

Statement No 2
For the Respondents
Dated 23 November 2015

IN THE INVESTIGATORY POWERS TRIBUNAL
BETWEEN:

Case No. IPT/14/85/CH

PRIVACY INTERNATIONAL

Claimant

-and-

(1) SECRETARY OF STATE FOR FOREIGN AND COMMONWEALTH
AFFAIRS

(2) GOVERNMENT COMMUNICATIONS HEADQUARTERS

Respondents

IN THE INVESTIGATORY POWERS TRIBUNAL
BETWEEN:

Case No. IPT/120-126/CH

GREENNET LIMITED
RISEUP NETWORKS, INC
MANGO EMAIL SERVICE
KOREAN PROGRESSIVE NETWORK (“JINBONET”)
GREENHOST
MEDIA JUMPSTART, INC
CHAOS COMPUTER CLUB

Claimants

-and-

(1) SECRETARY OF STATE FOR FOREIGN AND COMMONWEALTH
AFFAIRS

(2) GOVERNMENT COMMUNICATIONS HEADQUARTERS

Respondents

SECOND WITNESS STATEMENT OF CIARAN MARTIN

I, **Ciaran Liam Martin**, of Government Communications Headquarters (GCHQ), Hubble Road, Cheltenham, Gloucestershire, GL51 0EX, WILL SAY as follows:

- 1) I am the Director General for Cyber Security at GCHQ and a member of GCHQ’s main Board. In that role, I am responsible for GCHQ’s statutory responsibilities for information security in the United Kingdom and its work protecting the UK from cyber threats. I also have wider responsibilities for GCHQ’s external communications and policy. I have been in

this role since February 2014, having previously served in the Cabinet Office as Director of Constitutional Policy, Director of Security and Intelligence, and head of the Cabinet Secretary's Office. I have been a public official since 1997.

- 2) This is my second witness statement in these proceedings which I am authorised to make on behalf of the Respondents. The contents of this statement are within my own knowledge and are true to the best of my knowledge and belief. Where matters are not within my own knowledge they are based upon documentation made available to me and from discussions with others within the department.
- 3) Attached to this statement and marked Exhibit ['CM2'] is a bundle of relevant documents. Tab and page numbers below are references to that Exhibit.
- 4) In this second statement I address GCHQ's safeguards for communications protected by legal professional privilege ("LPP") and other confidential communications.

LPP and confidential communications

- 5) The RIPA Interception of Communications Code of Practice and the draft Equipment Interference Code of Practice stipulate that particular consideration should be given in cases where the subject of the interception might reasonably assume a high degree of privacy, or where confidential information (such as that which is legally privileged) is involved. GCHQ therefore takes special care to ensure that the acquisition, analysis and retention of communications in these circumstances, and the dissemination of any intelligence produced from them, is necessary and proportionate.
- 6) GCHQ treats four main categories of material as requiring special handling and dissemination; material that is legally privileged, confidential personal information, confidential journalistic information and the communications of and with UK legislators.
- 7) GCHQ applies those safeguards and handling procedures in place to ensure compliance with the RIPA Interception of Communications Code of Practice to all its data, irrespective of origin. Therefore, GCHQ's policies are applicable across the board, and apply equally to data derived from Computer Network Exploitation (CNE) as they do to data derived from other forms of interception.
- 8) A number of different GCHQ policies are relevant to the interception of legally privileged communications.
- 9) Acting on the advice of Counsel to Her Majesty's Government (HMG), and following the Belhaj IPT complaint, GCHQ's policies on the interception and reporting of legally

privileged communications were updated in the first half of 2015. In June 2015 the Interception of Communications Commissioner's Office (IOCCO) was consulted on these changes, and by August 2015 the policies had been further amended to incorporate suggestions made by IOCCO.

- 10) A copy of the 'Targeting' section of GCHQ's Compliance Guide is attached at [CM2-1]. This contains guidance where there may be targeting of lawyer's communications. This requires that "careful consideration" is given where lawyer-client communications are targeted. The 2015 changes to the policies on the interception and reporting of legally privileged communications stipulate that if officers intend to carry out any targeting that may attract any of the four categories of sensitive communications, (including those of a lawyer), an internal authorisation (a Combined Policy Authorisation (COPA)) must be obtained. In particular, where legally privileged information is or is likely to be involved, this authorisation must be ratified by a senior Foreign and Commonwealth Office (FCO) official prior to its approval within GCHQ.
- 11) Further information is provided in the 'Communications containing Confidential Information' section of the Compliance Guide (see attached at [CM2-2]). This document contains stipulations which are necessary in order to comply with the requirements of the Code of Practice where material which is legally privileged may be intercepted. This makes expressly clear that no material should be transcribed, gisted or otherwise analysed unless there are reasonable grounds to believe that it is necessary on the grounds of national security, the economic well-being of the UK or preventing or detecting a serious crime (see page 3 of [CM2-2]). It also states that intelligence based on the interception of confidential information can only be disseminated in accordance with GCHQ Reporting Policies on the sensitive professions and proportionality. Any intelligence that may potentially be confidential must be submitted for mandatory sensi-check. Staff other than those in the relevant GCHQ team are not empowered to release such information themselves unless as per agreement with the relevant GCHQ team.
- 12) As of April 2015 it specifies in the 'Communications containing Confidential Information' section of the Compliance Guide that if officers are likely to obtain confidential information as a result of their targeting activities, they must obtain a COPA in advance. This directive reasserts that in the case of legally privileged information, the COPA must be ratified by a senior FCO official.
- 13) The 'Oversight' section of the Compliance Guide (see [CM2-3]) explains that both the Intelligence Services Commissioner and the Interception of Communications Commissioner have oversight of the Intelligence Agencies' activities in respect of the four categories of communications containing confidential information, as specified above. Warrants and reporting that relate to communications containing confidential information will explicitly be

brought to the attention of the relevant Commissioner during the next inspection visit. Any material containing confidential communications that is retained will be made available to the relevant Commissioner if requested, including detail of whether that material has been disseminated.

- 14) GCHQ's Intelligence Sharing and Release Policy (see [CM2-4]) which came into force in September 2013 and was updated in June 2015 contains further guidance on the RIPA Code of Practice, the Human Rights Act 1998 and confidential communications. This document explains legal privilege and makes clear that such communications attract a special sensitivity. Any such material must undergo a mandatory sensitivity check (referred to as a sensi-check in the guidance). This check is done by a team separate from the team dealing with reporting. If in a particular case it is proportionate to release legally privileged material, the reporter will be instructed to apply the following caveat to the report, to help demonstrate that GCHQ has taken account of the communications' sensitivity and the heightened threshold of proportionality:

"This report contains material that may be subject to legal professional privilege, and onward dissemination/Action On is not to be taken without reverting to GCHQ."

- 15) The Intelligence Sharing and Release Policy sets out how the process of sensi-checking should be conducted. It also makes clear that communications of, and as of 2015, mention of sensitive professionals including lawyers or legal advisers are subject to a mandatory sensi-check. Prior to the creation of the Intelligence Sharing and Release Policy in September 2013, the equivalent policy was to be found in "Reporting Policy – Sensitive Professions" (see [CM2-5]) which applied between December 2010 and September 2013 and in Reponses 27 and 28 (see [CM2-6]) which applied between 2005 and December 2010. The changes to the policy on the interception and reporting of legally privileged communications in the first half of 2015 brought with it a lowering of the threshold for sensi-check for the reporting of privileged material. Presently, all reporting that mentions a lawyer must be submitted to sensi-checkers, who will refer a high number of these reports to Legal Advisers. Formerly, only reporting on the communications of a lawyer went via this route. As a result of the implementation of the 2015 policy and process amendments, the amount of reporting referred by sensi-checkers to Legal Advisers to ascertain whether or not the contents of an intelligence report carries legal privilege or not has arisen.

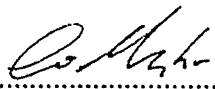
- 16) The "Sensi-Checking: How To Guide" (see [CM2-7]), contains a separate section on legal privilege. This makes clear that reporters and reporting quality checkers are not qualified or permitted to decide whether:

- a) the communications are privileged – this is reserved to Legal Advisers (LA) or to sensi-checkers or

- b) reporting the privileged communications is necessary and proportionate – this is reserved to sensi-checkers (acting on legal advice if appropriate).
- 17) Further it is made clear that the act of sensi-checking any such reporting is not sufficient to meet the Code of Conduct and it is vital that the additional consideration required is given and recorded. This is followed by a step by step guide to identifying whether the material is privileged which is used by sensi-checkers; guidance on the sending of reports to Legal Advisers; guidance on the reporting of such material including whether caveats should be added to the report and guidance on sensi-check exceptions (where the subject happens to be a lawyer but where the information obtained from them is routinely not privileged). The current version of the “Sensi-Checking: How To Guide” is dated March 2015 and the previous version of that Guide was last updated in December 2013.
- 18) Legally privileged material is not shown to lawyers engaged in relevant litigation. The practice underpinning this, known as Information Barriers, is set out in [CM2-8]. It is awaiting formal approval by the relevant GCHQ senior official. However, this policy has been followed in practice across the department since the Belhaj ruling, and reflects longstanding practice before that date.
- 19) As of June 2015, the Review and Retention section of the Compliance Guide states that material that contains legally privileged or other confidential information, or directly involves British Parliamentarians, and that is not required for intelligence reporting purposes must be deleted as soon as practicable, and that requests for exceptional retention of such material are unlikely to be approved. Following the Belhaj ruling, GCHQ made changes to the arrangements for the retention of legally privileged material. Prior to the Belhaj claim, non-reissued intelligence reports were retained in GCHQ’s intelligence report repository along with all other intelligence reports. Following Belhaj, GCHQ has taken steps to ensure the isolation of any legally privileged intelligence reports which have been retained in the repository and do not meet the threshold for onward reporting by GCHQ to its customers. GCHQ now intends to institute routine isolation and deletion on a rolling basis; intelligence reports will continue to exist in the intelligence report repository for six months in order to give all relevant analysts the opportunity to assess the relevance of the intelligence. After this time non-reissued legally privileged intelligence reports will be moved into isolation and will become subject to strict access controls. These isolated intelligence reports will be routinely deleted on a rolling monthly basis.
- 20) I also attach (see [CM2-9]) an up-to-date summary of GCHQ’s policy and guidance in relation to the special protection afforded to legally privileged information and other especially sensitive communications.

Statement of Truth

I believe that the facts stated in this statement are true.

Signed: 

Dated: 23 November 2015