

IN THE INVESTIGATORY POWERS TRIBUNAL
BETWEEN:

PRIVACY INTERNATIONAL

Claimant

and

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

Respondents

SUPPLEMENTARY WRITTEN SUBMISSIONS FILED
ON BEHALF OF THE RESPONDENTS FOR
OPEN PRELIMINARY ISSUES HEARING 26-29 JULY 2016

1. These further written submissions are intended to serve two purposes: to correct factual assertions in the Claimant's skeleton argument ('CSA'); and to respond to the Claimant's Scott Schedule.

Corrections to factual assertions in Claimant's skeleton argument

2. The Respondents have publicly avowed their BPD and BCD capabilities. The witness statements served on behalf of the Respondents provide a level of information about these capabilities, and also attest to their great value to the Respondents' work. It is in the nature of the Respondents' work that the detail of their operational techniques, including BPD and BCD, must be kept secret if the techniques are to remain effective. It follows that much of the detail relating to these capabilities has not been and cannot be made OPEN in these proceedings, for good national security reasons.
3. The purpose of this OPEN hearing is for the Tribunal to hear argument upon and to determine certain identified legal issues. A considerable quantity of OPEN evidential material has been made available to the Tribunal and to the parties for testing these legal issues. Indeed, an extensive exercise has been conducted by Counsel to the Tribunal, the Respondents and the Tribunal itself to ensure that all relevant evidence that can properly be made OPEN has been made available. In parallel to this OPEN evidence, a number of facts based on that evidence have been agreed between the parties.

Additionally, there are also a small number of facts that the parties have agreed are to be assumed for the purposes of this hearing.

4. Against this backdrop, the OPEN issues fall to be determined on the basis of, and only of, those facts which appear in the OPEN evidence, and/or the agreed and assumed facts. This is emphasised because the Claimant appears in places to invite the Tribunal to rely on, and indeed to assert as uncontroversial fact, matters that do not fall into either of these categories; and Moreover, there are a number of errors and potentially misleading statements in the Claimant's skeleton argument.
5. §1 CSA might be read as suggesting that SIS collects BCD. It does not. Only MI5 and GCHQ collect BCD.
6. §2 (and also §64) CSA refers to an assumed fact that s.94 data is shared with HMRC and the NCA. As the Claimant is aware, the Respondents objected to an assumed fact in those terms and a set of assumed facts has now been agreed between the parties that refers to the sharing of s.94 data with "*domestic law enforcement agencies*" (the terms of the assumed facts are set out in the Schedule of Agreed and Assumed Facts – this particular set of assumed facts is also set out at §9 of the Respondents' skeleton argument).
7. The second sentence of §3 CSA states:

"Current BCD collection includes location information and call data for everyone's mobile telephones in the UK for 1 year (Amended Security Service Witness Statement, §§25 and 130)"

Whilst the Amended MI5 Witness Statement does state that MI5 retains the BCD that it obtains for 1 year, the evidence does not state, and nor has it been agreed or assumed, that BCD collection includes communications data for "*everyone's mobile telephones in the UK*". This statement, the substance of which is repeated at §68(b) CSA, is no more than the Claimant's unsupported assertion, which (for the avoidance of doubt) is neither confirmed nor denied by the Respondents.

8. The examples of "*bulk travel data*" given at §5 CSA are all unsupported assertions by the Claimant. They do not appear in the evidence, nor are they agreed or assumed facts. Whether or not such data does form part of any of the Respondents' BPDs is neither confirmed nor denied.
9. The first sentence of §7 CSA states that "*Multiple datasets are joined together to enable profiling of the whole population*". This statement does not reflect the agreed assumed fact as to the reach of BPDs, although it is similar to an assumed fact for which the Claimant contended but which was not agreed. The agreed assumed fact is that "*the aggregation of multiple BPDs enables the Respondents to generate profiles and/or examine the activities of all of the individuals whose information is contained in the BPDs.*"
10. Nor is it accurate for the Claimant to assert (in the second sentence of §7) that "*It is common ground that such conduct increases the intrusion into privacy considerably*" [emphasis

added]. The Respondents do not accept that the use of the adverb is appropriate in such a general statement, nor is it supported by the passage of the Respondents' Closed Response that is relied upon.

11. The first sentence of §8 CSA is not referenced and is not accepted. The Respondents do contend, in general terms at least (and contrary to the view expressed by the Advocate General in *Watson & others*) that accessing communications data is less intrusive than accessing the content of communications, but that is not at all the same thing as saying that it is "*not particularly intrusive*".
12. The first sentence of §34 CSA asserts that "*BPD are shared with foreign security and intelligence services*". There is no evidential basis for this assertion. The Respondents' consistent position throughout this litigation has been neither to confirm nor to deny whether any such sharing has actually taken place. The agreed fact relating to this point (no.34 on the schedule) goes no further than stating that "*BPDs may be shared with the agencies' foreign partners*".
13. The same paragraph goes on to assert that "*It is assumed for the purposes of this hearing (the true position being neither confirmed nor denied) that [BPDs] are also shared with other UK government agencies for non-national-security purposes.*" This is misleading. This is not one of the assumed facts that has been either ordered or agreed. The extent of the OPEN factual agreement on this issue is reflected in agreed fact no.36, which states that "*BPDs may be disclosed to persons outside the agencies.*"
14. As to the balance of §34 CSA, the Tribunal should note §7.3.1 of the SIS Handling Arrangements [~~2/A/74~~], which require any service that might receive shared BPD to agree to rigorous requirements including access, use and onward disclosure. This paragraph of the Handling Arrangements also provides an answer to the similarly inaccurate assertion at §82(c) CSA.

Response to the Claimant's Scott Schedule

15. A further version of the Schedule containing the Respondents' case regarding each of the issues is attached.

25 July 2016

**JAMES EADIE QC
ANDREW O'CONNOR QC
RICHARD O'BRIEN**