

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

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**CLAIMANT'S SKELETON ARGUMENT**

**for the OPEN hearing on 12-13 March 2018**

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*The Claimant suggests the following numbering convention for the bundles:*

- October 2017 hearing bundle – volume 10
- December 2017 hearing bundle – volume 11
- Cross-examination hearing bundle – volume 12
- Supplementary cross-examination hearing bundle – volume 13

*Bundle references are in the form [Volume/Tab/Page].*

**I. INTRODUCTION**

1. This further OPEN hearing is to address:

1.1. The domestic legality of GCHQ's s.94 directions, including unlawful delegation, and the failure of the directions to comply with s.94(1) and (2A). The Tribunal has indicated, by its directions on 28 February 2018, that it is "*provisionally minded to conclude in the light of the OPEN and CLOSED evidence that one or more of such directions was/were unlawful by reference to such non-compliance and/or by virtue of unlawful delegation*".

1.2. Sharing;

1.3. Proportionality; and

1.4. Re-opening the Tribunal's October 2016 Judgment as to oversight.

2. The Tribunal is also respectfully requested to address the relevant date from which there could be said to be compliance with Article 8 ECHR (as per §§69-78 of the Claimant's skeleton argument for the October 2017 Hearing [10/1a/24-25] and §§12-16 of the Claimant's reply note for that hearing [10/1c/6-7]).
3. The Tribunal has already received substantial submissions on each of these issues, at the hearing on 17-19 October 2017 (the '**October 2017 Hearing**') (and, in respect of the re-opening of the Tribunal's judgment, at the hearing on 1 December 2017 (the '**December 2017 Hearing**').
4. Since the October 2017 Hearing, there have been the following main developments:
  - 4.1. The Respondents served further CLOSED (and opened up) evidence: the 8<sup>th</sup> Witness Statement of the GCHQ Witness, the 2<sup>nd</sup> witness statement of the MI5 Witness, and the 5<sup>th</sup> Witness Statement of the SIS Witness. The admission of this evidence was the subject of the Respondents' application at the December Hearing.
  - 4.2. In relation to the Respondents' statement at the October 2017 Hearing that Sir Stanley Burnton had commenced a review into international sharing which covered any sharing of BCD by GCHQ, IPCO confirmed that this was incorrect; *"we do not consider there to be any specific uncompleted review to complete"* [11/17].
  - 4.3. On 15 December 2017, the Respondents served further evidence: the amended 8<sup>th</sup> Witness Statement of the GCHQ Witness; the 9<sup>th</sup> Witness Statement of the GCHQ Witness (addressing IPCO's letter to the Tribunal regarding the IOCCO review process); and the 10<sup>th</sup> Witness Statement of the GCHQ Witness (acknowledging that the evidence about s.94 directions provided to date was materially inaccurate). (Some of this was further opened up on 15 January 2018).
  - 4.4. On 20 December 2017, the Claimant served responsive witness evidence of Dr Hosein.
  - 4.5. On 10 January 2018, the Tribunal heard CLOSED evidence from the witnesses for MI5, SIS and GCHQ. (A partially opened-up note of this hearing has been provided to the Claimant [12/40]).
  - 4.6. On 19 February 2018, the Respondents served the 11<sup>th</sup> Witness Statement of the GCHQ Witness, as well as a copy of the submission made to the Foreign Secretary

concerning the need for new directions following the Tribunal's October 2016 Judgment.

4.7. The GCHQ Witness was cross-examined by the Claimant at the OPEN hearing on 26 February 2018 (which followed a CLOSED hearing).

5. For the reasons explained further below, this wealth of new evidence served after the October 2017 Hearing serves only to strengthen the Claimant's case on each of the relevant issues.

## II. DELEGATION AND DOMESTIC LEGALITY

6. The Tribunal has indicated, by its directions on 28 February 2018, that it is already well aware of the Claimant's case on this issue, and so it anticipates the Claimant's role to be performed primarily in reply.

7. The 10<sup>th</sup> Witness Statement of the GCHQ Witness demonstrates that the evidence about how GCHQ's s.94 directions were made, as explained in the 4<sup>th</sup> Witness Statement and §7 of the 8<sup>th</sup> Witness Statement of the GCHQ Witness (and in the response to the RFI on 28 March 2017 [12/13/155]<sup>1</sup>) was materially misleading.

8. The accurate position is summarised in the Tabular Summary of the 10<sup>th</sup> Witness Statement of the GCHQ Witness, re-attached to this skeleton argument for ease of reference.

9. Of the 13 described occasions of making s.94 Directions between March 1998 and October 2016:

9.1. On every occasion about which information is provided until October 2016, the direction was in a general, rather than a specific, form. On three occasions, no information is provided about the form in which the direction was provided. The directions became specific in their nature in October 2016.

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<sup>1</sup> *"In the case of every section 94 direction made by the Foreign Secretary, a request under paragraph 2 has always been made immediately following the making of the direction. It is denied that either paragraph 2 or any other provision of the direction creates a power on the part of the Director of GCHQ or any other official either to select (i.e. to reduce) or to alter the specified communications data that the named PECN is required to provide under the express terms of the direction signed by the Foreign Secretary. For the avoidance of doubt, neither the Director of GCHQ nor any other official has ever sought to exercise such a power".*

- 9.2. On six occasions, the submission made to the Foreign Secretary was also in general terms rather than specific terms. On seven occasions, the submission to the Foreign Secretary was in specific terms.
- 9.3. In respect of 'trigger letters' sent by GCHQ with the detail of the direction, such letters are frequently missing (on at least seven occasions); the GCHQ Witness suggests in respect of a number of directions that such trigger letters may well not have ever existed – the direction instead having been given orally by a member of the 'Sensitive Relationship Team' ('SRT'). There is no written record of the actual request provided to the PECN, nor of the date of the instruction, though it has been inferred (see below) in some cases that it was narrower than the Direction.
- 9.4. On at least 10 occasions, the trigger letter provided by GCHQ (or data subsequently requested by and provided to GCHQ if there was no such letter) related only to a subset of the data specified on the direction.
- 9.5. In respect of the direction in August 1999 (and possibly the 1998 direction, which is missing), the direction conferred power on a nominated GCHQ official to "make, renew or modify" data requests [12/8/108].
- 9.6. The covering letters sent out with the trigger letters all purport (in very wide drafting) to confer powers on the authorised representatives from the SRT to make subsequent requests (see the reference at [12/8/116] to "initial request", "first request", "revalidation", "any future requests for data under this direction" all to be "signed on my behalf [i.e. behalf of the Director of GCHQ]"). Such cover letters reinforce the impression given by the direction that a delegation of power to the GCHQ Director, and from him to the SRT member nominated by him, has occurred.
10. This clear impression of authority being conferred on the SRT member to deal with the PECN must be seen in the context of the use to which s.94 directions were put. As became clear from the cross-examination of the GCHQ Witness, the reality of the situation is that s.94 directions were used as a legal basis for the data consensually provided by the PECNs; as was explained to Sir Mark Waller on 29 March 2011 at §10, "[t]he data GCHQ receives under s.94 Directions is that which CSPs [i.e. PECNs] are willing to provide, but there is no other mechanism by which we can support that provision with a form of legal authorisation" [13/7/527]; see also [13/7/526] at §16. The GCHQ Witness expressly

accepted in cross-examination that, where data was not being provided consensually, the s. 94 direction route would not be pursued. Consistently with this, in respect of one of the directions made in 2006, the GCHQ Witness explains at §13 of his 10<sup>th</sup> Witness Statement that no trigger letter was ever sent *“because there were a number of set-backs in the initiative involving this PECN provided following the signing of the direction”*. (This consensual nature of the regime also accords with §6.7 of the s.94 Review, in which Sir Stanley Burnton noted that *“[i]n one case a PECN had asked the agency to ensure that [sharing with other jurisdictions] did not happen”*).

11. The necessity for a s.94 direction flowed from the amendment of s.45(2) TA 1984. Under the version of that provision in force from its substitution by the Interception of Communications Act 1985 until 2 October 2000, section 45(2)(c) provided a defence to any party disclosing content or communications data (an offence under section 45(1)) should they do so *“in the interests of national security or in pursuance of an order of the Court”*. This provided a legal basis for a voluntary disclosure by a PECN to GCHQ. That provision was removed on 2 October 2000 (the date the HRA 1998 came into force), by Schedule 25 para 3 of RIPA, as commenced by SI/2000/2543. The natural legal basis having been removed, the Respondents appear to have decided upon the use of s.94 directions (which had not hitherto been used for this purpose) to legitimise (for s.45(1) purposes) the provision of consensually offered material, thus providing a (well concealed) defence under s.45(2)(c) TA 1984.
12. Accordingly, as a reflection of what remained an essentially consensual process (as it had been since the privatisation of BT in 1984 and the entry of competitors onto the telecommunications market) section 94 directions were requested of PECNs in a broad form from the Secretary of State, while GCHQ (acting via the SRT officers) negotiated with the PECN the specific categories of data that would be provided. See, for example, the amended note of the CLOSED hearing on 10 January 2018, in which the GCHQ Witness is reported to have said *“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”*.
13. Following the making of the direction by the Secretary of State – even in circumstances where the submission to the Secretary of State had been only in general terms – a GCHQ official would then decide what data in fact to request. That request was sometimes in

writing; it may, at other times, have been oral and not recorded either on GCHQ's or the PECN's records.

14. This true position has far-reaching implications for the domestic legality of the GCHQ regime of s. 94 directions, and for the extent to which it is in accordance with law under Article 8 ECHR.
15. First, and most obviously, the GCHQ's Witness's factual argument that the GCHQ officials, i.e. the SRT members allocated to the PECN in question, were merely a '*conduit*' of the decisions made by the Secretary of State (4<sup>th</sup> Witness Statement at §10 [12/4/69]) is untenable. GCHQ officials were making decisions for themselves about what data would be requested under a s.94 direction, following a broad submission having been made to, and a broad direction having been made by, the Secretary of State; and the surrounding communications, notably the trigger letters themselves and the covering letters (when provided) further reinforced/cultivated the apparent delegation of authority to act to the SRT member. For the reasons explained at §§51-61 of the Claimant's skeleton argument for the October 2017 Hearing [10/1a/18-20], this delegation is unlawful under the terms of s.94 of the Telecommunications Act 1984.
16. Second, even beyond the issue of delegation to GCHQ, there are broader implications for the conformity of the regime with ss.94(1)-(2A). The legislation requires: (i) the Secretary of State to consult with the relevant individual; (ii) the Secretary of State *personally* to give a general (s.94(1)) or a specific (s.94(2)) direction to that individual after such consultation; but (iii) only in circumstances where he believes that the conduct required by the direction is proportionate to what is sought to be achieved by the conduct. None of those three elements was complied with in respect of GCHQ's s.94 directions. (i) The Secretary of State did not consult with the relevant individuals as to the terms of the directions. Instead SRT members negotiated the detail of what was to be provided without reporting back. (ii) GCHQ's approach tramples on the distinction between s.94(1) and s.94(2) - a direction was sought under s.94(1) so that GCHQ could identify the specific activity itself. GCHQ rather than the Secretary of State purported to exercise the s.94(2) powers of specific direction. (iii) The Secretary of State did not address his mind to the proportionality of the conduct (i.e. the particular categories of data) that would in fact be requested under the direction - directions were frequently sought in broader terms than was considered necessary even in GCHQ's view; the

directions therefore plainly cannot have been proportionate, and the purpose of s.94(2A) is defeated.

17. Third, there are wide-ranging implications for the compliance of the s.94 regime with Article 8. The Claimant raised this point at §§61-64 of its skeleton argument for the October 2017 Hearing [10/1a/20-22]. Its case is now stronger still. Not only can the Respondents no longer rely on the purported safeguard of the Secretary of State personally making any such direction, but the terms of the directions were frequently unwritten, and no adequate records were kept of the directions in fact given. The conduct cannot be “*in accordance with law*” for the purposes of Article 8(2) ECHR. The application of established Convention case-law to a system of mass collection of data, affecting millions of individuals, conducted without Secretary of State approval for the specific conduct required, by officials alone, without even a contemporaneous record being made of what was requested (still less a formal written notice) and of what was provided is not a difficult exercise. It permits only one answer.
18. Fourth, there are important implications for the oversight regime. IOCCO appears to have been unaware of the true nature of the s.94 regime. Sir Stanley Burnton found in his July 2016 Review<sup>2</sup> [13/1/31-32]:

8.39 *The submissions supporting the acquisition of bulk communications data under a section 94 direction are highly detailed. They explain why the acquisition of the bulk communications data is required in the interests of national security, giving information about the operational requirement or intelligence gap that the agency is seeking to address. They provide an explanation of the relevant data to be acquired and the proposed action. The submissions, when addressing the issue of proportionality, give extensive detail as to how the data will assist to address the operational requirement, the expected value of the intelligence to be derived from the data and why there is no other appropriate or suitable alternative to the proposed direction.*

...

8.42 ...

- *GCHQ section 94 directions (given by the Foreign Secretary):*
  - o were very broad and provided a general description of communications data which was far wider than the requirement actually made of the PECN; and*
  - o 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*
  - o 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.*

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<sup>2</sup> IOCCO, “Review of directions given under section 94 of the Telecommunications Act (1984)”, July 2016 [13/1].

19. During cross-examination, the GCHQ Witness stated unequivocally that IOCCO was given all of the information described in his 10<sup>th</sup> Witness Statement prior to its July 2016 Review. If that is true, and this is hard to reconcile with the chronology, the contents of the July 2016 Review and the terms of §22 of his 10<sup>th</sup> Witness Statement (particularly the reference to “*further searches [being] carried out to identify the underlying documentation*” since on his most recent account such documentation had been in his possession for c.18 months) these conclusions were not open to IOCCO to reach – they were contrary to, and not otherwise supported by, the evidence before it. There has been a fundamental breakdown in the ability of the oversight regime to identify illegality by GCHQ, as recently as July 2016. As the Claimant explained in its letter to the Tribunal dated 28 February 2018, IOCCO should be given an opportunity to respond to this submission (and if, in fact, IOCCO was not provided with all of the information detailed in the 10<sup>th</sup> Witness Statement, then the GCHQ Witness has again provided materially inaccurate information to the Tribunal).
20. If, as appears more likely given the contents of §22 of the GCHQ Witness’s 10<sup>th</sup> Witness Statement, the true position is that the historic position about ministerial submissions and trigger letters had not been fully investigated by July 2016 and the (incomplete) historic materials now available had not been recovered, then IOCCO was misled. If so then §§8.39 and 8.42 reflect what IOCCO was told, after someone in GCHQ had decided to advance the incorrect case that: every s.94 direction ever made had been accompanied by a highly detailed submission to the minister identifying the specific data sought; and any variation of the data was first approved by the Secretary of State even if it did not result in a changed direction. That such erroneous statements could be made by GCHQ officials (innocently or otherwise) and remain undetected by IOCCO is itself indicative of an inadequate oversight system.
21. The Respondents’ response by email dated 7 March 2018 to the Claimant’s letter of 28 February 2018 states:

*“It was of course for Sir Stanley and his inspectors to request to see the documents that they wished to review, and they were shown everything that they asked for. ... We are not able to state with certainty precisely which of those documents were or were not seen. In particular, although GCHQ records indicate that IOCCO inspectors were provided, at their request, with submissions, the directions themselves and information about the data received by GCHQ pursuant to the directions, there is no express record of the IOCCO inspectors having asked to see or being shown what have been referred to in this litigation as ‘trigger letters’”.*



However, it is clear that Sir Stanley Burnton saw some of the ‘trigger letters’, because they are described in §8.42 as the “*supporting documentation*”. It appears very likely that IOCCO was shown only a subset of the submissions to the Foreign Secretary and the trigger letters, and was not informed of the true position summarised in paragraph 9 above. Given the Respondents’ failure to be able to answer the question about what IOCCO was or was not shown, the Claimant reiterates its submission that the Tribunal to request the assistance of the Commissioner in answering this question (as set out in its letter of 28 February 2018).

### III. SHARING

22. As to sharing, the Claimant relies on its written submissions at §§3-50 of its skeleton argument for the October 2017 Hearing [10/1a/2-18] and at §§2-9 of its reply note for that hearing [10/1c/2-5].
23. Subsequent to those submissions, as to sharing with industry contractors, the Re-Amended 8<sup>th</sup> Witness Statement of the GCHQ Witness explained at §§20-22 [12/8/6] that, contrary to his previous evidence to the Tribunal, there are about 100 contractors with Privileged User (i.e. administrator) privileges – and that this access is not limited to the design, build and testing phase of the GCHQ systems. Concern about the use of such industry contractors with administrator rights was identified by IPCO for the first time at §19 of its audit summary dated 15 September 2017 [12/33/353] – although it may also have been unaware of the extent of contractors holding administrator rights as subsequently disclosed. As to the significance of industry contractors being given administrator privileges, see §§7-19 of the evidence of Dr Hosein.
24. The previous Commissioners’ reports serve to confirm the greater risk of breaches posed by the Respondents’ use of industry contractors:
  - 24.1. The ISCom Report for 2014 identified at p. 37 that there had been “*two serious breaches where officers had undertaken unnecessary queries of bulk data with no proper business justification. Both were contractors*”.
  - 24.2. The ISCom Report for 2015 stated at p. 37, in relation to MI5, “*I was also concerned to see that a number of the breaches issued in relation to these non-BPD misuse investigations, as well as one BPD breach, were by individuals who were not permanent MI5 staff. It is very important that the parent organisations treat breaches as seriously as MI5 do when a breach is issued to a member of their own staff. MI5 explained that they*

*had written to the organisations concerned stressing the gravity of the issue and expressed their displeasure at the situation.”*

- 24.3. The ISCom Report for 2016 *“recommended that MI5 should make it plain to secondees and contractors that they are subject to MI5 rules of conduct regarding access to data and ensure all people working on MI5 premises know the consequences of misuse”*. It is a matter of serious concern that such a basic recommendation had to be made.
25. The Commissioner also commended, in both 2015 and 2016, the ‘protective monitoring’ regime for identifying misuse of data by staff. However, there is no consideration given by the Commissioner as to whether such a regime would be effective in relation to contractors with administrator rights – for the reasons subsequently identified by IPCO, the risk of untraceable and untraced abuse of the systems by such individuals had been overlooked.
26. Exhibited to the Amended 8<sup>th</sup> Witness Statement of the GCHQ Witness was an internal GCHQ filenote of Sir Stanley Burnton’s inspection on 14 November 2016 (GCHQ 15) [12/8/132]. This noted that: *“We can show full visibility and control of tasking on our own systems though less so when data leaves GCHQ”*. This serves to demonstrate the Claimant’s point that when the data leaves GCHQ’s systems, GCHQ loses control over it. See, for example, §33(b) of the GCHQ Witness’s Amended 5<sup>th</sup> Statement in relation to transfer of data: *“One of the databases that the samples were extracted from (REDACTED) was a telephony events database and would have contained at least some s94 data. ... As the samples have since been destroyed at our and the partner’s locations we do not have any records of exactly what they included. The data was transferred via an encrypted laptop transported from Benhall to the partner’s location via the secure courier service ...”*. This is echoed in relation to remote access by the GCHQ Witness’s statement that *“one database containing BPD has been accessed remotely by a small number of individuals (fewer than 20) working for industry partners. ... We cannot demonstrate exactly what data was accessed on these occasions”* (Amended 5<sup>th</sup> Witness Statement, §29(b) [12/5/8]).
27. This further evidence only strengthens the Claimant’s case as to Article 8 ECHR compliance, and the legality of sharing under EU law. There simply are not the requisite safeguards to protect from abuse of power (cf Weber at §95). An audit trail of the data that was accessed is a minimum requirement for a regime (which has no system of prior authorisation) to comply with the well-established requirements of the Convention.

#### IV. PROPORTIONALITY

28. The Claimant recognises that proportionality under the ECHR will need to be the subject of detailed CLOSED submissions and evidence. The Claimant relies upon its submissions at §§72-77 of its skeleton argument for the October 2017 Hearing [10/1a/24-27] and at §§17-18 of its reply note for that hearing [10/1c/7-8].
29. Of central importance, the Tribunal is asked to recognise that no assessment of proportionality of the BCD and BPD regime has yet been carried out. The Respondents' reliance on David Anderson QC's *Bulk Powers Review* is misplaced; that review considered whether there was an 'operational case' for bulk powers – and expressly did not consider the proportionality of them.
30. The Tribunal will no doubt be anxiously scrutinising in CLOSED the questions of whether less data could be used in a less intrusive way. This will involve analysis of whether the systems are designed to minimise the number of searches and the scope of any such search. It is expected that the analysis will need to be highly technical in nature and will require the Tribunal to have a good understanding of the Respondents' relevant systems and how they can be configured, adapted, and manipulated. The Claimant understands that Counsel to the Tribunal has made an application for an expert to be instructed; the Claimant fully supports that application. Only with such assistance will the Tribunal be in a position to carry out a proper assessment of proportionality.
31. As to the evidence in OPEN, the Claimant notes:
  - 31.1. IPCO's letter of 15 September 2017, in which it reported that, at GCHQ, "*when questioned staff were not considering steps to minimise the level of intrusion from any sharing (Handling arrangements 6.3)*" [12/33/351]. See also the gist of the letter of 10 November 2017: "*During the August inspection, we asked several members of staff about the considerations taken to minimise intrusion were sharing of datasets to take place. This question was intended to see whether officers would take steps to ensure the minimum necessary data was disclosed, as required by section 6.3 of the arrangements. This question was not answered in a way that gave us confidence that limiting intrusion would be a consideration*" [12/35/355]. See further the gist of the email of 28 November 2017: "*our reading of section 6 of the arrangements is that any instance of sharing would require*

*its own proportionality consideration, which we would expect GCHQ to be able to evidence in any instance of sharing” [12/37/361].*

- 31.2. The 2<sup>nd</sup> MI5 Witness Statement identifies at §14 that MI5 made 20,728 applications in the last year to access communications data from its BCD [11/14]. It also explains at §§15-17 that, by default, every single BPD is searched, rather than requiring the analyst to consider which BPDs should be searched. The witness merely states that (i) otherwise there would risk intelligence failure, and (ii) urgency requires it. This answer demonstrates that no adequate consideration is being given to proportionality.
- 31.3. The 5<sup>th</sup> SIS Witness Statement at §18 contains very surprising submissions regarding why the default is to search every BPD [11/15/4]. First, it is alleged that there is secrecy – even from the analysts – regarding which databases are held, and so the *“analysts do not know when they commence a search what BPDs are available”*; this is plainly no legal justification for infringing privacy rights unnecessarily. Indeed, this system design makes it more likely that a BPD will be searched unnecessarily. Second, it is asserted that *“the ability to deselect BPDs at the point of initial query would be disproportionate”*; no explanation is given as to why this simple action would be disproportionate. Third, it is said that this approach is adopted to *“minimise the risk of intelligence failure”*; however, that demonstrates no consideration of whether, on the particular facts of any particular search, the need to search wider across BPDs is or is not likely to lead to intelligence failure.
- 31.4. The Re-Amended 8<sup>th</sup> Witness Statement of the GCHQ Witness is gisted at §14 that *“GCHQ might also use a social media dataset to conduct research into improving analytical techniques and processes” [12/8/101]*. Social media data is likely to be highly intrusive personal data, yet it appears to be used and mined for research and development purposes.

## V. RE-OPENING THE TRIBUNAL’S OCTOBER 2016 JUDGMENT

32. The Claimant has already set out in detail its application for the Tribunal to re-visit its conclusions about oversight from the October 2016 Judgment, by its written application dated 10 November 2017 (appended to the Claimant’s skeleton argument for the December 2017 Hearing [11/1]).

33. That application falls to be supplemented by the further disclosure in the following three respects.
34. First, there is the new information provided by GCHQ in the GCHQ Witness's 10<sup>th</sup> Witness Statement. For the reasons outlined above, the very process by which GCHQ obtained directions was unlawful in domestic law, yet this remained unnoticed by, and devoid of oversight from, the Commissioners, until identified by the Claimant in this litigation.
35. The inadequacy of oversight is brought into yet sharper relief if, as the GCHQ Witness told the Tribunal on oath, IOCCO had been provided with all the information contained in the GCHQ Witness's 10<sup>th</sup> witness statement before its s.94 review was published in July 2016 – see paragraphs 19-20 above.
36. Second, the GCHQ Witness provided additional evidence about the audit oversight process in his 9<sup>th</sup> Witness Statement. He explains at §6 that, only from June 2017 is the search term routinely presented during audits [12/9/134]. For the period from at least 2010 until September 2016, a search term *“could be reviewed during an audit alongside the three-part justification if further context to the three-part justification was required. This was not the primary focus of the audit though which was to assess the quality of the statement justifying the necessity and proportionality of the access to GCHQ data”*. In relation to the period from September 2016 to June 2017, *“search terms were not presented alongside the three-part justification”*. For the reasons already explained to the Tribunal in oral submission, there cannot be proper oversight unless the search term is also presented. A perfect tick-box exercise could be performed in the written justifications, only for a search to be carried out on something not properly or adequately connected to that justification, thus being disproportionate. This fact appears to have been appreciated by IOCCO inspectors in June 2017 – but oversight was lacking in this crucial regard before this.
37. Third, the Respondents' assertion that there was oversight in relation to international sharing, by virtue of a review carried out by Sir Stanley Burnton, was shown to be wrong. See paragraph 4.2 above, and see §23 of the Claimant's skeleton argument for the December hearing [11/1/10].

38. For these reasons, together with the other reasons already identified, the Tribunal should not have found that the system of oversight was effective from the date of avowal of the s.94 regime (cf [94] of the October 2016 Judgment [10/2a/35]).

## VI. DATE OF COMPLIANCE WITH ECHR

39. The Tribunal already has the Claimant's submissions on this point, at §§66-71 of the skeleton argument for the October 2017 Hearing [10/1a/23-24] and §§12-16 of its reply note for that hearing [10/1c/6-7]. The Claimant's argument has been reinforced by disclosure on 19 February 2018 of the submission to the Foreign Secretary requesting the new directions. (The Claimant does not understand why this document was not disclosed prior to the October 2017 Hearing).
40. The GCHQ Witness had attempted, at §17 of his 4<sup>th</sup> Witness Statement, to suggest that the possibility of the prior s.94 directions being void by virtue of the Tribunal's judgment was merely "*as additional reason*" and "*we did not consider that there would be any merit in any argument to that effect*" [10/4/71]. In fact, the submission to the Foreign Secretary provides:

*"1. As you are aware, the Investigatory Powers Tribunal will judge that the use of section 94 of the Telecommunications Act 1984 for the acquisition of bulk communications data (BCD) was not, prior to the publication of the s.94 Handling Arrangements in November 2015, sufficiently foreseeable.*

*2. In light of this judgement, GCHQ is seeking re-issue of its existing s.94 Directions, in order to ensure that the Directions upon which it relies have been issued under a regime that has been judged to be fully foreseeable. These Directions have been issued by previous Secretaries of State in the interests of National Security over a number of years.*  
..."

41. The concern that the extant s.94 directions were void was, therefore, in accordance with the Claimant's submissions as to the correct position in law, the primary concern for GCHQ. While the terms of the submission to the Foreign Secretary do not affect the legal position, it is striking that both parties are *ad idem* that the effect of the Tribunal's October 2016 Judgment was to confirm that the directions made under the *ultra vires* regime were, and always had been, void. The Tribunal is respectfully asked to make an appropriate declaration recording the correct position in law.

## VII. COSTS

42. The Tribunal does not have jurisdiction to make a *pro bono* costs order against the Respondents under section 194 of the Legal Services Act 2007.

43. To remove that difficulty, the Claimant's solicitors and counsel have now entered into conditional fee agreements, where the definition of success is the recovery of an award of costs in the Claimant's favour. The Claimant's solicitors and counsel have committed to donating any sum awarded to the Access to Justice Foundation, as if the order were a *pro bono* costs order. The Claimant will consider what order to invite the Tribunal to make in due course to reflect the multiple additional hearings caused by the Respondents' conduct.

THOMAS DE LA MARE QC

BEN JAFFEY QC

DANIEL CASHMAN

Blackstone Chambers

BHATT MURPHY

8 March 2018

Tabular Summary of 10<sup>th</sup> Witness Statement of the GCHQ Witness

Direction Number	Date of Direction	Whether direction was general or specific	Submission to the Foreign Secretary	Trigger letter?	Whether trigger letter (or data subsequently provided if no such letter) related to a subset of the data in the direction
1	§6: 23 March 1998	Missing	General	Yes: 27 March 1998 [105]	Subset
2	§6: [Aug] 1999 (replacing direction of 23 March 1998)	[108]	Specific	Yes [106-7]	Subset
3A, B etc.	§7 Number of directions on 15 March 2001	Not disclosed; no averral that standard form used	Specific	Yes: 8 May 2001 (c. 2 months later) <b>Not disclosed</b>	All
4A etc.	§8-10: Number of directions on 29 November 2001	[110, 114]	General	Sent to a number (but not all) of PECNs on 17 January 2002 (again c.2 months later) [109-110, 111-2, 113-4, 115-6] Some trigger letters cannot be found - <b>lost</b>	Subset
5A and 5B	§11-13: Two directions in 2006	Not disclosed; Standard form	1 x General 1 x Specific	1 x Believed that no trigger letter sent (gen submission - §13) 1x No trigger letter can be found <b>No record of oral notice (§12); date unknown</b>	Subset
6	§13: 2007 (replacing one of the 2006 directions)	Not disclosed; no averral that standard form used	General	Yes: eight days later	?
7	§14: 2007	Standard form	General	Not known whether sent and cannot be found <b>No record; dates unknown</b>	Subset
8	§15: 2010	Standard form	Specific	Not known whether sent and cannot be found <b>No record; Dates unknown</b>	Subset (reflective of the submission to the Foreign Secretary)



9	§16: 2011 (replacing a number of those issued on 29 November 2001)	Standard form	General	Specific	Not known whether sent and cannot be found <b>No record; Dates unknown</b>	Subset
10A etc	§17: Number of directions in 2012	<u>One</u> in standard form: 3 only?	1 x General [Others not mentioned]	1 x Specific [Others not mentioned]	1 x No trigger letter sent [Others not mentioned] <b>No records; Dates unknown</b>	1 x Subset [Others not mentioned]
11	§18: 2012 (replacing one of those issued on 29 November 2001)	Standard form	General	General	Not known whether sent and cannot be found <b>No record; dates unknown</b>	Subset
12	§19: 2012	Standard form	General	Specific	No trigger letter sent. <b>No record; dates unknown</b>	Subset (reflective of the submission to the Foreign Secretary)
13A etc.	A number of directions on 14 October 2016 (intended to replace all GCHQ's extant s.94 Directions)	New form	Specific	Made clear that the new directions would carry greater specificity on their face	Yes: same day <b>Not disclosed</b>	Referred expressly to the greater specificity contained in the new directions

IN THE INVESTIGATORY POWERS TRIBUNAL

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

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CLAIMANT'S SKELETON  
ARGUMENT

for the OPEN hearing on 12-13  
March 2018

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**Privacy International**  
62 Britton Street  
London  
EC1M 5UY

**Bhatt Murphy**  
10 Tyssen Street  
London  
E8 2FE  
DX 46806 Dalston