

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

BETWEEN:

THE QUEEN on the application of
LIBERTY

Claimant

-and-

(1) THE SECRETARY OF STATE FOR THE HOME DEPARTMENT
(2) THE SECRETARY OF STATE FOR FOREIGN AND COMMONWEALTH AFFAIRS

Defendant

THIRD WITNESS STATEMENT OF ANDREW SCURRY

I, Andrew Scurry of the Home Office, 2 Marsham Street, London SW1P 4DF, will say as follows:

1. I am Head of the Investigatory Powers Unit in the Home Office. I have held this position since March 2016. I am responsible for the policy and legislation concerning investigatory powers, including communications data, and was involved in the policy development, parliamentary process and implementation of the Investigatory Powers Act 2016 ("The Act").
2. I make this third statement on behalf of the Defendants. The purpose of the statement is to further address the timing of the introduction of independent authorisation for communications data access requests, and in particular the time taken to establish the Office for Communications Data Authorisations ("OCDA"), by reference to explanations sought by the Claimants in a Note of 28 February 2018. It should be read with my second witness statement.

3. The Claimant has listed seven matters in the Note, which it says are not addressed in my second witness statement or in the attached letter from the Investigatory Powers Commissioner. I do not agree that none of the seven matters is addressed, but for clarity, and to assist the Court, I address each of them below.

(1) *When the Government reached its current view as to the likely "go live" date of the OCDA.*

4. There are two issues here. The first is when the "go live" date of OCDA was actually agreed. The second is when it became apparent that the appropriate "go live" date was likely to be April 2019.
5. The "go live" date of OCDA is set out in a detailed implementation plan as being April 2019. The plan was agreed on 21 February 2018.
6. There was a Communications Data Theme Board meeting on 21 February 2018. The Communications Data Theme Board ("the Board") is the group of senior officials who are responsible for the implementation of the communications data provisions in the 2016 Act, and the associated changes to independent authorisation that the Government needs to make in response to the judgment in *Watson CJEU*. At the Board meeting on 21 February, the plan for implementation was approved at official level. Later that same day, there was a meeting with the Investigatory Powers Commissioner (Sir Adrian Fulford), for formal agreement of the plan, which was given.
7. The development of the plan has been a lengthy, ongoing process. Each separate element of the plan (for example, accommodation, IT, recruitment, and integration with wider implementation of the other provisions of the Act) has been subject to continuous development and refinement for many months.
8. July 2018 was the formal and agreed date in the plan for commencement of independent authorisation right up until 21 February, when it was changed to April 2019. However, as plans were developed over the course of December 2017 and January 2018, it began to become clear that July 2018 was unlikely to be a realistic "go live" date for OCDA. At that point, it appeared that an implementation date of December 2018 might be possible, on the basis of the still-developing plans. But as we began to validate and build confidence in the

plan it became clear that even December 2018 would not be possible. By the time the Defendants came to lodge their skeleton argument on 19 February, the current best estimate of the time that it would take to bring the authorisation regime into operational effect was April 2019. That is now reflected in the decisions taken on 21 February 2018.

9. The major factor that has changed our view on the possible implementation date is a proper understanding of the viability of the IT solution and the scale of the IT challenge that implementation presents (alongside the not insignificant challenges of recruiting, security clearing and training staff, and procuring, securing and equipping appropriate accommodation).
10. The original go live date of July 2018 was based on most access requests being made to OCDA by email. However, on 1 December 2017, the decision was taken, in consultation with Sir Adrian Fulford, to work towards a more secure and efficient IT solution for OCDA to manage access requests. The view was taken that a solution based largely on email was not viable, because it was insufficiently secure; ran the risk of errors being made in access requests; and would create significant risks for OCDA (because OCDA would need to have a new IT mechanism for managing more than 200,000 emails per year, to ensure that they were tracked, allocated to the right people for authorisation, that authorisations could not be altered, missed or forgotten, were stored appropriately, and so on), as well as for public authorities (because they would need to re-key information and manually upload OCDA's decisions and so on).
11. The IT and timing implications of the decision on OCDA's minimum viable IT solution to manage access requests has become gradually clearer, as detailed planning has developed. Timings associated with recruitment, obtaining security clearances and delivering accommodation have also been the subject of further refinement. As I have explained above, the date of April 2019 was only formally decided on 21 February 2018, but was viewed by me and my team as the likely "go live" date for at least a week or so before that.
12. I am satisfied that April 2019 is a realistic date for implementation, and will remain so. We now have detailed planning for implementation, that has been subject to close scrutiny and challenge, and that has been tested rigorously at the meetings on 21 February. We, and the Investigatory Powers Commissioner, are confident that the plan is robust.

(2) When it first became apparent to the Government that it could not meet the previous “go live” date of July 2018.

13. I have explained this above.

(3) Why the court was not updated sooner as to the Government’s view.

14. Again, I have explained this above. It has only become clear to us very recently that April 2019 is the realistic “go live” date, and the formal decision to move from July 2018 to April 2019 was taken on 21 February.

(4) What work or analysis had been done to inform the previous “go live” date of July 2018

15. As I have explained above, plans were being developed on the basis of a predominantly email based solution. In July 2017, the view was taken that an email based solution could probably be implemented in a 12-month period. That remained the formal date until 21 February 2018.

(5) In the light of the answer to (4), how the time can have expanded from 7 months to 16 months (from December 2017)

16. Again, I have explained this above. The major factor has been a considered and significant change in the approach to implement a viable IT solution.

(6) What consideration was given to the need to uphold the rule of law, and the possibility of a different form of lawful authorisation.

17. The reason why a new independent body (OCDA) is being created to authorise access requests is precisely because the Government recognises the importance of complying with the law (including EU law). As I have explained above, consideration was given (and indeed, plans were developed) on the basis of a different and less secure method of authorising requests – i.e. by email – which it was anticipated would take less long to develop. The reason why we have not pursued that course is because of the likelihood of

errors and lack of data security (among other matters); and, therefore, unjustified interference with individuals' privacy rights.

18. I have exhibited to this statement as Exhibit AS1 the Government's current high-level implementation plan.
19. For completeness, the Government has considered other possible solutions apart from OCDA. In particular, we have considered whether it would be possible for police forces to authorise each others' access requests (i.e. a "cross-authorisation" solution). We do not consider this to be a viable long-term solution, because of the operational complexity that the police and other partners think that it would cause, among other issues. Nor do we consider it feasible to "lift" persons who authorise access requests, and place them in a separate body, as the Claimant has suggested. That is because almost universally, those persons who authorise access requests are senior officers within each relevant public authority, who authorise requests as only a small proportion of their job.
20. We also considered whether requests could be judicially authorised. Given the volume of requests made for communications data we thought that this would be impracticable as the judiciary is simply not resourced to take on this additional function.
21. Having concluded that the right model was an independent administrative body we then considered carefully whether the body should sit under the auspices of the Investigatory Powers Commissioner, be a part of a Government department or operate as a standalone body. Having considered the options Ministers concluded that the best model was to ask Sir Adrian Fulford to be responsible for the body and we set out a broad proposal for Sir Adrian to consider. This culminated in Sir Adrian agreeing to take on responsibility for the body in September 2017, subject to a number of conditions which he set out in his letter to the Court of 27 February 2018.

(7) What Sir Adrian Fulford was told when the detailed plan was revealed to him and when he was contacted in light of yesterday's hearing

22. The detailed plan was not presented to the Investigatory Powers Commissioner as a “fait accompli”. Sir Adrian Fulford has been fully sighted and regularly updated on the plan since October 2017 and has the final sign-off on it. Each part of the plan was tested rigorously with Sir Adrian on 21 February 2018. If he had stated that the plan should be altered, that is what would have happened.

23. I entirely reject the suggestion that Sir Adrian Fulford was given an “inaccurate” account of the hearing, and I do not understand how the Claimant can properly infer that from the terms of Sir Adrian’s letter.

I believe that the facts in this witness statement are true

Signed:

Dated:

