



European
Commission

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Brussels, **18 MAI 2015**

Subject: *Complaint by* [REDACTED]
ref. 2004/2013/PMC

Dear Ms O'Reilly,

Thank you for the letter of 2 October 2014 regarding the above-mentioned case.

I am pleased to enclose the comments of the Commission on this complaint. A translation into the language of the complainant (German) will be transmitted shortly.

I regret that a certain delay has occurred in the transmission of this reply.

Naturally, the Commission remains at your disposal for any further information you may require.

Yours sincerely,

Enclosures

*Ms Emily O'REILLY
European Ombudsman
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**Opinion of the Commission on the European Ombudsman's draft recommendation
- Complaint by [REDACTED] ref. 2004/2013/PMC**

1. THE OMBUDSMAN'S DRAFT RECOMMENDATION

On 2 October 2014, the Ombudsman informed the Commission of her draft recommendation in the above-mentioned case and invited the institution to submit an opinion.

The Ombudsman's draft recommendation reads as follows:

(i) The Commission should grant access to the UK Foreign Secretary's letter of 3 July 2013 to the Commissioner.

(ii) The Commission should grant access to all the other documents requested by the complainant concerning the mass surveillance of the internet by UK state agencies, or properly justify why, in its view, disclosure has to be refused.

2. THE COMMISSION'S COMMENTS ON THE DRAFT RECOMMENDATION

The Ombudsman's draft recommendation concerns the following documents, to which the Commission had refused access¹:

1. letter of 25 June 2013 from Mrs Reding, Vice-President of the Commission, to Mr Hague, UK Foreign Secretary;
2. letter of 3 July 2013 from Mr Hague to Mrs Reding;
3. letter of 25 July 2013 from the Director-General of the Commission's DG Justice to the UK Permanent representative to the EU, and
4. correspondence (18 complaints) from citizens asking the Commission to investigate the matter.

The Commission wishes to reiterate at the outset that all the documents relate to an on-going Commission investigation, which could potentially lead to the opening of infringement proceedings. As explained in the Commission's confirmatory decision of 15 November 2014 there is a general presumption, recognised by the Court of Justice, that the disclosure of such documents would undermine the purpose of the on-going investigations. In that context, the Commission is in principle not required to carry out a specific and individual examination of each of these documents. The Commission's refusal to the requested documents was based on the general presumption of non-disclosure applicable in such cases.

¹ Paragraph 2 of the Ombudsman's decision.

Following the Ombudsman's draft recommendation, the Commission has re-assessed the above-mentioned documents in light of the arguments put forward by her.

2.1. Concerning point (i) of the draft recommendation:

In the present case, despite the fact that the UK authorities had not raised any objections to grant public access to the letter of 3 July 2013 to Commissioner Reding, the Secretary-General of the Commission considered that no public access to it could be granted, as the document is covered by the general presumption of non-disclosure, being part of the Commission's on-going investigations on the processing and collection of information by the UK's security and intelligence agencies.

The Commission maintains its view that until the Commission's investigation is definitely closed, early disclosure of this letter and of any other document relating to the on-going investigations (such as the letters sent by the Commission to the UK authorities) would affect the dialogue between the UK authorities and the Commission as well as, more generally, the institution's ability to effectively carry out its investigation and to decide on the appropriate response, in the absence of undue external pressure.

The Commission wishes to point out in this regard that, as is the case for the procedure for reviewing State aid, infringement proceedings on the basis of Articles 258 or 260 TFEU, as well as preliminary investigations that might lead to infringement proceedings are of a bilateral nature. In such cases, the Commission's position is only addressed to the Member State concerned and, as such, the correspondence exchanged with the Member State - including the responses from the Member State - are subject to the same access protections. The exchanges between the Commission and the Member State are covered by the general presumption of non-disclosure, as recognised by the Court of Justice.

However, as the Ombudsman correctly pointed out, the annex to the letter of 3 July 2013 from Mr Hague to Commissioner Reding, which consists of a speech by Mr Hague given in the House of Commons, was already made public by the UK authorities. Indeed, this speech is accessible on the website of the House of Commons via the following link:

<https://www.gov.uk/government/speeches/foreign-secretary-statement-to-the-house-of-commons-gchq>

Given that the letter of 3 July 2013 contains in essence the information that was made publicly available by the UK authorities in the context of the speech by Mr Hague, the Commission sees no reason to protect the content of the said letter under these circumstances. The Commission is thus pleased to inform the Ombudsman that it accepts the first part of her draft recommendation.

2.2. Concerning point (ii) of the draft recommendation:

2.2.1. Letters from the Commission to the UK authorities:

The Commission maintains its view that it cannot grant access to the two letters which it sent to the UK authorities: the letter of 25 June 2013 from Commissioner Reding and the letter of 25 July 2013 from the Director-General of DG Justice.

These letters are part of the Commission's ongoing investigation into the alleged mass collection of personal data in the form of communications data processing by the UK authorities. In her draft recommendation the Ombudsman agrees with the Commission

that these letters are covered by the general presumption of non-disclosure and their disclosure might undermine the purpose of the Commission's on-going investigations, in line with the third indent of Article 4(2) of Regulation 1049/2001².

2.2.2. Complaints from citizens:

As regards the correspondence from citizens (18 complaints), which had been entered into the Commission's system for the registration of complaints (CHAP) at the moment of the complainant's application for access to documents, and listed in the Commission's confirmatory decision of 15 November 2013, the Ombudsman notes in her draft recommendation that *the Commission was in principle correct to base its decision to refuse access on the general presumption*.

The Ombudsman, nevertheless, expressed doubts whether these complaints can indeed be considered as relating to the Commission's investigation, given that they were submitted after the Commission has already written its first letter concerning the relevant issue to the UK authorities and in view of the fact that they appear to contain merely general points and questions.

The Commission takes note of the Ombudsman's conclusion that the allegations raised in the complaints appear to contain merely general points. This fact does however not justify in itself that access to these complaints is granted. These complaints are part of the Commission's overall investigations into the mass surveillance programmes and their compatibility with fundamental rights. This exercise requires from the Commission to tread a delicate path between on the one hand its competence as guardian of the Treaties and on the other hand the competence of the Member States in the area of national security.

In view of the above, the relevant documents are to be considered as part of the Commission's investigation and are therefore covered by the general presumption of non-disclosure.

Consequently, the Commission maintains its view that access to these complaints cannot be granted at present.

However, the Commission wishes to point out that the above conclusions concerning the Commission's letters to the UK and the complaints from citizens have a temporal dimension. As soon as the Commission's services decide how to proceed further with its investigation - either to launch a formal infringement proceedings or to close its investigation by sending the closing letters to the complaints - the Commission will examine any possible new applications for access in light of the applicable legislation. If at that point in time it would appear that none of the exceptions laid down in Article 4 of Regulation 1049/2001 are applicable, the Commission will have no reasons to withhold the documents and will release them.

2.2.3 Concerning the overriding public interest:

The Ombudsman considers that the Commission's assessment pertaining to the existence of an overriding public interest *was limited to some fairly general statements*. According

² Paragraph 32 of the Ombudsman's draft recommendation.

to the Ombudsman, millions of EU citizens were possibly affected, and the underlying issue had led to a widespread political and international debate on this topic. The Ombudsman therefore concluded that the Commission did not deal adequately with the question of whether there was an overriding public interest in disclosure in the present case.

The Commission recalls in this regard that its investigation concerns the processing and collection of information by the UK's security and intelligence agencies. In considering whether there is an overriding public interest in this case, the Commission took into account the arguments brought by the applicant. In that context, the Commission stated that the fundamental right to freedom of the press under Article 11 of the Charter of Fundamental Rights may, under Article 52(1) of that Charter, be limited, without there being any interference by public authority, within the meaning of Article 11(1) of the Charter.

The Commission concluded that there was no overriding public interest in disclosure in the present case and that the public interest in solving the case and ensuring conformity with the EU law by the Member State concerned prevails.

The Commission acknowledges that there is indeed a widespread political and international debate on this topic and in particular on the effects of mass surveillance programmes on the individual's right to data protection. The Commission has and is still actively following up allegations which point to the violation of the fundamental right to data protection. Evidently this is a very sensitive area: where a Member State claims non-applicability of EU law due to the national security exemption, this clause in accordance with settled case-law of the Court will be interpreted strictly. Member States seeking to take advantage of such exceptions need to prove that it is necessary to have recourse to it in order to protect its essential security interests. The Commission is currently collecting all this information to assess the appropriate steps to take in the future.

However, the Commission reiterates its view that the public interest in this case is best served by non-disclosure of its correspondence. Any alleged irregularities by the UK authorities are for the Commission, as guardian of the Treaties, to investigate so as to enable the latter, if appropriate, to ask the UK authorities to take the necessary action. As explained above, in order to effectively carry out such investigations and decide on the appropriate Commission response, it is important that the Commission's investigation is kept confidential.

Indeed, putting the Commission's correspondence with the UK authorities at this point in time and outside their context would lead to unwarranted and premature conclusions about the extent to which the processing and collection of information by the UK's security and intelligence agencies complies with EU law. It is therefore in the public interest that the investigations, covering a very sensitive topic, are carried out effectively and efficiently, without any premature involvement of the public. This assessment applies to the current stage of the proceedings and does not prejudice the possible release of the letters once the investigations are closed.

In view of the above, the Commission reiterates its position that there is no overriding public interest in the disclosure of the Commission's letters to the UK authorities and the complaints from citizens.

4. CONCLUSION

By disclosing the letter of 3 July 2013 from the UK authorities, the Commission is pleased to inform the Ombudsman that it accepts part (i) of her draft recommendation.

As for part (ii) of the draft recommendation, the Commission considers that, for the reasons explained above, it is unable to grant access, at least at this stage in the proceedings, to its letters of 25 June 2013 and 25 July 2013, addressed respectively by Commissioner Reding and the Director-General of DG Justice to the UK authorities and to the complaints from citizens.

Annex: Letter of 3 July 2013 from the UK authorities to the Commission



Foreign &
Commonwealth
Office

London SW1A 2AH

From the Secretary of State

3 July 2013

Viviane Reding
Vice-President of the European Commission
Brussels

Dear Viviane Reding,

I am writing in response to your letter of 25 June 2013. Although I cannot comment on what are reported as leaked documents, I do want to set out the context for the work of the UK's security and intelligence agencies.

Secret intelligence is vital to the UK, and indeed to every other Member State. It enables us to detect threats against our countries ranging from nuclear proliferation to cyber attacks. Secrecy is necessary for the effectiveness of this work, but this secrecy is also the reason why the right safeguards are essential for governing the activities of our security and intelligence agencies. The UK security and intelligence agencies practise and uphold the law at all times, including when dealing with information from outside the UK. Our legislation is fully compatible with the right to privacy, as set out in Article 8 of the European Convention on Human Rights.

The UK has a strong framework of democratic accountability and oversight that governs the use of secret intelligence. At its heart are three Acts of Parliament: the Security Service Act 1989, the Intelligence Services Act 1994 and the Regulation of Investigatory Powers Act 2000.

The Acts require the agencies to seek authorisation for their operations from a Secretary of State, normally myself or the Home Secretary. And, as I said to Parliament on 10 June, Ministers take great care to balance individual privacy with our duty to safeguard the public.

All these authorisations are subject to independent review by an Intelligence Services Commissioner and an Interception of Communications Commissioner, both of whom must have held high judicial office and who report directly to the Prime Minister. They review the way these decisions are made to ensure that they are fully compliant with the law. Indeed, in his most recent report, the Interception of Communications Commissioner said: "it is my belief...that GCHQ staff conduct themselves with the highest levels of integrity and legal compliance."

The activities of our intelligence agencies also come under the rigorous independent oversight of the Intelligence and Security Committee of Parliament. Indeed, the UK Government recently passed the Justice and Security Act, which strengthened Parliamentary oversight of the agencies.

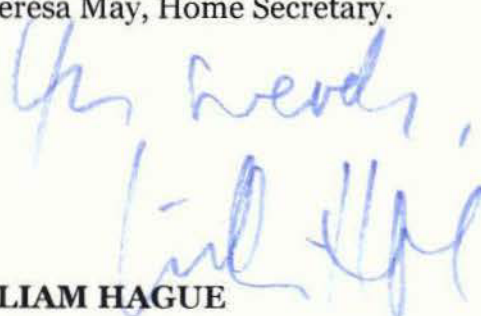
I should also like to assure you that our secret and intelligence agencies uphold stringent standards of data protection. Any data obtained are subject to proper statutory controls and safeguards, including the relevant sections of the Intelligence

Services Act, the Human Rights Act 1998 and the Regulation of Investigatory Powers Act.

Finally, I note that national security is clearly a responsibility of national Governments.

Full details of this democratically accountable system were set out in my statement to the House of Commons on the 10 June, and I enclose a copy of that statement for your convenience.

I am copying this letter to the Rt Hon Chris Grayling, Lord Chancellor and Secretary of State for Justice, and the Rt Hon Theresa May, Home Secretary.



WILLIAM HAGUE

The Foreign Secretary The Rt Hon William Hague MP
Statement to the House of Commons

GCHQ

Monday 10th June 2013

With permission, Mr Speaker, I shall make a statement on the work of the Government Communications Headquarters—GCHQ—its legal framework and recent publicity about it. As Foreign Secretary, I am responsible for the work of GCHQ and the Secret Intelligence Service—MI6—under the overall authority of the Prime Minister. My right hon. Friend the Home Secretary is responsible for the work of the Security Service, MI5.

Over the past few days, there have been a series of media disclosures of classified US documents relating to the collection of intelligence by US agencies, and questions about the role of GCHQ. The US Administration have begun a review into the circumstances of these leaks in conjunction with the Justice Department and the US intelligence community. President Obama has been clear that US work in this area is fully overseen and authorised by Congress and relevant judicial bodies, and that his Administration are committed to respecting the civil liberties and privacy of their citizens.

The Government deplore the leaking of any classified information, wherever it occurs. Such leaks can make the work of maintaining the security of our own country and that of our allies more difficult, and by providing a partial and potentially misleading picture they give rise to public concerns. It has been the policy of successive British Governments not to comment on the detail of intelligence operations. The House will therefore understand that I will not be drawn into confirming or denying any aspect of leaked information. I will be as informative as possible, to give reassurance to the public and Parliament. We want the British people to have confidence in the work of our intelligence agencies, and in their adherence to the law and democratic values, but I also wish to be very clear that I will take great care in this statement and in answering questions to say nothing that gives any clue or comfort to terrorists, criminals and foreign intelligence services as they seek to do harm to this country and its people.

Three issues have arisen in recent days which I wish to address. First, I will describe the action that the Government are taking in response to recent events. Secondly, I will set out how our intelligence agencies work in accordance with UK law and subject to democratic oversight. Thirdly, I will describe how the law is upheld with respect to intelligence co-operation with the United States, and deal with specific questions that have been raised about the work of GCHQ.

First, in respect of the action we have taken, the Intelligence and Security Committee has already received some information from GCHQ and will receive a full report tomorrow. My right hon. and learned Friend the Member for Kensington (Sir Malcolm Rifkind), who chairs the Intelligence and Security Committee, is travelling to the United States on a long-planned visit with the rest of the Committee. As he has said, the Committee will be free to decide

what, if any, further action it should take in the light of that report. The Government and the agencies will co-operate fully with the Committee, and I pay tribute to its members and their predecessors from all parties.

Secondly, the ISC's work is one part of the strong framework of democratic accountability and oversight that governs the use of secret intelligence in the United Kingdom, which successive Governments have worked to strengthen. At its heart are two Acts of Parliament: the Intelligence Services Act 1994 and the Regulation of Investigatory Powers Act 2000.

The Acts require GCHQ and the other agencies to seek authorisation for their operations from a Secretary of State, normally the Foreign Secretary or Home Secretary. As Foreign Secretary, I receive hundreds of operational proposals from the SIS and GCHQ every year. The proposals are detailed: they set out the planned operation, the potential risks and the intended benefits of the intelligence. They include comprehensive legal advice describing the basis for the operation, and comments from senior Foreign Office officials and lawyers. To intercept the content of any individual's communications in the UK requires a warrant signed personally by me, the Home Secretary, or by another Secretary of State. This is no casual process. Every decision is based on extensive legal and policy advice. Warrants are legally required to be necessary, proportionate and carefully targeted, and we judge them on that basis.

Considerations of privacy are also at the forefront of our minds, as I believe they will have been in the minds of our predecessors. We take great care to balance individual privacy with our duty to safeguard the public and the UK's national security. These are often difficult and finely judged decisions, and we do not approve every proposal put before us by the agencies. All the authorisations that the Home Secretary and I give are subject to independent review by an Intelligence Services Commissioner and an Interception of Communications Commissioner, both of whom must have held high judicial office and report directly to the Prime Minister. They review the way these decisions are made to ensure that they are fully compliant with the law. They have full access to all the information that they need to carry out their responsibilities, and their reports are publicly available. It is vital that we have that framework of democratic accountability and scrutiny.

I have nothing but praise for the professionalism, dedication and integrity of the men and women of GCHQ. I know from my work with them how seriously they take their obligations under UK and international law. Indeed, in his most recent report, the Interception of Communications Commissioner said:

"it is my belief...that GCHQ staff conduct themselves with the highest levels of integrity and legal compliance."

This combination of needing a warrant from one of the most senior members of the Government, decided on the basis of detailed legal advice, and such decisions being reviewed by independent commissioners and implemented by agencies with strong legal and ethical frameworks, with the addition of parliamentary scrutiny by the ISC, whose powers are being increased, provides one of the strongest systems of checks and balances and democratic accountability for secret intelligence anywhere in the world.

Thirdly, I want to set out how UK law is upheld in respect of information received from the United States, and to address the specific questions about the role of GCHQ. Since the 1940s,

GCHQ and its American equivalents—now the National Security Agency—have had a relationship that is unique in the world. This relationship has been and remains essential to the security of both nations, has stopped many terrorist and espionage plots against this country, and has saved many lives. The basic principles by which that co-operation operates have not changed over time. Indeed, I wish to emphasise to the House that although we have experienced an extremely busy period in intelligence and diplomacy in the past three years, the arrangements for oversight, and the general framework for exchanging information with the United States, are the same as under previous Governments. The growing and diffuse nature of threats from terrorists, criminals or espionage has only increased the importance of our intelligence relationship with the United States. That was particularly the case in the run-up to the Olympics. The House will not be surprised to hear that our activity to counter terrorism intensified and rose to a peak in the summer of last year.

It has been suggested that GCHQ uses our partnership with the United States to get around UK law, obtaining information that it cannot legally obtain in the United Kingdom. I wish to be absolutely clear that that accusation is baseless. Any data obtained by us from the United States involving UK nationals are subject to proper UK statutory controls and safeguards, including the relevant sections of the Intelligence Services Act, the Human Rights Act 1998, and the Regulation of Investigatory Powers Act.

Our intelligence-sharing work with the United States is subject to ministerial and independent oversight, and to scrutiny by the Intelligence and Security Committee. Our agencies practise and uphold UK law at all times, even when dealing with information from outside the United Kingdom. The combination of a robust legal framework, ministerial responsibility, scrutiny by the intelligence services commissioners, and parliamentary accountability through the Intelligence and Security Committee should give a high level of confidence that the system works as intended.

That does not mean that we do not have to work to strengthen public confidence whenever we can, while maintaining the secrecy necessary to intelligence work. We have strengthened the role of the ISC through the Justice and Security Act 2013, to include oversight of the agencies' operations as well as their policy, administration and finances. We have introduced the National Security Council so that intelligence is weighed and assessed alongside all other sources of information available to the Government, including diplomatic reporting and the insights of other Government Departments, and all that information is judged carefully in deciding the Government's overall strategy and objectives.

There is no doubt that secret intelligence, including the work of GCHQ, is vital to our country. It enables us to detect threats against our country ranging from nuclear proliferation to cyber attack. Our agencies work to prevent serious and organised crime, and to protect our economy against those trying to steal our intellectual property. They disrupt complex plots against our country, such as when individuals travel abroad to gain terrorist training and prepare attacks. They support the work of our armed forces overseas and help to protect the lives of our men and women in uniform, and they work to help other countries lawfully to build the capacity and willingness to investigate and disrupt terrorists in their countries, before threats reach us in the United Kingdom.

We should never forget that threats are launched at us secretly, new weapons systems and tactics are developed secretly, and countries or terrorist groups that plan attacks or operations against us do so in secrecy. So the methods we use to combat these threats must be secret,

just as they must always be lawful. If the citizens of this country could see the time and care taken in making these decisions, the carefully targeted nature of all our interventions, and the strict controls in place to ensure that the law and our democratic values are upheld, and if they could witness, as I do, the integrity and professionalism of the men and women of our intelligence agencies, who are among our nation's very finest public servants, I believe they would be reassured by how we go about this essential work.

The British people can be confident in the way our agencies work to keep them safe. Would-be terrorists, those seeking to spy against this country or those who are the centre of organised crime should be aware that this country has the capability and partnerships to protect its citizens against the full range of threats in the 21st century, and that we will always do so in accordance with our laws and values, but with constant resolve and determination.