by the Claimant during the October and December 2017 hearing, the witness statement of Dr Hosein and points raised in correspondence with IPCO."

8. Page 12. Amend the gist at the fourth entry so that it reads:

"There was a then discussion about the detail of the CLOSED schedule and the adequacy of paperwork relating to the s.94 regime."

9. Page 12. Amend the penultimate GCHQ Witness entry so that it reads:

"Yes, but not the 2001 submission – that did not specify the type of data as we didn't know what we would need [REDACTION] and we were acting quickly. The direction was broad like the submission, the request was less."

26 February 2018