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 OUTLINE OF ADDITIONAL ISSUES

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1. In accordance with paragraph 7(b) of the Tribunal's order dated 9 March 2017, the Claimant here provides an outline explanation of the two matters it invites the Tribunal to determine at the hearing commencing on the 5 June 2017. The issues raised by these two matters are summarised in issues 13 to 16 of the Claimant's draft list of issues dated 28 April 2017.

SECTION 94 DELEGATION

2. Section 94(1)-(2) of the Telecommunications Act 1984 ("TA 1984") provides:

> *(1) The Secretary of State may, after consultation with a person to whom this section applies, give to that person such directions of a general character as appear to the Secretary of State to be necessary in the interests of national security or relations with the government of a country or territory outside the United Kingdom.*
>
> *(2) If it appears to the Secretary of State to be necessary to do so in the interests of national security or relations with the government of a country or territory outside the United Kingdom, he may, after consultation with a person to whom this section applies, give to that person a direction requiring him (according to the circumstances of the case) to do, or not to do, a particular thing specified in the direction.*

3. The Respondents have disclosed, subsequent to the Tribunal's earlier judgment on the legality of the section 94 regime (reported at [2016] HRLR 21), two redacted example section 94 Directions. The first came into use on 29 November 2001 (the "Old Direction"), and the second came into use on 14 October 2016 (the "New Direction").

4. Both of the Directions provide a delegated power to the Director of GCHQ or any person so authorised by the Director of GCHQ to make a request for bulk communications data ("BCD").

5. Paragraph 2 of the Old Direction provides (emphasis added):

> *[Name of CSP] shall, if requested to do so by the Government Communications Headquarters (GCHQ), acting through the Director of GCHQ or any person authorized 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 Telecommunications System (PTS) and data concerning the topology and configuration of [Name of CSP]'s PTS. …*

6. Paragraph 2 of the New Direction provides (emphasis added):

> *[Name of CSP] shall, if requested to do so by the Government Communications Headquarters (GCHQ), acting through the Director of GCHQ or any person authorized 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 section 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 Telecommunications System (PTS). …*

7. As a matter of domestic law, Parliament has conferred the wide-reaching power under section 94 TA 1984 on the Secretary of State personally. In delegating this power to the Agencies, the Respondents have thereby frustrated the legislative purpose. The question does not even arise as to whether there is lawful delegation within the Secretary of State's ministerial department for the purposes of the *Carltona* principle – the Director of GCHQ is himself constitutionally demarcated from a Secretary of State and thus cannot be delegated powers under the *Carltona* doctrine: see *R (Bourgass) v Secretary of State for Justice* [2015] UKSC 54 at [55].

8. Further, this delegation under the section 94 Directions entirely circumvents the distinction drawn in the legislation between sub-section 94(1) and 94(2), being a distinction between directions of a general character and specific directions. The Director of GCHQ (or whoever else is authorised) may be making either a general or a specific direction under the broadly-worded delegation. The legislative purpose in drawing this distinction in the statute is thereby further frustrated.

9. In addition to these issues of legality under domestic law, the delegation of the power under section 94 affects the conformity of the section 94 regime with Article 8 ECHR and with rights under the EU Charter. At the previous hearing before the Tribunal, the Respondents relied on the fact that it would be the Secretary of State personally making requests for BCD under section 94 as an important safeguard to the exercise of the power; indeed, the section 94 regime was even contrasted with a power to request data that could be exercised by the Agencies. For example, the Respondents' skeleton argument for the previous hearing contained the following assertions (emphasis added):

29. It is all the more plain that that was Parliament's intention when consideration is given to the fact that the exercise of the power is constrained in other ways. Specifically:

… (b) the category of those who can make a direction is extremely limited – directions can only be made by a Secretary of State.

…

40. Secondly, the power to make directions for the production of CD under s.94 and the power to make orders under s.22 of RIPA are properly understood as parallel regimes. The regimes could both lead to the production of CD for use for national security purposes. However, those who can exercise the powers are distinct:

a. A direction under s.94 can only be made by a Secretary of State. A s.94 direction cannot be made in the name of an official.

b. An order under s.22(4) of RIPA, by contrast, can only be made by a 'designated person'. Section 25(1) of RIPA specifies a number of 'relevant public authorities', including the police and the intelligence agencies, and s.25(2) provides that "persons designated for the purposes of this Chapter are the individuals holding such offices, ranks or positions with relevant public authorities as are prescribed for the purposes of this subsection by an order made by the Secretary of State."

…

43. … (b) To the extent that there is greater specificity of safeguards in the RIPA context, that is explicable by reason of the fact that under that regime directions are made by a large number of different officials in a wide range of different organisations throughout the country. It does not follow that the same system is needed in the s.94 context, where a much smaller number of directions are made and then only by a Secretary of State (ie at the highest level of Government).

…

49. Secondly, the Claimant's argument again overlooks the fact that there is no overlap between the categories of those who can make the two types of orders. A Secretary of State cannot make an order under RIPA s.22, and the array of law enforcement officers and officials who are 'designated persons' for the purposes of s.22 have no power to make a direction under s.94.

50. Thirdly, it is inherent in the Claimant's argument that there is a simple dichotomy between directions made under s.94 (no safeguards) and those made under RIPA s.22 (detailed safeguards). The fact that s.94 directions are made personally in the name of a Secretary of State is in itself an important safeguard that cannot be replicated in a s.22 direction.

…

79. A direction under s.94(1) can only be given where it "appear[s] to the Secretary of State to be necessary in the interests of national security or relations with the government of a country or territory outside the United Kingdom." Further, the Secretary of State can only give such a direction if "he believes that the conduct required by the direction is proportionate to what is sought to be achieved by that conduct." Thus there are, and at all relevant times have been, safeguards in the form of statutory requirements that the giving of a s.94 direction must be, in the independent judgment of a Secretary of State, both necessary for one of the permitted purposes and proportionate.

…

105. As stated above (at §§79-80 above) in respect of GCHQ, s.94(1) itself contains statutory safeguards requiring that the giving of a s.94 direction be, in the independent judgment of a Secretary of State, both necessary and proportionate. Consultation with the CSP is also required under s.94(1). The Secretary of State will thus be appraised of any material factors, including those relating to necessity and proportionality, which the CSP wishes to bring to his/her attention.

10. Each of these submissions to the Tribunal was materially misleading and factually wrong. The Tribunal gave judgment on the basis of the submissions put to it at the previous hearing: see, for example, the Tribunal's finding that, under section 94, "*the Secretary of State has (after the necessary consultation) considered it necessary (and proportionate) to obtain the data*" (see [2016] HRLR 21 at [54]). The Tribunal's judgment answered the question: "*Is it lawful under domestic law for a Secretary of State to issue directions to telecommunications and internet service providers (PECNs) to supply communications data to the Security Service and to GCHQ and for them to store and examine it?*" (ibid at [22]) and assessed "*the lawfulness of obedience to an intercept warrant under the hand of the Secretary of State*" (ibid at [30]). Given that the Tribunal was not provided with the true factual situation nor able to hear submissions thereon, the Tribunal should hear submissions on the true factual situation and on the relevant legal questions that arise as a result.

TIMING OF ARTICLE 8 BREACH

11. In its earlier judgment, the Tribunal found that the section 94 regime was not 'in accordance with law' prior to its avowal in November 2015, and thus was in breach of Article 8 ECHR until avowal. The consequence of the Tribunal's finding is that any section 94 Direction made prior to avowal was unlawful, as it was made in exercise of the unlawful regime, and thus was void ab initio. Requests for BCD made under such void section 94 Directions were therefore also without lawful authority. (See, for example, the majority of the Court of Appeal *R (Shoesmith) v Ofsted* [2011] EWCA Civ 642, including Stanley Burnton LJ's recognition at [137] that the relevant public authority '*proceeded on the basis that the direction was lawful and took the risk of its subsequently being held to be void*').

12. Upon receipt of the draft and embargoed judgment, the Respondents realised that

their existing section 94 Direction – the Old Direction – was consequently void and without effect. The Respondents therefore decided to issue a new section 94 Direction – the New Direction – which post-dated avowal of the section 94 regime.

13. The consequence is that the date from which the Respondents' demands for BCD could potentially have a legal basis which is 'in accordance with law' begins not from the date of avowal of the section 94 regime; rather, such potential compliance is, at the earliest, when requests for BCD were made under a section 94 Direction that was not void i.e. 14 October 2016.

14. Given that there was illegality over a greater period of time than addressed by the Tribunal in its earlier judgment, the Tribunal is invited to give further consideration to this issue as a matter of priority on the basis of the correct factual position.

15. There are also significant practical consequences for the Claimant arising from this later date of the Respondents' breach. In particular, in relation to remedies, the Respondents are alleging that the illegality was too distant for them to be able to ascertain whether the Claimant's data was unlawfully held and deleted, or whether it was never unlawfully held. This excuse will stand no scrutiny where the illegal activity was happening as recently as October 2016

CONCLUSION

16. Both of these new issues are discrete issues, which require relatively little Tribunal time for submissions to be made on them and for them to be resolved. They both respond to disclosure that has been made by the Respondents for the first time in relation to this hearing. In these circumstances, it is submitted that the Tribunal should consider the two issues at the earliest available opportunity, and the Claimant accordingly requests permission for them to be heard at the hearing commencing on the 5 June 2017.

TOM DE LA MARE QC

BEN JAFFEY QC

DANIEL CASHMAN

Blackstone Chambers

2 May 2017