

IN THE INVESTIGATORY POWERS TRIBUNAL
BETWEEN:

- (1) ABDEL HAKIM BELHAJ
- (2) FATIMA BOUDCHAR
- (3) SAMI AL SAADI
- (4) KARIMA AIT BAAZIZ
- (5) KHADIJA SAADI
- (6) MUSTAFA AL SAADI
- (7) ANAS AL SAADI
- (8) ARWA AL SAADI

Claimants

-and-

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

Respondents

SUMMARY OF THE RESPONDENTS' CLOSED RESPONSE
ADDRESSING THE LEGAL AND POLICY REGIME

Introduction

1. As indicated in paragraph 145 of the Respondents' Open Response of 17 January 2014, each of the Respondents 1 to 3 ("the Agencies") has its own internal policies/procedures which implement the RIPA Code on the "Interception of Communications" ("the Interception Code"); and set out in further detail the practices/procedures to be followed in respect of the interception of material which may be legally privileged ("LPP material").
2. The Respondents have set out a summary of those internal policies/procedures below. It is not possible to disclose the full details of the policies/procedures because to do so would be damaging to the public interest or prejudicial to national security, the prevention or detection of serious crime and the continued discharge of the functions of the intelligence services.

3. It is important to emphasise at the outset of this summary that the policies/procedures summarised below are designed to act as additional safeguards *in the event that* the Agencies come into possession of LPP material in the course of performing their statutory functions. Nothing in this document is to be taken as any indication of the frequency with which the Agencies obtain and/or handle LPP material.

General

4. Although it is not applicable in the context of interception, the Agencies comply with the additional safeguard contained in the "Covert Surveillance and Property Interference Code of Practice" at section 4.26, namely that *"where there is any doubt as to the handling and dissemination of matters which may be subject to legal privilege, advice should be sought from a legal adviser within the relevant public authority before any dissemination of the material takes place"*.
5. The Agencies also provide guidance on the circumstances which might give rise to *"an unusual degree of collateral infringement of privacy"* within the meaning of paragraph 3.1 of the Interception Code and to which attention should be drawn in a warrant application if those circumstances are applicable to the application.
6. In summary the Agencies apply the following safeguards, which are applicable in the event that LPP material is intercepted:
 - a) Internal policies/procedures which (i) seek to ensure that no LPP material is acted on or further disseminated unless a legal adviser has first advised on the lawfulness (including the necessity and proportionality) of such action or dissemination and which (ii) seek to ensure that appropriate caveats are placed on any LPP material which is acted on or disseminated and which highlight the need to handle the material sensitively.
 - b) Internal policies/procedures which ensure that intercepted material is only retained where necessary and proportionate.
7. As set out below, each Agency has developed its own detailed policies/procedures which are specific to the working of each organisation and which reflect the requirements of the Interception Code.

The Security Service

8. The Security Service has a longstanding policy on handling LPP material which might be obtained in the course of its investigations, in accordance with RIPA and the Interception Code. This includes guidance to Service lawyers, together with wider official guidance for Service officers on the handling of LPP material.

9. In short, the Security Service policy provides that no LPP material can be acted upon or further disseminated unless approval has been sought from a senior manager with advice from a Security Service lawyer.
10. A summary of the process which is adopted by the Security Service for identifying and handling LPP material has been set out below.
11. When the Security Service applies to the Secretary of State for an interception warrant under Part 1 of RIPA, consideration is always given by Security Service officers to the likelihood of obtaining LPP material. If the obtaining of such material is judged to be likely, the warrant application states (a) whether the obtaining of this material is the purpose of the interception and (b) if so, whether there is a justification for obtaining the material in terms of necessity and proportionality. When the Security Service applies for the renewal or cancellation of the warrant, the Secretary of State is informed whether the Security Service had obtained any LPP material under the original warrant and (with a renewal) the assessment is updated of the likelihood of obtaining any more such material.
12. In order to fulfil its statutory functions, the Security Service collects intelligence through a number of methods authorised under RIPA and/or the Intelligence Services Act. These include interception and eavesdropping.
13. Security Service analysts are provided with training and written guidance on the principles of necessity and proportionality as well as how to identify LPP and other 'Confidential' material. In short, the guidance states that any discussion of legal proceedings or the substance of any legal advice should be referred to a Service lawyer for consideration of whether LPP applies.
14. As described above, the Security Service issues guidance to assist lawyers in determining if LPP applies. In addition to their professional training, Service lawyers are provided with further training in post on identifying LPP material. In summary, lawyers are guided to have regard to the statutory definition of LPP in s. 10 of the Police and Criminal Evidence Act 1984, which provides a broad and comprehensive definition of LPP material. Where it is difficult for lawyers to make a determination, a 'precautionary' approach is adopted.
15. The lawyer will give advice on the handling of LPP material which may include one or more of the following:
 - a) Whether LPP in fact applies to the material;
 - b) Whether the material should be destroyed;
 - c) Whether any action would be permitted by the terms of the Security Service Act and/or the ECHR as well as whether there is a risk to the integrity of any legal proceedings;
 - d) Whether to apply a caveat to the material which highlights the need to consult with lawyers and whether to limit any further dissemination to a minimum number of individuals.

16. Thus the necessity and proportionality of obtaining and dealing with LPP material, which the Security Service recognises can be especially intrusive, is considered at every stage.
17. In line with the RIPA Code of Practice, a record of any LPP material which is intercepted and retained is made. These records are made available on a regular basis to the Interception of Communications Commissioner. The Commissioner can choose to review intercepted and retained LPP material to determine that its use and retention is in accordance with RIPA. The Commissioner is provided with a full list of warrants within his remit that are or have been live during the period under review, including any which include LPP material. During his most recent inspection the Inspector confirmed that he was satisfied LPP material was being handled appropriately.
18. The Security Service provides guidance to Counsel and/or external lawyers who may be involved in reviewing Security Service material in connection with legal proceedings. This explains how LPP material will be labelled if such material has been identified as part of the searches for potentially disclosable information. It explains that such material will be marked (with a caveat) and advises that such material should not be reviewed, but a note should be made of its serial number. The material will initially be reviewed by a Service Legal Adviser, but if necessary will be reviewed by an independent lawyer.

The Secret Intelligence Service (SIS)

19. The policies and procedures within SIS governing the potential acquisition and handling of LPP material closely follow the provisions laid out in the Codes of Practice and have also been agreed by the Interception Commissioner.
20. In cases where an application for a warrant is likely to result in the interception of legally privileged communications, Chapter 3 of the Interception of Communications Code of Practice sets out the additional safeguards which must be adhered to. SIS has a rigorous internal application procedure for all intercept warrants to ensure that RIPA is complied with. All submissions for interception warrants require internal sign off from the relevant Director, Legal Advisers and operational policy and compliance staff before being sent to the Foreign Secretary for authorisation.
21. Handling guidance is provided to SIS transcribers in order to assist in the identification of any LPP material which might be intercepted. This provides guidance on the meaning of legal privilege and notes that privilege can fall away if the communications are to further a criminal purpose. The guidance notes that it can be difficult to identify legal privilege and refers transcribers to the legal advisers if there is any doubt.

22. If the transcriber believes that LPP material may have been intercepted, in accordance with para 3.5 of the Code, additional safeguards apply before that material is transcribed or reported. Safeguards would include consulting an appropriate legal adviser for guidance on the handling of the material including whether it is necessary within the meaning of the RIPA to retain, transcribe or report the material as well as placing a privileged material caveat on the report stipulating that a legal adviser should be consulted before any further dissemination takes place. In addition to adding this caveat, a note would also be included in the report recording the date on which the contents had been discussed with a legal adviser as well as confirmation that it meets the operational requirement authorised by the warrant.
23. SIS maintains a feedback sheet for every warrant obtained which includes a section for recording if interception of legally communications has occurred that has not been issued as a report. "Recording" in this context (where privileged communications have not been reported) does not include the details of any content from the calls. It would simply be recording the fact that legally privileged material has been intercepted as a result of the warrant but that the material was not retained or reported as relevant to the operation. This is an important requirement as this information must be included in a warrant renewal submission as an important factor in considering the proportionality of the intercept.
24. RIPA section 15 safeguards state that dissemination should be "limited to the minimum that is necessary for the authorised purpose of the intercept warrant" and SIS adheres very closely to this principle. In the event that LPP material were to be reported an appropriate legal adviser would be consulted to ensure that any further dissemination is both necessary and proportionate.
25. Any LPP material intercepted and retained by SIS must be reported to the Interception Commissioner in accordance with para 3.6 of the Code. The previous Interception Commissioner (Sir Paul Kennedy) approved the relevant SIS handling guidance (which deals, *inter alia*, with the handling of LPP material) in April 2012 during one of his six-monthly inspections of SIS. In addition Sir Paul Kennedy and his successor have not raised any concerns about the handling of LPP material within SIS.
26. The procedures set out above concerning the handling of LPP material mitigate against the possibility that LPP material will be seen by Counsel conducting a disclosure exercise in legal proceedings. In addition, prior to Counsel viewing any material, a list of all potential documents of relevance to the case will be produced. Prior to any material being provided to Counsel this list is first reviewed by an appropriate legal adviser. If any material were to contain LPP material that legal adviser would consider the appropriate course of action to take in respect of it.

GCHQ

27. GCHQ demonstrates that its actions are necessary and proportionate by producing an accountable record of those actions for oversight and audit purposes. In many cases this takes the form of a justification (commonly referred to as 'HRA justification') completed by the individual taking the action and comprising an identification of the statutory purpose in support of which the action is being taken, the Joint Intelligence Committee intelligence requirement and a free-text explanation as to why the action is being taken.
28. Intelligence sharing and release policy principles are set out in guidance to all staff. In particular GCHQ always acts in accordance with UK and international law. As part of this, when GCHQ acquires material in exercise of its monitoring function:
 - i) Such material is released only for specified purposes (in the interests of national security, to safeguard the economic wellbeing of the UK or in support of the prevention or detection of serious crime);
 - ii) Access to the material is minimised and controlled on the basis of need-to-know;
 - iii) The organisation acts proportionately and applies safeguards to minimise intrusion and to respect human rights; and
 - iv) The organisation accounts for everything it releases.
29. A number of different GCHQ policies are relevant to the interception of legally privileged communications.
30. In accordance with the Interception Code, GCHQ's Compliance Guide highlights the requirement that the issue of legal privilege must be addressed in any relevant warrant application.
31. In addition the Compliance Guide makes clear that officers should not transcribe, retain, or otherwise analyse intercept containing confidential information unless there are reasonable grounds to believe it is necessary in the interests of national security or the economic well-being of the UK or in support of the prevention and detection of serious crime.
32. Separate guidance is provided to GCHQ staff on the meaning of legal privilege. The guidance makes clear that such communications attract a special sensitivity and sets out a mandatory requirement for a check where material may potentially be confidential. The guidance on how to conduct the necessary checks makes clear that certain GCHQ staff are not qualified or permitted to decide whether:
 - a) The communications are privileged. This is reserved to legal advisers or to senior checkers using detailed guidance. The detailed guidance provides that all material must be sent to legal advisers for checking unless a senior checker is certain that legal privilege does not apply.
 - b) Reporting the privileged communications is necessary and proportionate. This is reserved to senior checkers acting on the guidance of legal advisers and legal

advice should be followed regarding whether the material can be reported, in what level of detail and to whom.

33. Further it is made clear that the act of checking any such reporting is not sufficient to meet the Interception Code and it is vital that the additional consideration required is given and recorded.
34. There is also a step by step guide to identifying whether the material is privileged which is used by checkers; guidance on the sending of reports to legal advisors and guidance on the reporting of such material including whether caveats should be added to the report.
35. If necessary in a particular case, a caveat will be applied to any information/intelligence issued by GCHQ to demonstrate that proper account has been taken of the communications' sensitivity and the heightened threshold of proportionality and making it clear that no action may be taken on the information/intelligence without first reverting to GCHQ.
36. GCHQ guidance also highlights the fact that privileged material should not find its way into court or to government lawyers who may be handling a case.
37. In accordance with Chapter 3 of the Interception Code, the Interception Commissioner is able to inspect any LPP material which may have been intercepted and retained. GCHQ also has a policy of notifying the Interception Commissioner of any activity which is highly likely to reveal legally privileged advice. No concerns have been raised by the Interception Commissioner about the handling of LPP material within GCHQ.

Future conduct

38. In terms of their future conduct, the Agencies can confirm that, if, notwithstanding the safeguards set out above, circumstances were to arise whereby a legal adviser or policy official with conduct of litigation (to which the relevant Agency was a party) was to come into possession of LPP material belonging to another party to the dispute, the Agencies would seek advice from independent Counsel.

10 April 2014