IN THE INVESTIGATORY POWERS TRIBUNAL Case No. IPT/15/110/CH

B E T W E E N:

PRIVACY INTERNATIONAL

Claimant

and

(1) SECRETARY OF STATE FOR FOREIGN AND COMMONWEALTH AFFAIRS
(2) SECRETARY OF STATE FOR THE HOME DEPARTMENT
(3) GOVERNMENT COMMUNICATIONS HEADQUARTERS
(4) SECURITY SERVICE
(5) SECRET INTELLIGENCE SERVICE

Respondents

CLAIMANT'S SUPPLEMENTAL REQUEST FOR FURTHER INFORMATION AND DISCLOSURE

The Respondents have now disclosed several tranches of documents: 2014-2015 materials, pre-2014 materials, correspondence with the Commissioner in 2004, RFI responses, amended pleadings and a letter of 11 April 2016 correcting inaccurate information about authorisation procedures.

There are also (a) new documents; and (b) differently redacted versions of previously disclosed documents attached to the witness statements. Entirely unhelpfully, the differences and new passages that have been disclosed have not been highlighted or otherwise identified.

This Supplemental Request for Further Information and Disclosure sets out, in consolidated form, the Claimant's additional requests. However, it must be regarded as provisional at present given the unhelpful and piecemeal nature of the disclosure given to date.

The Claimant also has concerns as to whether the process of redaction has been carried out properly. For example, in RFI 10/Exhibit O there appear to have been redactions that have been made without them being marked, making it almost impossible to identify where a RFI may be required. The only clue that there may have been a hidden redaction is the presence of the colon after paragraph 9.2:

> 9.2 If disclosure of a bulk personal dataset, or a substantial part of it, to a partner organisation is contemplated, whether at GCHQ's or the partner's initiative, the procedures below must be followed:
>
> 9.3 Another SIA Agency:
>
> 9.3.1 If the proposed recipient of the dataset is another SIA Agency, that Agency will (as with any other operational data) formally request transfer of the data via the "Inter-Agency Sharing" (IAS) process. As with authorisation to acquire a bulk personal dataset, this disclosure request will be considered and authorised (or rejected) by *relevant GCHQ senior officials*. The Authoriser's decision and the reasons for it will be recorded on the dataset's BPD form, as well as on the IAS request form.
>
> **[REDACTED]**

Correspondence between Home Office and Sir Swinton Thomas (Interception of Communications Commissioner) in 2004

1. Do the Respondents now accept that the bulk transfer of data from CSPs to the Agencies engages Article 8 ECHR, and EU data protection law, even if the data does not contain the real name of the person?

2. Do the Respondents now accept that data which can be deanonymised by the Agencies (e.g. a database containing phone numbers but not subscriber names) is personal data, and engages Article 8 ECHR?

3. Does the Commissioner now accept the same?

4. If so, when did the Respondents and the Commissioner first accept that the transfer of such data engages Article 8 ECHR and is personal data? Please disclose all relevant documents evidencing the change in position of (a) the Respondents; and (b) the Commissioner.

5. Was the Commissioner's attention drawn to section 1(1) of the Data Protection Act 1998 or Article 2(a) of the Data Protection Directive? If so, when? Please provide copies of the relevant documents.

6. Please confirm that all correspondence between the Interception of Communications Commissioners and the Respondents relating to Bulk Personal Datasets and s. 94 TA 1984 has now been disclosed, including the results of any inspections or audits.

GLD letter of 11 April 2016

7. Please provide the December 2014 and December 2015 IOCCO Security Service inspection report and the preceding reports referred to.

8. Please provide a copy of the briefing notes to the Home Secretary and the Home Secretary's response.

9. What is the factual basis for the assertion that use of an independent DP is not possible for reasons of security, in circumstances where an independent DP is now always used in cases involving sensitive professions.

10. Please provide a copy of the correspondence with the Commissioner expressing concerns at the Security Service's current practices around the use of DPs.

Closed Response to RFI dated 15 January 2016

11. Generally: Responses have only been provided from 1 June 2014 onwards. Please provide responses to the queries from June 2005 onwards. It is not sufficient to only

answer queries within a year of issue, because the relevant use of BPD and BCD was deliberately concealed from the public, including any information about safeguards, errors or misuse.

12. Security Service BPD errors: Please identify the nature and content of the deleted dataset, how long it was held, how often it was accessed or used and why it has now been deleted. Please state the exact nature of the individual non-compliance by staff members and the outcome of the disciplinary procedures.

13. Security Service BCD errors: Please give full and precise particulars of the necessity and proportionality errors and disclose the documents setting out the errors and the action taken on their discovery.

14. SIS BPD errors: Please identify the type and content of the mistakenly ingested datasets, how long they were held, how often they were accessed or used and whether their use has now been authorised. Please unredact the withheld part of (a)(i). Please state the exact nature of the individual non-compliance by staff members and the outcome of the disciplinary procedures.

Closed Response

15. Paragraph 108: Please identify the alleged safeguards.

16. As to the use of experiments (e.g. paragraph 123), please identify the extent to which such experimental activity takes place, whether external contractors are given access to bulk datasets, and whether such use is and has been fully audited by the Commissioners and whether each search or algorithm developed is subject to approval and a written justification prepared before use, and identify the restrictions preventing the viewing of material being used for experimental use.

17. How many BPDs have been deleted as a result of an internal review process?

18. How many BPDs have been deleted as a result of an opinion expressed by a Commissioner?

19. Footnote 6: Please explain why the use of section 22 RIPA to authorise access to or use of BCD was not disclosed in the Open Response, identifying the alleged national security reason why it was not disclosed.

Closed Exhibits

20. Exhibits E, P and R: The entire exhibits have been redacted, without even a title. Please disclose the document, or gist it.

21. Exhibit H: Please disclose the redacted timescales for acquisition and use, the redaction following the requirement for appropriate authorisation, the redactions detailing permitted use and the redactions about data sharing with SIA partners.

22. Exhibit H: External Oversight: Please disclose all documents recording consideration within the Agencies and the other Respondents as to the scope, adequacy and potential changes to external oversight.

23. Exhibit H, Corporate Risk: the gist concerning bulk financial information appears to be unnecessary and designed to minimise embarrassment rather than protect national security. Please disclose.

24. Exhibit I: Please disclose the redacted passages in paragraphs 5.1.1, 7.3.2, 8.0.4-5, 9.1 and 9.3.4 all of which appear to set out relevant safeguards, or caveats on safeguards.

25. Exhibit J: Please disclose the redacted passages in paragraphs 4-7 and 9-11 all of which appear to set out relevant safeguards, or caveats on safeguards.

26. Exhibit S: Please disclose the redacted or gisted passages in paragraphs 2.4, 3.18, 4.3, 4.3.5, 4.3.6 and 4.3.8 all of which appear to set out relevant safeguards, or caveats on safeguards.

27. Exhibit T: Please disclose the redacted or gisted passages in paragraphs 2 and 4 all of which appear to set out relevant safeguards, or caveats on safeguards.

Pre-2014 Disclosure

28. Document 1: Section VI, footnote 1 cross-refers to a 1999 paper on Databases written for the IOCA and ISA Commissioners. Please disclose.

29. Document 3, page 9: Please disclose the guidance for sharing operational data with a company.

30. Document 9: Please disclose the worked examples. It is not possible to understand whether there are adequate and proper safeguards in practice without some disclosure of details of usage.

31. Document 10: This policy guidance should be disclosed in full. Guidance about legal authorisation methods and safeguards is not secret.

32. Document 11: The gist provided is entirely inadequate. The source document should be disclosed. Or if not possible, the nature of the workshops, the reasons for them, and any concerns that were addressed in them or disclosed by them ought to be disclosed.

33. Document 13: Please disclose document in full. The gist is inadequate. What was the previous audit trail? Why were new procedures requires to make the audit trail adequate? What changed? Which section of the Service was failing to keep a proper audit trail? How many people were affected? How was the problem discovered?

34. Document 14. As document 11. Was there evidence that analysts were not properly confining the time periods of their requests? If so, how was this problem discovered? How many people were affected?

35. Document 15: Disclose document in full. There is no good reason for a partial gist to be provided.

36. Document 16: Disclose redacted item(s) in table of contents. From the substance of the document, this appears to be a reference to "Collateral Intrusion".

37. Document 16: Disclose Annex A. If standard form wording and justifications are used, this is a relevant matter in considering whether the systems and safeguards provided are adequate.

38. Document 17: Annex B. As document 16.

39. Document 18: As document 16 and 17.

40. Document 19: As document 16 and 17.

41. Document 21: Database newsletters:

    a. Please identify how each instance of misuse of the database referred to was discovered and what action was taken against each individual responsible.

    b. Please provide the original text of the gist "*for personal reasons*", so that the nature and extent of the misuse can be understood. This gist appears to have been introduced to avoid embarrassment at the disclosure of misconduct, not for a genuine reason of national security.

    c. How many searches have been made for public figures without a proper operational need?

    d. As at 2011 and 2012, was there any requirement to record the reasons for a search, or any form of documented justification?

<u>Open Disclosure in Response to RFI</u>

42. Document 7, footnote 1: Please provide copy of correspondence between GCHQ and Cabinet Office.

43. Document 15: Please disclose redacted material in footnotes 2 and 3 defining metadata and content. Please disclose (or gist) examples of intrusion assessments and the redacted passages relating to 'corporate risk'.

44. Document 17: Disclose redacted passages in Sections B-E which appear to set out safeguards or caveats on safeguards.

45. Document 31: Please disclose redacted parts of document, which set out safeguards and procedures and report on compliance standards.

46. Document 34 and 35: Please disclose redacted parts of document.

47. Document 44: Please provide the documents recording the Commissioner's analysis, views and conclusions and please disclose redacted parts of document, which set out safeguards and procedures.

GCHQ Witness Statement

48. Paragraphs 8-11: Does the data in BPD repositories include information obtained under section 94 TA? Is this tool made available to other government organisations, such as HMRC?

49. Paragraph 12: Does the data in BPD repositories include information obtained under section 94 TA? Is this tool made available to other government organisations, such as HMRC?

50. Paragraph 18: Does 'travel data' include locational information obtained under section 94 TA and/or under section 8(4) warrants?

51. Paragraph 24: Has GCHQ held a BPD consisting of medical records in the past? If so, please state when the BPD was obtained and deleted, the reasons for its obtaining and deletion, whether the BPD was domestic, foreign or both and the use made of it. Please disclose all relevant documents setting out the obtaining, approval, use made

and deletion of the BPD. There is no national security reason for refusing to provide responses – both MI5 and MI6 have expressly denied *ever* holding a medical or health BPD. Accordingly, a NCND response is wrong in principle.

52. Paragraph 65: Please disclose the training materials.

53. Paragraphs 67-99: Please disclose the records of the meetings, the documents discussed at the meetings and any correspondence prior to and after the meeting.

54. Paragraph 70: Please confirm that as at December 2010, there was no requirement for analysts to record an authorised purpose, a JIC requirement or a free-text justification before each BPD search.

55. Paragraph 73: Please provide the TDS analysis as of March 2011 demonstrating the usefulness of BPDs.

56. Paragraph 73: What audit did Sir Mark Waller carry out of the use of the BPDs, or of the proportionality of their retention and use? Did Sir Mark Waller examine a sample of the queries made, or examine whether they were proportionate and necessary?

57. Paragraph 76: What audit did Sir Paul Kennedy carry out of the use of the BPD, or of the proportionality of its retention and use? Did Sir Paul Kennedy examine a sample of the queries made, or examine whether they were proportionate and necessary?

58. Paragraph 77: What audit did Sir Mark Waller carry out of the use of the BPDs? Did Sir Mark Waller examine a sample of the queries made, or examine whether they were proportionate and necessary?

59. Paragraph 78: What audit did Sir Paul Kennedy carry out of the use of the BPD? Did Sir Paul Kennedy examine a sample of the queries made, or examine whether they were proportionate and necessary?

60. Paragraph 79: When was the "highly sensitive and closely held dataset" obtained? Did the Commissioner express any concerns? What is the nature of the dataset? What audit did Sir Paul Kennedy carry out of the use of the BPD? Did Sir Paul Kennedy examine a sample of the queries made, or examine whether they were proportionate and necessary?

61. Paragraph 80: What audit did Sir Mark Waller carry out of the use of the BPDs? Did Sir Mark Waller examine a sample of the queries made, or examine whether they were proportionate and necessary?

62. Paragraphs 81-82: What was the retention period? Has this now been changed? What audit did Sir Anthony May carry out of the use of the BPD? Did Sir Anthony May examine a sample of the queries made, or examine whether they were proportionate and necessary?

63. Paragraph 83: What audit did Sir Mark Waller carry out of the use of the BPDs? Did Sir Mark Waller examine a sample of the queries made, or examine whether they were proportionate and necessary?

64. Paragraph 84: What audit did Sir Anthony May carry out of the use of the BPD? Did Sir Anthony May examine a sample of the queries made, or examine whether they were proportionate and necessary?

65. Paragraph 85-86: Please identify the nature and content of the datasets referred to. What audit did Sir Mark Waller carry out of the use of the BPDs? Did Sir Mark Waller examine a sample of the queries made, or examine whether they were proportionate and necessary?

66. Paragraph 87: What audit did Sir Anthony May carry out of the use of the BPDs? Did Sir Anthony May examine a sample of the queries made, or examine whether they were proportionate and necessary?

67. Paragraphs 88-89: Please identify the nature and content of the datasets referred to. What audit did Sir Mark Waller carry out of the use of the BPDs? Did Sir Mark Waller examine a sample of the queries made, or examine whether they were proportionate and necessary?

68. Paragraphs 90-91: What audit did Sir Anthony May carry out of the use of the BPDs? Did Sir Anthony May examine a sample of the queries made, or examine whether they were proportionate and necessary?

69. Paragraph 92: What were Sir Mark Waller's conclusions? What steps did he take in the inspection? What audit did Sir Mark Waller carry out of the use of the BPDs? Did Sir Mark Waller examine a sample of the queries made, or examine whether they were proportionate and necessary?

70. Paragraphs 93-94: What were Sir Mark Waller's conclusions as to the necessity and proportionality of the holding and use of this dataset? What steps did he take in the inspection? What audit did Sir Mark Waller carry out of the use of the BPD? Did Sir Mark Waller examine a sample of the queries made, or examine whether they were proportionate and necessary? What examination did Sir Mark Waller make of the bulk analytical techniques deployed, or the conduct and results of the trial?

71. Paragraph 95: Please state what steps the Inspectors took. Did the Inspectors audit the use of the BPD? What questions did they ask? Did the Inspectors examine a sample of the queries made, or consider whether they were proportionate and necessary?

72. Paragraph 95: Prior to May 2015, had the Inspectors ever previously been involved in the inspection of BPD?

73. Paragraph 98: Please define and explain "LUCKY STRIKE". Is this a bulk analytical system? What safeguards are applied to the operation of the system?

74. Paragraph 101: How many queries had been run against the database during the period when unauthorised? What use was made of the database whilst unauthorised?

75. Paragraph 115: Please explain the nature and scope of each of the section 94 directions. In particular, did the directions include UK telephone calls, information and about location of individuals?

76. Paragraph 119: Please explain the nature and scope of the expanded directions.

77. Paragraph 120: Please state the nature and type of Internet Communications Data obtained. Does the data include communications data of UK persons? What limits are placed on the use of the data? May the data lawfully be used for purposes not related to "UK cyber defence operations"? Has the data been so used? When (if ever) did the Commissioners first carry out an audit of this use of section 94? Please provide the relevant documents and set out the results of the audit.

78. Paragraphs 133-151: Please disclose the records of the meetings, the documents discussed at the meetings and any correspondence prior to and after the meeting.

79. Generally on BCD: Please state the precise scope and extent of oversight provided by the Interception of Communications Commissioner, including disclosure of the actual terms of the agreed non-statutory scrutiny of Sir Swinton Thomas. Is Sir Anthony May's July 2015 report correct that such oversight was limited to only certain aspects of safeguards? What were the express terms on which the Intelligence

Services Commissioner provided oversight? Please disclose all of the relevant documents.

80. Paragraphs 133-135, 137: Please state what steps Sir Swinton Thomas and Sir Peter Gibson carried out by way of non-statutory scrutiny of section 94 directions. In particular, was any audit ever carried out of the granting of section 94 directions or the use (in particular proportionality) of section 94? Did the 'review' simply consist of reading a briefing and receiving a presentation?

81. Paragraph 139: Was Sir Mark Waller informed about the MILKWHITE programme, under which section 94 data is made available outside the security and intelligence agencies? What audit did Sir Mark Waller carry out of the use of section 94 data?

82. Paragraph 140: Please disclose the records of this meeting in full. The gist is inadequate, in particular as Sir Mark Waller does not appear to have carried out any audit of use, and there does not appear to have been certainty as to whether he had authority to do so.

83. Paragraph 141: Did Sir Mark Waller carry out any audit of the use of section 94 data?

84. Paragraph 142: Did the Secretary of State approve the request for continued use of the section 94 direction after the end of the pilot? Please disclose the relevant documents. Did Sir Mark Waller audit the use of the material obtained? What did his review consist of? What documents were made available to him?

85. Paragraph 144: What is the basis of saying that "Sir Mark Waller appeared reassured"? Please explain the statement about acquiring private information. All information obtained under section 94 is private. Was Sir Mark Waller's attention drawn to Articles 5 and 6 of the e-Privacy Directive? Please disclose the minutes of the meeting.

86. Paragraphs 145, 146, 147 and 148: Did Sir Mark Waller carry out any audit of the use of section 94 data? What did his review consist of in each case?

87. Paragraphs 150-151: Please state what steps the Inspectors took on each occasion. Did the Inspectors audit the use of the BCD obtained under section 94? Did the Inspectors examine a sample of the queries made, or examine whether they were proportionate and necessary?

Security Service Witness Statement

88. Paragraph 136: Please state what steps the Commissioners took on each occasion a review was carried out. Did the Commissioners audit the use of the BCD obtained under section 94? Did the Commissioners example a sample of the queries made, or examine whether they were proportionate and necessary?

89. Paragraphs 137-139: Please provide a copy of the briefings referred to and the further explanation given to Sir Stanley Burnton.

90. Paragraph 145: Please identify the proportion of cases involved. In each case, please identify whether the DP was independent from the investigation.

91. Paragraph 146: Please identify the proportion of cases referred to whether the justification was written up retrospectively and the proportion of cases where it was not written up at all.

92. Paragraph 147: Please disclose the documents evidencing the reporting of the error and a copy of the "reminder".

93. Paragraph 147: How many staff made the errors described? Has any disciplinary action been taken against the staff responsible for the error?

SIS Witness Statement

94. Paragraph 57: Please disclose a copy of the Cabinet Office report.

95. Paragraph 61: What bulk personal data was searched and on how many occasions? When did the improper conduct occur? What was the suspected purpose of the improper searches? How was the misuse detected?

Exhibits to witness statements

96. MI5 p. 815/13 Please identify the aspects of "data management and oversight" which "remain weak and require enhanced oversight". Please explain the period in which such management or oversight was weak.

97. MI5 p. 819 Please disclose the draft and final letters to the Commissioners and any responses.

Other

98. Please disclose copies of the 2010 Review of Agency Handling of Bulk Personal Data and the Hannigan Review (if different from the Cabinet Office review of the same year).

THOMAS DE LA MARE QC

BEN JAFFEY

10 June 2016