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SPECIALIST OPERATIONS

Mr John Whittingdale
Chair of Culture, Media & Sport Committee

John Yates QPM
Acting Deputy Commissioner

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Your ref:
Our ref: ACSO/132/11
24th March 2011

Dear Mr Whittingdale,

I write further to my letter of 14th March 2011 in relation to my response to the allegations made by Chris Bryant, MP in the Adjournment Debate on 'Mobile Communications (Interception)' on 10th March 2011.

Mr Bryant made a number of statements about the manner in which this investigation has been undertaken by the Metropolitan Police. In particular, he has suggested that I may have misled your Committee. This is a very serious allegation and it is for this reason that I felt it necessary to write and provide further detailed background material as well as to offer to appear before you to discuss any points you feel need further clarification.

During the Debate Mr Bryant made several assertions that are not correct. The most stark and immediate of these is the aspect that relates to my evidence provided to the Home Affairs Select Committee on 7th September 2010. Mr Bryant stated that I misled the Committee in relation to legal advice. He stated that "I misled the Committee....and used an argument that had never been relied on by the CPS or by his own officers so as to suggest that the number of victims was miniscule."

During this evidence, I set out what I termed the "very prescriptive" definition under Section 1, Regulation of Investigatory Powers Act (S.1 RIPA) of what has become known as mobile phone voicemail 'hacking'. Principally, I explained to the Committee that in 2006, to prove the offence of *Interception of a Communication* under Section 1 of this Act, the Prosecution had to show that a voicemail had been intercepted prior to it being listened to by its intended recipient. On this basis, I advised that there may in fact only be perhaps ten to twelve victims against whom we could actually prove the above mentioned offence of *Interception of a Communication* had occurred in relation to the evidence at that time.

Mr Bryant stated that "never at any stage during the prosecution of Goodman and Mulcaire did anybody from the Crown Prosecution Service advise the Metropolitan Police that the law should be interpreted in such a way". This is not correct.

The investigation began on 21st December 2005. Legal advice - including as to what constituted an offence of *Interception of a Communication* under S.1 RIPA - was generally given "orally in conference" as explained by the Director of Public Prosecutions (DPP) in his letter to you, as the Chair of the Culture Media and Sport (CMS) Committee on 3rd

November 2009. In this same letter, the DPP also explains that the following advice was given to the original investigation team: "section 1(1) of RIPA…requires the communication to be intercepted 'in the course of its transmission'." This is a direct rebuttal of what Mr Bryant claimed.

The latter clause is also qualified in the same letter:

"section 2(7)…has the effect of extending the time of communication until the intended recipient has collected it. The CPS view was that the observations of Lord Woolf were correct, and accorded with the rationale of prohibition in Section 1(1). Moreover, it was also our view that in this case there was nothing to be gained from seeking to contend for a wider interpretation of Section 2(7) than that contemplated by Lord Woolf."

This advice itself followed a previous letter from the DPP to you, as the CMS Chair, on 30th July 2009 in which he states:

"The Law: 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."

A further reference to this point is mentioned in the same letter again as being "an essential element of the offence."

The same legal advice was given to the Senior Investigating Officer (SIO) during the Mulcaire/Goodman case throughout the investigation in 2006. It permeated every aspect of his investigative strategy and his submissions to the CPS and required the employment of tactics, and indeed experts, to evidence the difference between a voicemail being opened or unopened at the point of its alleged interception.

There are several references to legal advice throughout the Goodman/Mulcaire investigation.

On 9th March 2006, the SIO recorded:

"Guidance to be sought from the Head of CT CPS to establish range of possible offences."

On 4th April 2006, in his review of the case to date, the SIO reflected the oral advice given thus far and sought further guidance from the CPS, specifically:

"In terms of points to prove, the key aspect would be that any interception took place prior to the intended recipient receiving the message."

On 20th April 2006, the SIO met with the senior CPS lawyer and provided relevant briefing material to which the CPS lawyer replied by email on the 25th April 2006 that:

"The offences under Section 1 RIPA would, as far as I can see, only relate to such messages that had not been previously accessed by the recipient." The CPS lawyer does however go on to say that the law in this area was not clear as, at the material time, it remained untested. The law, therefore, was untested, but the legal advice to the police was unequivocal.

On 30th June 2006, an Advice File was submitted by the SIO to the CPS which included opinion from an expert who specialises in telecommunication forensics. This included details of the technical challenges of proving that a voicemail had been intercepted prior to it being accessed by its intended recipient thus reinforcing the view that this was an essential element of the offence. (Note: on 13th July 2006, the CPS lawyer met with the same expert to discuss this point.)

On 18th July 2006, the CPS lawyer wrote to the SIO:

"It is also apparent that on four occasions....messages left on the voicemail of *(Subject A)* have been accessed by those numbers prior to *(Subject A)* retrieving those messages."

In the same letter, the CPS lawyer goes on to refer to these as "the RIPA offences" and "the four alleged instances of offences under RIPA". In relation to the SIO's tactic of asking the victims not to access their voicemails for a period to see what happens, the CPS lawyer refers to the lack of any apparent interception of these unopened voicemails during this time as a "weakness" in the case, again reinforcing that proof of this point was indeed an essential element of the offence.

This letter formed part of a further Advice File which included the same telecommunication forensics expert's testimony. This again reiterated the SIO's tactic - based on the advice given - with respect to leaving voicemails unopened in an effort to obtain best evidence if someone were trying to intercept them.

In a further email of 2nd August 2006 to the police team, the CPS lawyer refers to "the 4 main clear RIPA offences" and on 9th August, the Deputy SIO explains in his log that:

"It should be noted that the advice from CPS at present is that we will require not only evidence of access but also evidence that (1st) a message existed and (2nd) that message was intercepted prior to being listened to by a victim. Only when both parts are complete would an offence be committed."

On 7th August 2006, a third Advice File was submitted to the CPS which included additional evidence from one of the Service Providers which detailed the fact that the voicemails (of Subject A) were unopened by the intended recipient at the point of interception.

As is evidenced above, the SIO and his Deputy were very clear in what was required to provide the CPS and Counsel, and ultimately the Court, with the best evidence to secure a conviction. In light of the CPS and Counsel advice given at the time (as restated by the DPP himself in 2009) they based their investigative strategy on the need to prove that voicemails were unopened when "intercepted" and therefore still "in the course of their transmission" under Section 1 RIPA 2000.

In the Adjournment Debate of 10th March 2011, Mr Bryant also went on to say that the CPS "formally warned" a team from the Metropolitan Police on 1st October last year that "it was wrong to claim such an interpretation" of this offence. Further, he states that this misinterpretation of the law was "the very reason - and the only reason - why the Metropolitan Police refused point blank to re-open the case until January of this year."

Mr Bryant is mistaken on both matters.

On the first point, there was no such 'warning' in relation to any previous cases. The claim may however refer to the provision of some newly commissioned legal advice - in late 2010 - as to what might constitute an offence of *Interception of a Communication* for the purposes of any future investigations. The CPS, as is perfectly proper, have signalled an intention hereon to adopt a wider interpretation of what might constitute an offence of this nature - possibly to include the interception of voicemails that have already been opened by the intended recipient. This may of course impact on the current investigation being led by my colleague, DAC Akers.

On the second matter, concerning the opening of a new investigation, it is clear that the sole reason for doing so was due to the fact that News International provided new material to the police in January of this year.

Whatever the outcome of future investigations of this nature, the fact remains that during the Mulcaire and Goodman case, and throughout the ensuing period until October 2010, the legal advice on this matter was unequivocal and, as I said on 7th September 2010, "very prescriptive".

The significance of this point is clear. While the suspects may have had many possible targets of interest, we could only prove the offence of voicemail interception in relation to a very small number of cases.

If a wider interpretation of what constitutes an 'interception' is now applied, then this position will of course need to be reviewed and may change significantly. This will be a matter for the new investigation team to address and clearly it would be wrong for me to comment further at this time.

I feel it important that your Committee be aware in greater detail of the very real legal challenges that this investigation posed. I also thought it important that I demonstrate the detailed and determined efforts undertaken by both the police and the CPS to overcome these challenges. I trust that this letter will allay any concerns that you may have had about the integrity of the evidence that I provided to your Committee. I did not mislead you or any other Committee in relation to this case.

This letter has been copied to the other Parliamentary Committees who have an interest in these matters, as well as the Director of Public Prosecutions.

Yours sincerely

John Yates
Acting Deputy Commissioner