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No: IPT/15/110/CH

IN THE INVESTIGATORY POWERS TRIBUNAL

P.O. Box 33220
London
SW1H 9ZQ

Date: 18 December 2017

Before:

SIR MICHAEL BURTON (PRESIDENT)
MR. JUSTICE EDIS
SIR RICHARD MCLAUGHLIN
MR. CHARLES FLINT QC
MS. SUSAN O'BRIEN QC

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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**

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Hearing date: 1 December 2017
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APPEARANCES

Mr T De La Mare QC, Mr B Jaffey QC and **Mr D Cashman** (instructed by **Bhatt Murphy Solicitors**) appeared on behalf of the **Claimant**

Mr J Eadie QC, Mr A O'Connor QC, and **Mr R O'Brien** (instructed by **Government Legal Department**) appeared on behalf of the **Respondents**

Mr J Glasson QC (instructed by **Government Legal Department**) appeared as Counsel to **the Tribunal**

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APPROVED JUDGMENT

RULING ON REDACTION OF GCHQ/13

1. Exhibit GCHQ/13 to the 8th open statement of a GCHQ witness contained a number of letters relating to the giving of directions to telecommunications operators under s. 94 of the Telecommunications Act 1984 (the Act). Those letters were redacted with the intention of effectively withholding the name of the companies to which directions under s. 94 had been given. There was an inadvertent failure in the redaction process by the Respondent, so that in two documents, dated 1998 and 2002, the name of the company was revealed, or information was disclosed in a form from which the name of the company could be inferred. The Claimant very properly promptly informed the Respondents. The Claimant now applies for an order that the identity of the particular company to which the relevant letters were sent should no longer be kept secret, but should be openly disclosed in evidence, and thus made public. The Tribunal heard oral argument, in private, on 1 December 2017 and decided to dismiss the application, with written reasons to follow.

2. Under Rule 6 (1) of the Investigatory Powers Tribunal Rules 2000 the Tribunal is required to carry out its functions in such a way as to secure that information is not disclosed to an extent, or in a manner, that is contrary to the public interest, or prejudicial to, inter alia, national security or the continued discharge of the functions of any of the intelligence agencies. To that end, notwithstanding the power of the Tribunal to require disclosure of documents, they may be redacted or, if appropriate, edited (see **Belhadj v Security Service and others** IPT/13/132-9H Judgment 18 November 2014 at paragraphs 11-12), before disclosure to other parties.

3. S. 94 (5) of the Act provides that a person to whom a direction is given shall not disclose, or be required by any enactment or otherwise to disclose, anything done by virtue of s. 94 if the Secretary of State has notified him that the Secretary of State is of the opinion that disclosure is against the interests of national security. Each of the relevant directions contains a statement from the Secretary of State that disclosure of the direction is against the interests of national security.

4. It is clear that if the letters exhibited had properly redacted the identity of the telecommunications operator to which directions under s. 94 of the Act had been directed, then the Tribunal would have been required, both under Rule 6 (1) and s. 94 (5), to uphold that redaction. The basis for the redaction, and the statement from the Secretary of State, is that if the identity of the operator to whom a direction has been given is disclosed then persons determined to avoid tracing and investigation by the intelligence agencies would be careful to avoid using the communications network of that operator. In principle that consideration does dictate that neither the identity of the operator, nor the type of action required under the direction, should be disclosed. That general principle is not challenged by Ben Jaffey QC for the Respondents who made clear that he was not arguing that the identity of all telecommunications operators to whom s. 94 directions had been given should be disclosed, but only the name of the telecommunications operator which could be gleaned from the imperfectly redacted correspondence in exhibit GCHQ/13.

5. The question is whether that principle continues to apply when the identity of the telecommunications operator has been inadvertently disclosed to the Claimant. It is difficult to see why it should not.

6. James Eadie QC for the Respondents accepts that in these circumstances the Claimant cannot be prevented from using or deploying in its submissions any material information which has been disclosed. The Article 6 rights of the Claimant are thus protected.

7. However, there is no need for the Claimants to use that knowledge because the identity of the operator is irrelevant to the issues which the Tribunal has to decide as to the legality of the form of directions given by the Secretary of State under s.94. On that issue the identity of the operator is not relevant evidence. So the Claimant seeks to go further than the concession made by the Respondents allows, by arguing that the public interest requires that the documents should be opened up so that the public can

know the identity of the telecommunications operator to whom the direction under s. 94 had been given. That is said to be required by the principle of open justice. Mr. Jaffey also argued that there is no realistic claim that it would be contrary to the interests of national security to disclose the identity of a telecommunications operator to which directions had been given in 1998 and 2002.

8. However, the common law principle of open justice derived from **Scott v Scott** [1913] AC 417 is not absolute, but subject to statutory exceptions. In this case its application must be subject to Rule 6 (1) which prevents the disclosure of information contrary to the interests of national security. In principle it would be contrary to the interests of national security to disclose the identity of any person to whom a s. 94 direction has been given, and that rule must apply to any such information, including information inadvertently disclosed to one party.

9. The only authority cited in the short argument on this issue was the judgment of Mitting J in a SIAC case (**XX v Secretary of State for the Home Department**, Appeal No: SC/61/2007, 10 September 2010), which deals with the point, which is common ground, that where information is inadvertently disclosed fairness requires that the advocate in possession of the information should be able to deploy "*all of the information helpful to XX's case which he had properly acquired*". We also refer to the dicta of Maurice Kay LJ in **Secretary of State for the Home Department v. Mohamed (formerly CC)** [2014] 1 WLR 4240 at paragraph 20:

> *"Lurking just below the surface of a case such as this is the governmental policy of neither confirm nor deny ("NCND"), to which reference is made. I do not doubt that there are circumstances in which the courts should respect it. However, it is not a legal principle. Indeed, it is a departure from procedural norms relating to pleading and disclosure. It requires justification similar to the position in relation to public interest immunity (of which it is a form of subset). It is not simply a matter of a governmental party to litigation hoisting the NCND flag and the court automatically saluting it. Where statute does not delineate the boundaries of open justice, it is for the court to do so. In the present case I do not consider that MAM and CF or the public should be denied all knowledge of the extent to which their factual*

and/or legal case on collusion and mistreatment was accepted or rejected. Such a total denial offends justice and propriety."

10. In this case to withhold the name of the telecommunications operator does not offend justice, for that identity forms no part of either party's case and is not relevant to any issue which the Tribunal has to decide. Rule 6 (1) delineates the boundaries of information which may be disclosed. It is a fair point that, viewed in isolation, disclosure of the correspondence with one operator which took place in 1998 and 2002 may not in itself directly damage the interests of national security, but it would violate the principle under which the telecommunications operators are required to operate under s. 94 and thus damage confidence in the secrecy of the system. Disclosure of the identity of one operator would lead to argument that the identity of others should then be revealed. The answer to any question whether a telecommunications operator had been made subject to a direction under s. 94 could only be neither to confirm nor deny.

11. For these reasons the Tribunal dismisses the application made by the Claimant for a direction that the relevant correspondence in GCHQ/13 should not be redacted. The relevant correspondence should be excluded from GCHQ/13 and, in its place, redacted copies of the correspondence should be substituted which effectively ensure that the identity of the telecommunications operator is not disclosed.