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The Rt Hon John Whittingdale OBE MP
Chairman
Culture, Media and Sport Committee
House of Commons
7 Millbank
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Dear Mr Whittingdale,

Thank you for your invitation to provide further written evidence to the Committee. As I understand it, the Committee would like me to give a fuller account of the advice on the law that was given to the Metropolitan Police by prosecution lawyers (whether Crown Prosecution Service or counsel) in the investigation and prosecution of Messrs. Goodman and Mulcaire in 2006-7.

Before I set out my understanding of the position, I need to make the following plain. I was not the Director of Public Prosecutions during the period of the investigation and prosecution of this case in 2006-7. Moreover, the CPS lawyer who had the day to day conduct of the case at the time no longer works for the CPS. I am therefore at a considerable disadvantage in giving evidence to the Committee.

Therefore the approach I have taken is as follows. I have asked my Principal Legal Advisor to look at all the documents currently in the possession of the CPS. In addition, I have spoken myself to the DPP at the time of investigation and prosecution of Messrs Goodman and Mulcaire, Lord Macdonald of River Glavern

QC, and to the CPS lawyer then responsible for the case (the then Head of CPS Special Crime Division). That discussion was in 2009 and it is fair to say that, at that remove, their recollection of the detail was understandably limited and the question of the interpretation of RIPA was not central. I have also spoken at some length to both leading and junior counsel. Those discussions took place in 2009, 2010 and, given the importance of the issues now before the Committee, again yesterday when I spoke to leading counsel for over an hour on the telephone and junior counsel face-to-face. In the last week, I have attempted to contact again the then Head of SCD, but without success.

Nonetheless, I am acutely conscious of the difficulties and risks inherent in piecing together a history of the legal advice given by the CPS to the Metropolitan Police nearly five years ago based on documents created by, and recollections of, others. I am also acutely conscious of the fact that I may not have seen all of the documents created by the Metropolitan Police and, inevitably, I was not privy to any of their internal discussions during the course of the investigation.

It is important to bear in mind that, on 14 January 2011, I asked my Principal Legal Advisor, Alison Levitt QC, to conduct a review of all the material in the possession of the police. This exercise involves an examination of all material considered as part of the original investigation into Messrs Goodman and Mulcaire and any material that has subsequently come to light. The purpose of this assessment is to ascertain first, whether there was evidence which would have justified the consideration of other suspects at the time or since. Secondly, whether there is any material which could now form evidence in any future criminal prosecution relating to phone hacking.

Subsequently, on 26 January 2011, the Metropolitan Police announced that they were launching a new investigation into this matter as a result of new evidence that had been passed to them. This evidence and any other which the police obtain as a result of their new investigation will be subject to the same assessment by Ms Levitt.

Two points emerge from this. First, Ms Levitt's review is far from complete. It is possible that there are further documents which she has not considered in the time available to her which may have a bearing on the issues before the Committee. If any relevant matters subsequently come to light, I will, of course, inform the Committee of them.

Second, there is now a "live" investigation into phone hacking and I have therefore deliberately limited my evidence to the specific and discrete issues which now arise before the Committee and have deliberately not attempted to address any of the wider issues. I do not propose to comment further on the live investigation.

That all having been said, I am reasonably satisfied from the documents currently available and from my discussions with leading and junior counsel that a sufficiently clear picture has emerged for me to assist the Committee on the issues that have arisen.

I will therefore set out my understanding of the advice on the law given by the CPS to the Metropolitan Police during the investigation and prosecution of Messrs Goodman and Mulcaire in 2006-7 and any advice given subsequently.

The first occasion when the Metropolitan Police contacted the CPS about their investigation into phone hacking was in March 2006 when a telephone call was made to the Head of the CPS Counter Terrorism Division (CTD). The Head of CTD informed the Metropolitan Police that the case would not be handled by CTD but by the CPS Special Crime Division (SCD). Accordingly she advised that the Metropolitan Police should speak to the Head of SCD.

Ms Levitt has spoken to the Head of CTD about this telephone call. The Head of CTD does not recall giving any specific advice and believes that she would not have done so without knowledge of the facts. But she accepts that if the Metropolitan Police had asked her which offences may have been appropriate for them to look at on such brief facts as may have been mentioned in a phone call, she probably would have done so. Any views which she may have expressed were necessarily

provisional, not least because she was at the same time indicating that she would not be dealing with the case herself and that the Metropolitan Police should be seeking the advice of SCD.

It appears from internal Metropolitan Police documents that, on 4 April 2006, the SIO reviewed the case. It seems that, at that early stage, the Metropolitan Police had understood the CPS to have advised that potential offences, both under the Regulation of Investigatory Powers Act 2000 (RIPA) and under the Computer Misuse Act 1990, may be relevant. It also appears that the Metropolitan Police were proceeding on the basis that the Computer Misuse Act offences may potentially have been the easier offences to prove.

The Head of the CTD does not recollect giving a prescriptive view of the RIPA offences in the course of the telephone call described above, but even if she had been understood as suggesting a narrow view, the significance of the reference to the Computer Misuse Act is that, from the outset, the Metropolitan Police were advised that alternative offences might also be available, which did not require proof that a message had been listened to before it was accessed by the intended recipient. (At the relevant time, offences under the Computer Misuse Act were summary offences and thus subject to a six month time limit, which ran from the date upon which evidence to warrant proceedings came to the knowledge of the prosecutor. It is now an either way offence).

It appears that on 20 April 2006, the Metropolitan Police did then ask the Head of SCD for advice on possible offences. And, on 25 April 2006, the Head of SCD gave advice by email. The following advice was given:

> *"It is my view that the scenario gives rise to the consideration of (a) offences under s1 of RIPA and (b) s1 of the Computer Misuse Act 1990."*

There then followed an analysis of each offence, making it plain that the Computer Misuse Act offence could apply whether or not the messages had already been listened to. The Head of SCD suggested that expert evidence should be obtained in

relation to proving the offences under both RIPA and the Computer Misuse Act (to deal with different and separate expert issues).

Since the advice given by the CPS to the Metropolitan Police on RIPA is specifically an issue, it may assist if I quote in full the advice given on that issue at that stage:

> "*... the offences under section 1 of RIPA would, as far as I can see, only relate to such messages that had not been previously accessed by the recipient. However, this area is very much untested and further consideration will need to be given to this*".

It is worth pointing out in this context that in the Metropolitan Police decision log entry of the following day (26 April 2006), the SIO refers to the reviewing lawyer's email as containing "initial" advice and notes that the behaviour gives rise to offences under RIPA and the Computer Misuse Act. He concluded that he would get further technical data before deciding how the investigation should progress. It seems to me clear that the investigation was thus progressing on the basis that both offences were relevant.

This is confirmed when, on 30 June 2006, the Metropolitan Police sent a file to the CPS seeking further advice. That file indicated that the investigation was indeed proceeding into offences under RIPA and the Computer Misuse Act.

Advice was then given by the CPS to the Metropolitan Police in a letter from the Head of SCD dated 18 July 2006. The advice in that letter was that:

> "*... whilst there are many aspects of the evidence I would require to be clarified, it is my initial assessment that offences under the CMA and RIPA 2000 may be provable. However in addition I would also be looking at considering an offence of conspiracy to commit those offences on the basis of the other evidence being available.....*".

The significance of the reference to conspiracy is that, as with the Computer Misuse Act offence, a charge of conspiracy would not necessarily require proof that every interception had taken place before it had been accessed by the intended recipient.

On 28 July 2006, instructions were prepared by the CPS for, and sent to, leading and junior counsel. Then, on the 2 August 2006, a conference took place between Head of SCD and counsel. After that conference, and on the same day, an email was sent by the Head of SCD to the Metropolitan Police. The relevant part of that email, so far as the issues before the Committee are concerned, is as follows:

> *" ... we concluded that in essence the alleged criminal activity alleged against the suspects does give rise to the offences I have outlined in my previous correspondence. We have briefly discussed before the possibility of arguing that what we have termed our Computer Misuse Act offences might fall to be considered as RIPA offences – that the issue had not definitively been argued. I was reticent about arguing the point in this case. However, having considered the matter with counsel we have concluded that we could properly argue the point – and in any event nothing would be lost as we already have the 4 main clear RIPA offences ... we would therefore propose sample substantive offences to reflect the period of offending plus the 4 main offences under RIPA.*
>
> *"We have concluded that the Computer Misuse Act offences might in actual fact detract from what is the main thrust of our case. We would therefore not propose to pursue them. Let's face it, if offered pleas to those offences we would not accept them. We still consider that conspiracy to commit RIPA offences would be applicable..... Counsel does agree with me that the data provided does present a strong case thus far".*

It appears to me that the decision at that stage not to pursue the Computer Misuse Act offence any further was tactical and not based on any interpretation of the law.

Messrs Goodman and Mulcaire were arrested on 8 August 2006 and charged the next day.

Pausing at this stage, from the documents in the possession of the CPS, it appears that this email of 2 August 2006, the letter of 18 July 2006 and the email of the 25 April 2006 referred to above are the only advice given by the CPS to the Metropolitan Police which was reduced to writing. I have in the last two weeks asked the Metropolitan Police on several occasions if there is, to their knowledge, any other advice which was reduced to writing. Nothing additional has been provided to me.

Moving forward, I have discussed with leading and junior counsel the approach they took from the point at which they were instructed, ie from 28 July 2006, until the conclusion of the prosecution of Messrs Goodman and Mulcaire. They have indicated to me in the clearest of terms that:

(a) they regarded the question of whether or not the unauthorised accessing of a voicemail message after the recipient collected the message is a RIPA offence was a difficult legal issue which had not been tested or authoritatively determined;

(b) that there were tenable arguments either way, but the observations of Lord Woolf in *NTL v Ipswich Crown Court* (2002) pointed to a narrow view;

(c) that they approached the prosecution on the basis that, if the issue of interpretation arose, it may be preferable to proceed on a narrow interpretation thereby avoiding the necessity of having a contested trial.

I have pressed leading counsel on the third of these issues and he is clear that he did not at any stage give a definitive view that the narrow interpretation was the only possible interpretation and that, if he had been expected or required to give such a definitive view, he would have produced a full written advice. Leading counsel has assured me that the prosecution's pragmatic approach to the interpretation of the

RIPA offence did not affect the course of the proceedings or the charges against the defendants.

Thus, the position in the prosecution of Messrs Goodman and Mulcaire was as set out in my letter of 29 October 2010 to the Home Affairs Committee (and copied to this Committee), namely that:

> *"... it was not necessary to resolve in the proceedings whether section 1(1) of RIPA required proof that the interceptions had taken place before the intended recipients had listened to the messages. There were two reasons for this. First, the prosecution did not in its charges or presentation of the facts attach any legal significance to the distinction between messages which had been listened to and messages which had not. Secondly, the prosecution not having made the distinction, the defence did not raise any legal arguments in respect of the issue, and pleaded guilty. It is evident, therefore, that the prosecution's approach to section 1(1) of RIPA had no bearing on the charges brought against the defendants or the legal proceedings generally. Indeed the prosecution was not even required to articulate any approach. The issue simply did not arise for determination in that case."*

Before I sent that letter to the two Committees in October 2010, I asked that it be checked for accuracy with counsel instructed in the prosecution of Messrs Goodman and Mulcaire. Junior counsel confirmed the accuracy of the letter before it was sent. Yesterday I took the added precaution of going through the extract set out above, line by line, with junior counsel and he again confirmed that it accurately described the position at the time.

I should add this, in analysing the charges on the indictment against Messrs Goodman and Mulcaire in detail, Ms Levitt has observed that in relation to a number of the counts on the indictment there was no evidence that the message had been intercepted before it had been listened to by the intended recipient. Put another way, if the prosecution had taken the narrow view of the RIPA offences, the indictment could not have been drafted in the way that it was. Yesterday, I discussed this specifically with junior counsel (who drafted the indictment) and he confirmed

that included in the indictment were counts relating to calls in respect of which there was no evidence one way or other whether the interception had taken place before collection by the intended recipient. I also discussed this with leading counsel yesterday. His view was that this provided powerful support for the contention that the prosecution could not have taken a definitive narrow view of the RIPA offences at the time.

Messrs Goodman and Mulcaire pleaded guilty on the 29 November 2006 and were sentenced on the 26 January 2007.

As far as I am aware, the Metropolitan Police did not ask the CPS for any further advice on RIPA or any other offences until September 2010 when they embarked on an investigation into matters published by the New York Times on 10 September 2010.

By this time, I was DPP and I was concerned that clearer and more robust legal advice should be provided to the Metropolitan Police. I therefore asked for new leading counsel to provide comprehensive advice on the proper interpretation of the offence in question under RIPA. That advice accorded with my own view that a court might adopt a wide interpretation of the offences under RIPA and accordingly I asked the then Head of SCD to advise the Metropolitan Police at the first opportunity of my view and that I considered that investigations into phone hacking should not be inhibited by a narrow approach to RIPA offences. That advice was given to the police orally in October 2010 and in writing in December 2010.

Between the conclusion of the prosecution of Messrs Goodman and Mulcaire in January 2007 and the advice given to the Metropolitan Police Service in October 2010, I provided written evidence to this Committee on 30 July 2009, 3 November 2009 and, on 29 October 2010, I copied a letter to this Committee that I had written to the Home Affairs Committee. In the 30 July 2009 written evidence I referred to an examination of the material supplied to the CPS that I had asked to be carried out. I then dealt with a very specific issue, namely an email which contained a

transcript of various messages. In that context, I summarised for the purposes of dealing with the email, the charges, the law and the investigation in 2006-7. In summarising the law I said "*... to prove the criminal offence of interception, the prosecution must prove that the actual message was intercepted prior to it being accessed by the intended recipient*". This summary was based on what I understood to be leading counsel's recollection (in 2009) of the approach he had taken in 2006-7. Leading counsel did not at that stage have all of the relevant documentation before him. In retrospect, now having gone through the documents in some considerable detail, leading counsel and I accept that it would have been better to have indicated that the summary of the law set out in my letter reflected the pragmatic basis upon which counsel thought it preferable to proceed at the time, rather than a definitive statement of the law.

Bringing all this together and bearing in mind the considerable caveats I set out at the beginning of this letter, my own conclusions about the advice given by the CPS to the Metropolitan Police in relation to the prosecution of Messrs Goodman and Mulcaire are as follows:

(a) advice was given by the CPS to the Metropolitan Police at an early stage of the investigation indicating, in provisional terms, that it seemed that the offences under RIPA might require the prosecution to prove that a message had been listened to before it was accessed by the intended recipient. But no concluded or definitive view was ever reached and, from the outset, the Head of SCD indicated that the interpretation was "very much untested" and that further consideration would need to be given to the interpretation;

(b) as matters turned out, the prosecution was never required to, nor did it, articulate a definitive view of the law;

(c) the indictment in the case of Messrs Goodman and Mulcaire included counts where there was no evidence one way or the other as to when the message in question had been listened to and once the defendants had pleaded guilty,

"the prosecution was not ... required to articulate any approach. The issue simply did not arise for determination in that case";

(d) from the outset, the CPS also gave the Metropolitan Police advice about the Computer Misuse Act offence in respect of which the issue of when a message was listened did not present a difficulty. Furthermore, from a relatively early stage of the investigation, the Head of SCD also gave advice that conspiracy to commit offences both under RIPA and Computer Misuse Act might be a possibility. Again that would not necessarily require the prosecution to prove that a message had been listened to before it was accessed by the intended recipient;

(e) in my view, the legal advice given by the CPS to the Metropolitan Police on the interpretation of the relevant offences did not limit the scope and extent of the criminal investigation.

I wish to make it abundantly clear that I can only give evidence about my understanding of the advice the CPS actually gave to the Metropolitan Police and the understanding of the CPS team as to the effect of that advice. It is not for me to give evidence about the understanding that the Metropolitan Police may have taken from the advice that was being provided to them, nor the basis upon which they approached the nature and extent of the investigation. Those matters can only be dealt with by the Metropolitan Police.

I have shared this letter with Acting Deputy Commissioner Yates and invited him to identify to me any factual inaccuracies. He did not identify any factual inaccuracies, but did make a number of observations and where I have felt able to do so, I have reflected them in my letter.

I am sending a copy of this letter to the Home Affairs Committee and will ask that it be treated as part of my evidence when I appear before that Committee next week.

Yours Keir Starmer

KEIR STARMER QC
Director of Public Prosecutions