

IN THE INVESTIGATORY POWERS TRIBUNAL

P.O. Box 33220
London
SW1H 9ZQ

Date: 16 April 2019

THE HON. MR. JUSTICE EDIS
SIR RICHARD MCLAUGHLIN
MR. CHARLES FLINT QC
MS. SUSAN O'BRIEN QC

Between:

PRIVACY INTERNATIONAL
- 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

Claimant

Respondents

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**

Sir James 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**

Hearing dates: 8 September 2017, 17, 18 and 19 October 2017, 1 December 2017, 10 January
2018, 26 February 2018, 12 -13 March 2018 and 25 September 2018.

Mr Justice Edis:

1. These are the OPEN reasons for the Determination of the Tribunal dated 26th September 2018 which followed a hearing on 25th September 2018. There is also a CLOSED statement of reasons. These reasons are the responsibility of the four currently serving members of the Tribunal following the retirement of Sir Michael Burton as President on 26th September 2018. All four members have contributed to the preparation of the OPEN and CLOSED reasons. Any further proceedings will be dealt with by a constitution of the Tribunal including the President.
2. “Avowal” in relation to BCD occurred on 4th November 2015 and in relation to BPD on 11th March 2015, as explained in the first judgment. “Pre-avowal” means prior to the avowal date for the type of material concerned.
3. The determinations made by the Tribunal on 26th September were as follows:-
 - i) That GCHQ has held BPD pre-avowal and BCD relating to the Claimant pre-16 October 2016 (because of the unlawfulness of the obtaining of some material under invalid authorisations granted prior to that date);
 - ii) That the Security Service has:
 - a) held BPD and BCD relating to the Claimant unlawfully pre-avowal;
 - b) accessed or examined BPD and BCD relating to the claimant pre-avowal.
 - iii) That SIS held BPD relating to the claimant pre-avowal.
4. This claim has resulted in three substantive open judgments, as summarised in paragraphs [1]-[3] of the last in that series, “the third judgment” delivered on 23rd July

2018. The decisions announced on 25th September, summarised above, give effect to the conclusions reached in the first judgment in 2016 and the third judgment in 2018. The reasons for those judgments have already been fully set out and published and nothing further needs to be said about them. The determinations made and recorded above followed from the conclusions in those judgments and the reasons are already apparent.

5. An issue arose at the hearing of 25th September on which it is necessary to express some conclusions which are not related to the determinations. During the development of the evidence between the first and the third judgment it emerged that there was data held by the Security Service in a section of its systems called “workings” which related to the Claimant. Officers when using the datasets created a note of what had been done and copied material into this section of the system so that they could work on it. It was not routinely deleted when the work was complete, and there was no routine deletion policy. This related to the period of time when material was unlawfully held by reason of the decision in the first judgment.
6. This issue first became known to the Tribunal and the Claimant in the Respondents’ Re-Amended Open Response to the Claimants’ Request for Further Information Relating to Searches (RFI Response) served in October 2017, and was again revealed in the Respondents’ Re-Amended Report to the IPT on Searches disclosed in OPEN on 14th September 2018. Its emergence into that document caused renewed focus on it. Counsel for the Respondents informed the Tribunal on instructions that the material had been recently deleted. The Tribunal directed a witness statement to indicate what had been done, and to ascertain whether any copy had been kept so that IPCO could see what had happened.

7. The MI5 witness statement dated 8th October 2018 confirms that the material was deleted on 24th September 2018, the day before the hearing. It is said in the witness statement from a Security Service witness that the material in “workings” was considered by the team responsible for this litigation in the light of the skeleton argument from the Claimant dated 19th September 2018 which complained, among other things, about the retention of this data. That team decided to delete it, having established that this had not already been done. The reason given is that there was no proper basis for retaining it and it should therefore be deleted in order to minimise the intrusion into the Claimant’s privacy. It is said that this is consistent with the approach of all the UKIC agencies to this litigation. They have not suspended their usual Review, Retention and Deletion policies during its course.
8. There is a record of what has been deleted, but the material itself has not been copied. That record is available for inspection by IPCO, and was inspected by IPCO in October 2017. The investigation of the issue by IPCO is a matter for IPCO and the Tribunal has seen correspondence relating to this which is CLOSED. This correspondence was inspired by a letter to IPCO sent on the day of the hearing, the 25th September 2018.
9. Having considered the open witness statement, and the CLOSED material, the Tribunal is satisfied that the deletion of material relating to the Claimant was carried out for proper reasons, the issue having been previously reported to IPCO, and did not in any way prejudice the conduct of this case, or any investigation by IPCO, as a sufficient record of the deletion was retained for future reference.
10. IPCO wrote to the Claimant’s solicitors on 29th November 2018 after investigating this issue with the Security Service. The letter says that IPCO has no concerns about the necessity and proportionality of the actions taken by the Security Service in deleting the

data, and also says that a Review, Retention and Deletion policy for the “workings” area has been put in place and is overseen by IPCO. It concludes:-

“We have discussed with MI5 their decision to delete the material relating to PI. Whilst regrettable, MI5’s concern was, in our judgment, a legitimate one as they considered they no longer had a necessity and proportionality case to retain the material for the fulfilment of their statutory functions. We have informed them, however, that they would have a clear lawful basis to retain data for the purposes of facilitating the carrying out of any functions of the Judicial Commissioners or IPT.”

11. We respectfully agree with those observations. This issue does not form part of the reasons for the determinations of the IPT in this case, but we have recorded its outcome in this judgment because of the importance we attach to the way in which evidence is provided to the IPT by the Security Service.
12. The consequences of this state of affairs, if any, so far as remedy is concerned will be for the Tribunal to assess in due course. At this stage the Tribunal expresses no view about it.
