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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

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**RESPONDENTS' REVISED RESPONSE TO THE CLAIMANTS'  
REQUEST FOR FURTHER INFORMATION**

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This Revised Response is served in response to the Request for further information about the Summary of the Respondents' Closed Response Addressing the Legal and Policy Regime. That Request for further information is dated 22 April 2014.

Of Paragraph 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".*

1. Please provide a copy of the procedures used, and any training materials used as to those procedures, and any internal reports, audits or investigations into compliance with those procedures redacted as necessary to protect national security.

**Relevant extracts and gisted passages (indicated as such) from those policies/procedures are provided with this Amended Response.**

**As to training, personnel are trained by reference to the disclosed internal policies. Evidence as to the fact of training referred to in paragraphs 13 and 14 of the Respondents' OPEN Summary of the Respondents' Closed Response, will be provided (subject to national security considerations). However, it is not**

considered necessary for the issues to be determined, or proportionate, to conduct a wider disclosure exercise comprising training materials relevant to the identification and handling of LPP material. Training about LPP material is usually delivered as part of a broader training exercise (a significant component of which is delivered virtually).

The Agencies' processes for identifying, recording and handling LPP material are set out in the extracts and gisted passages provided with this Revised Response. As previously stated, on each occasion where intercepted LPP material is retained and reported it is flagged to the Interception of Communications Commissioner (eg §144.5 of the Respondents' Open Response (7 February 2014) and §17, Open Summary of Respondent's Closed Response (10 April 2014). During his six-monthly visits the Commissioner will request and review a sample of these cases. In his most recent reports, the Commissioner has confirmed he was satisfied overall that LPP material was being handled appropriately.

The Agencies do not operate separate compliance systems (beyond the processes described above) which generate written reports, audits or investigations directed to checking compliance with these policies concerning LPP.

2. Has any of the information in the Summary of the Respondents' Closed Response Addressing the Legal and Policy Regime previously been made accessible to the public? If so, where and when?

**No this information has not been made publicly accessible before.**

#### Of Paragraph 4

*"... the Agencies comply with the additional safeguard contained in the "Covert Surveillance and Property Interference Code of Practice" at section 4.26..."*

3. In respect of each of the Agencies, please explain when it was decided to comply with paragraph 4.26 of the Covert Surveillance and Property Interference Code of Practice in respect of interception, and provide documents evidencing the same.

**The Agencies' compliance with the additional paragraph 4.26 safeguard in the Covert Surveillance and Property Interference Code of Practice pre-dates January 2010 and therefore this compliance has subsisted throughout the period relevant to the Claimants' complaints.**

4. When was the decision of each Agency to comply with paragraph 4.26 of the Covert Surveillance and Property Interference Code of Practice in respect of interception first made public?

**This was first made public when the Open Summary was served on 10 April 2014.**

#### Of Paragraph 6(a)(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."*

5. Please identify the caveats used to protect LPP material by each of the Agencies and their meaning and effect.

**This is apparent from the verbatim extracts and gisted passages of the internal policies provided with this Revised Response. The effect, depending on the context, is to alert the receiver of the information of the requirement to avoid reading the material, or to seek legal advice/ authorization before acting upon it due to its special sensitivity.**

#### Of Paragraph 8

*"The Security Service has a longstanding policy on handling LPP material..."*

6. When was the Security Service's policy on handling LPP material first introduced?

**The Security Service policy referred to includes guidance to Service lawyers and separate guidance for Service Officers. Written policy on handling LPP material has been in place since at least October 2002 and therefore has been in place throughout the period relevant to the Claimants' complaints.**

7. When, if at all, has it been revised or amended? If revisions or amendments have been made, please identify the changes made.

**Relevant extracts and gisted passages from the guidance to Service lawyers dated April 2011, December 2010 and May 2008 have been provided (See Exhibits 6, 7 and 8). Changes to the policy made during this period are evident from these documents. Exhibit 1 is the current version, dated January 2014. The guidance to Service Officers is dated 29 July 2011.**

8. Please provide a copy of the policy, redacted as necessary to protect national security.

**Relevant verbatim extracts and gisted passages of the policies have been provided in open - see answer to question 1 above.**

#### Of Paragraph 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"*

9. Please provide a copy of the guidance, redacted as necessary to protect national security. The content of the guidance, summarised above, is not secret.

**Relevant verbatim extracts and gisted passages from guidance to intelligence analysts have been provided with this Revised Response (see Exhibit 4).**

10. Please identify the date of the guidance, and the date of any revisions or previous guidance.

**The date is provided with the disclosed extracts and gisted passages of the guidance.**

Of Paragraph 14

*"... the Security Service issues guidance to assist lawyers in determining if LPP applies..."*

11. Please provide a copy of the guidance, redacted as necessary to protect national security. Guidance as to the content of the law cannot be secret.

**Relevant verbatim extracts and gisted passages from the guidance to Service lawyers have been provided with this Revised Response (see Exhibit 1).**

12. Please identify the date of the guidance, and the date of any revisions or previous guidance.

**This is provided with the disclosed extracts and gisted passages from the guidance. See further the answer to Request 7.**

Of Paragraph 15

*"The lawyer will give advice on the handling of LPP material which may include one or more of the following:*

*...*

*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"*

13. When does the guidance require or advise that LPP material should be destroyed?

**The guidance states explicitly that if it is clear to the reviewing lawyer that the LPP material cannot be of intelligence value or the reporting of it would be clearly disproportionate, the lawyer should inform the originator of the information and destroy the material (Exhibit 1, §18). Where the intelligence value or proportionality of reporting is less clear, the lawyer will probe the justification for keeping the material. The judgment whether to destroy the material or pass it on is to be recorded in the log of confidential material (Exhibit 1, §19).**

**After it has been judged that there is sufficient justification (taking account of its special sensitivity) to retain the intercepted LPP material, the same criteria to**

determine the length of time and circumstances in which it should be retained are applied to it as to other intercepted material. The applicable principle is that retention must be limited to the minimum necessary for the authorized purpose. This approach to the retention of LPP material is also adopted by the other Agencies.

14. When does the guidance indicate that action would be permitted on the basis of intercepted privileged material?

The guidance indicates that action may be taken if the material is of sufficient intelligence value, judged in the light of the particular sensitivity of the material. Disclosure of the material to an outside agency is subject to the judgment that disclosure is

- (i) necessary for the protection of national security or for another s2(2)(a) purpose;
- (ii) proportionate to that aim;
- (iii) will be confined to the minimum amount of material to the minimum number of people; and
- (iv) appropriate caveats will be applied to the material for example to minimize the risk of further dissemination including to those involved in legal proceedings having access to it (Exhibit 1, §22-23).

Decisions on action or disclosure should be made at senior management level in consultation with a legal advisor (Exhibit 1, §25)

15. When would there be a “*risk to the integrity of any legal proceedings*” and what does the guidance require be done in such a case?

The guidance gives an example that LPP material relating to a criminal investigation should not be disclosed to officers involved in that investigation but to someone outside of the investigation so as not to prejudice future legal proceedings (Exhibit 1, §24).

16. Does the guidance prevent the use or dissemination of privileged material to any person involved in giving instructions on litigation against the Agencies?

This guidance states explicitly that in cases where the Agency is a party to proceedings, Service lawyers with conduct of those proceedings should not see LPP material relating to those proceedings. This is achieved by retaining and regularly updating a spreadsheet record of Service lawyers allocated to particular cases and ensuring that LPP material is not sent to them for review (Exhibit 1, §§16-17).

17. Does the guidance require that information barriers are created between persons with access to LPP material and any person involved in litigation against the Security Service that the information relates to?

**The guidance addresses the question of information barriers in this situation, as described above and detailed within the extracts / gisted passages of the policy provided with this Revised Response.**

Of Paragraph 17

*"... During his most recent inspection the Inspector confirmed he was satisfied LPP material was being handled appropriately".*

18. When did the most recent inspection take place?

**At the time the Respondents' OPEN Summary of the Respondents' Closed Response was drafted (10 April 2014), the most recent inspections of the interception agencies by the Interception of Communications Commissioner had been in "the Autumn and Winter of 2013" as recorded in his 2013 report to which the Response referred (para 3.30-2, page 10). Further inspections took place in the summer of 2014. The Commissioner's 2014 Report has not yet been published.**

19. Has the Inspector or the Interception of Communications Commissioner (or any other Commissioner) previously expressed concerns about the Security Service's handling of LPP material?

**The Interception of Communications Commissioner has only once noted a concern regarding the handling of LPP material in his last ten open annual reports. In his 2004 report the Interception of Communications Commissioner noted that SIS had reported an error in that they had not recorded the interception of a piece of LPP material on the Commissioner's log (para 58, IOCC Annual Report 2004).**

20. If so, what concerns were expressed, and when were they raised?

**See answer to question 19 above.**

Of Paragraph 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".*

21. Please provide a copy of the guidance, redacted as necessary to protect national security. Guidance on general principles to be applied during disclosure exercises is not secret.

**Relevant verbatim extracts and gisted passages from the guidance have been provided with this Revised Response (see Exhibit 5).**

22. Please identify the date of the guidance, and the date of any revisions or previous guidance.

**This guidance came into existence in May 2012.**

23. What steps does the guidance require be taken if relevant privileged information is in fact reviewed by Counsel or external lawyers instructed in litigation?

**The guidance does not prescribe steps which would be taken if such information were to be inadvertently reviewed in the manner described.**

24. Does the guidance require that information barriers are created between Service Legal Advisers with access to LPP material and any person (including other Legal Advisers) involved in litigation against the Security Service that the information relates to?

**The guidance seeks to create information barriers by instructing Counsel/ external lawyers who may be reviewing Security Service material to be alert to material marked as subject to LPP. They are clearly instructed not to review it but to record its existence and location.**

25. When will LPP material be shown to and reviewed by an independent lawyer?

**As stated in paragraph 18 of the OPEN 'Summary of the Respondents' CLOSED Response addressing the legal and policy regime' - material is reviewed by an independent lawyer if a Service Legal Adviser considers this is necessary.**

**If LPP material is potentially relevant to proceedings it will be reviewed by an independent lawyer not connected to those proceedings (Exhibit 5, §4). The guidance to Service lawyers (Exhibit 1) advises that this may be necessary, for example in a criminal case in order to identify parts of a document which may not be subject to LPP and to identify anything in a privileged section of a document which may undermine the prosecution case or assist the defence (Exhibit 1, §36). Review by an independent lawyer is also envisaged in certain civil cases (Exhibit 1, §37).**

26. Does the guidance require that any independent lawyer with access to LPP material and any person (including other Legal Advisers) is not involved in litigation against the Security Service that the information relates to?

**The independent lawyer is 'independent' in the ordinary meaning of the word. For example, it would be a different CPS lawyer not instructed in the particular criminal case, or a different Counsel to that instructed in any other case.**

**See further the answers to Requests 16, 17 and 24 above.**

27. What steps does the guidance take to ensure that officers of the Security Service and the Security Service are unable to use LPP material (intentionally or unconsciously) to their benefit in litigation brought against the Security Service?

**See answers to Requests 16, 17, 24 and 26 above.**

**There are also other safeguards in place to ensure that officers of the Security Service are unable to use LPP material (whether intentionally or otherwise) to their benefit in litigation including:**

- **Stringent requirements for the processing of information obtained via interception - including safeguards in s.16 of RIPA about the extent to which external communications covered by a s. 8(4) warrant can be read, looked at or listened to.**
  - **Stringent requirements relating to the handling of intercepted material in s.15 of RIPA and Chapter 6 of the Code, including limitations on handling of intercepted material to the minimum necessary for authorised purposes, together with the destruction of intercepted material as soon as there are no longer grounds for retaining it.**
  - **Oversight by the Commissioner, the ISC and the Tribunal of interception powers under RIPA, including scrutiny of the Safeguarding arrangements under s.15 of RIPA by the Commissioner.**
  - **The fact that Security Service lawyers are bound by professional obligations which would preclude their involvement in any such conduct.**
28. Has the Security Service ever provided relevant LPP material to external lawyers or counsel during a disclosure exercise? If so, what steps, if any, were taken to safeguard the integrity of the litigation?

**As set out above, the Agency is aware of the need to ensure that external lawyers and Counsel (and its officers) conducting (or involved in) litigation do not have access to material subject to LPP in order to avoid the risk of prejudicing the fairness of the litigation and has procedures in place to prevent this. As to what may have occurred in the past, there is no central repository where information of this kind would be recorded.**

**In light of this, further enquiry would involve identifying, contacting and questioning a large number of officers/ external counsel/lawyers as to the state of their knowledge and experience followed by further detailed searches. That exercise has not been undertaken. In the context of a preliminary issue which is to proceed on the basis of assumed facts, this enquiry would be disproportionate.**

**There is a single known case/instance, from the material which has been examined (in relation to which disclosure is still being considered) where the potential for “tainting” was identified. Additional procedures were promptly put in place to safeguard the integrity of the litigation.**



29. Has the Security Service ever provided relevant LPP material to its officers giving instructions or evidence in litigation against the Service? If so, what steps, if any, were taken to safeguard the integrity of the litigation?

**See answer to Request 28 above. As to steps which would be taken to safeguard the integrity of litigation, see the answers to Requests 16, 17, 24-16 above.**

Of Paragraph 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."*

30. Please provide a copy of the policies and procedures referred to, redacted as necessary to protect national security. If the guidance closely follows the Codes of Practice, it is not secret.

**Relevant verbatim extracts and gisted passages from the policies and procedures have been provided with this Revised Response (see Exhibits 11 and 13).**

31. Please identify the date of the policies and procedures, and the date of any revisions or previous policies and procedures.

**This is provided with the disclosed extracts and gisted passages of the policies.**

Of Paragraph 21

*"Handling guidance... provides guidance on the meaning of legal privilege..."*

32. Please provide a copy of the guidance, redacted as necessary to protect national security. Guidance as to the content of the law cannot be secret.

**Relevant extracts and gisted passages from the guidance have been provided with this Revised Response (see Exhibit 11).**

33. Please identify the date of the guidance, and the date of any revisions or previous guidance.

**This is provided with the disclosed extracts and gisted passages from the guidance.**

Of Paragraph 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".*

34. Please identify the differences in policy or practice between SIS, the Security Service and GCHQ in their approach to the RIPA Section 15 safeguards?

**The Agencies are not aware of any material difference in their practices as to how the RIPA s.15 safeguards are applied to LPP material. In terms of differences in written policy, the Security Service Guidance to Service lawyers and SIS Handling policy expressly refer to the need to ensure dissemination is limited to the minimum necessary. There is no equivalent in the GCHQ policies, albeit as a matter of practice GCHQ does apply the RIPA s.15 safeguards.**

35. Does SIS have any guidance that requires that information barriers are created between Legal Advisers with access to LPP material and any person (including other Legal Advisers) involved in litigation against any of the Agencies that the information relates to?

**In summary, the SIS handling arrangements provide that a senior legal advisor (from a team not involved in the litigation) be made responsible for advising whether intercepted material might be covered by LPP, and for consulting records identifying lawyers and officers involved in legal proceedings against HMG so as to ensure that LPP material is not passed to these individuals. The same advisor is also responsible for the extent of distribution of this material, its storage and its destruction.**

36. Does SIS have any guidance that requires that any independent lawyer with access to LPP material and any person (including other Legal Advisers) is not involved in litigation against the Security Service that the information relates to?

**SIS does have guidance which addresses information barriers where there is litigation against the Agencies. See answer above.**

37. What steps does the guidance take to ensure that officers of SIS and the SIS are unable to use LPP material (intentionally or unconsciously) to their benefit in litigation brought against SIS?

**As set out above the guidance addresses the issue of information barriers where there is litigation against SIS by seeking insulate those involved in litigation against the Agency from having access to LPP material.**

**There are also other safeguards in place to ensure that officers of SIS are unable to use LPP material (whether intentionally or otherwise) to their benefit in litigation including:**

- **Stringent requirements for the processing of information obtained via interception - including safeguards in s.16 of RIPA about the extent to which external communications covered by a s. 8(4) warrant can be read, looked at or listened to.**
- **Stringent requirements relating to the handling of intercepted material in s.15 of RIPA and Chapter 6 of the Code, including limitations on handling**

of intercepted material to the minimum necessary for authorised purposes, together with the destruction of intercepted material as soon as there are no longer grounds for retaining it.

- Oversight by the Commissioner, the ISC and the Tribunal of interception powers under RIPA, including scrutiny of the Safeguarding arrangements under s.15 of RIPA by the Commissioner.
- The fact that SIS lawyers are bound by professional obligations which would preclude their involvement in any such conduct.

#### Of Paragraph 26

*“The procedures set out above concerning the handling of LPP material mitigate against the possibility of 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.”*

38. Does SIS have a policy or guidance about the handling of LPP material during a disclosure exercise? If so, please provide a copy.

**The practice has been summarised at §26 of the OPEN Summary of the Respondent’s Closed Response addressing the legal and policy regime. There is no written policy, other than Exhibit 12, which is specifically directed to the handling of LPP material during a disclosure exercise.**

39. Does SIS create information barriers between legal advisers with access to LPP material and any person (including other legal advisers) involved in litigation against the Agencies that the information relates to?

**As stated and summarised above, SIS does have policies which address information barriers in this situation.**

40. What steps does SIS take to ensure that officers of the Agencies and the Agencies are unable to use LPP material (intentionally or unconsciously) to their benefit in litigation brought against the Agencies?

**As set out and summarised above, SIS takes steps - reflected in its policy - to ensure that officers are unable to use LPP material in this way.**

**There are also other safeguards in place to ensure that officers of SIS are unable to use LPP material (whether intentionally or otherwise) to their benefit in litigation including:**

- Stringent requirements for the processing of information obtained via interception - including safeguards in s.16 of RIPA about the extent to which external communications covered by a s. 8(4) warrant can be read, looked at or listened to.
- Stringent requirements relating to the handling of intercepted material in s.15 of RIPA and Chapter 6 of the Code, including limitations on handling of intercepted material to the minimum necessary for authorised purposes,

together with the destruction of intercepted material as soon as there are no longer grounds for retaining it.

- Oversight by the Commissioner, the ISC and the Tribunal of interception powers under RIPA, including scrutiny of the Safeguarding arrangements under s.15 of RIPA by the Commissioner.
- The fact that SIS lawyers are bound by professional obligations which would preclude their involvement in any such conduct.

41. What would be the “*appropriate course of action*” if relevant LPP material is identified? What has been SIS’s practice to date, what guidance exists, and what factors have been taken into account when deciding on the appropriate action?

**SIS would in practice take such steps as were appropriate pursuant to the relevant authorities. This would be likely to involve consulting independent Counsel to advise on the particular steps that should be followed in any particular case.**

42. Has the SIS ever provided relevant LPP material to external lawyers or counsel during a disclosure exercise? If so, what steps, if any, were taken to safeguard the integrity of the litigation?

**As set out above, the Agency is aware of the need to ensure that external lawyers and Counsel (and its officers) conducting (or involved in) litigation do not have access to material subject to LPP in order to avoid the risk of prejudicing the fairness of the litigation and has procedures in place to prevent this. As to what may have occurred in the past, there is no central repository where information of this kind would be recorded. In light of this, further enquiry would involve identifying, contacting and questioning a large number of officers/ external counsel/lawyers as to the state of their knowledge and experience followed by further detailed searches. That exercise has not been undertaken. In the context of a preliminary issue which is to proceed on the basis of assumed facts, this enquiry would be disproportionate.**

43. Has the SIS ever provided relevant LPP material to its officers giving instructions or evidence in litigation against the Agencies? If so, what steps, if any, were taken to safeguard the integrity of the litigation?

**See answer to Request 42 above.**

Of Paragraphs 32 and 34

*“Separate guidance is provided to GCHQ staff on the meaning of legal privilege”.*

*“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”.*

44. Please provide a copy of the guidance referred to, redacted as necessary to protect national security.

**Relevant verbatim extracts and gisted passages from the guidance have been provided with this Revised Response (see Exhibit 20).**

45. Please identify the date of the guidance referred to, and the date of any revisions or previous guidance.

**The guidance dates from October 2008.**

Of Paragraph 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”.*

46. Please provide a copy of the guidance referred to.

**Relevant verbatim extracts and gisted passages from the guidance have been provided with this Revised Response (see Exhibit 20).**

47. Please identify the date of the guidance, and the date of any revisions or previous guidance.

**See answer to Request 45.**

48. Does the Security Service and SIS have equivalent guidance? If so, please provide a copy.

**See answers to Requests 16, 24 and 35 above.**

49. Does GCHQ have a policy or guidance about the handling of LPP material during a disclosure exercise? If so, please provide a copy.

**As referred to in Request 46 above, GCHQ guidance highlights the need to ensure that privileged material does not find its way to government lawyers who may be handling litigation. GCHQ practices are consistent with those of the other Agencies, as reflected in documents that are sensitive and are still being considered for disclosure. In practice information barriers are put in place and GCHQ also records and clearly communicates to those that need to know which personnel are able to see any LPP material that there might be and those that must not.**

50. Does GCHQ create information barriers between legal advisers with access to LPP material and any person (including other legal advisers) involved in litigation against the Agencies that the information relates to?

**See answer to Request 49.**

51. What steps does GCHQ take to ensure that officers of the Agencies and the Agencies are unable to use LPP material (intentionally or unconsciously) to their benefit in litigation brought against the Agencies?

**See Answer to Request 49.**

**There are also other safeguards in place to ensure that officers of GCHQ are unable to use LPP material (whether intentionally or otherwise) to their benefit in litigation including:**

- **Stringent requirements for the processing of information obtained via interception - including safeguards in s.16 of RIPA about the extent to which external communications covered by a s. 8(4) warrant can be read, looked at or listened to.**
- **Stringent requirements relating to the handling of intercepted material in s.15 of RIPA and Chapter 6 of the Code, including limitations on handling of intercepted material to the minimum necessary for authorised purposes, together with the destruction of intercepted material as soon as there are no longer grounds for retaining it.**
- **Oversight by the Commissioner, the ISC and the Tribunal of interception powers under RIPA, including scrutiny of the Safeguarding arrangements under s.15 of RIPA by the Commissioner.**
- **The fact that GCHQ lawyers are bound by professional obligations which would preclude their involvement in any such conduct.**

52. Has GCHQ ever provided relevant LPP material to external lawyers or counsel during a disclosure exercise? If so, what steps, if any, were taken to safeguard the integrity of the litigation?

**Answer to Request 42 above is repeated mutatis mutandis.**

53. Has GCHQ ever provided relevant LPP material to its officers giving instructions or evidence in litigation against the Agencies? If so, what steps, if any, were taken to safeguard the integrity of the litigation?

**See answer to Request 52 above.**

#### Of Paragraph 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”.*

54. When did this statement as to the Agencies’ future conduct come into effect?

**This statement came into effect on the date the OPEN 'Summary of the Respondents' CLOSED Response addressing the legal and policy regime' was served on 10 April 2014.**

55. Do the Agencies have procedures in place to ensure that pending advice from independent counsel, officers of the Agencies and the Agencies are unable to use LPP material (intentionally or unconsciously) to their benefit in litigation brought against the Agencies? If so, please explain how and provide a copy of the procedures adopted.

**It is implicit in paragraph 38 of the OPEN 'Summary of the Respondents' CLOSED Response addressing the legal and policy regime' that the Agencies would not act before seeking the advice of independent Counsel.**

56. What steps would the Agencies take if in future 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 to prevent the Agencies enjoying any advantage in litigation or making any use of LPP material?

**The Agencies would take all appropriate steps in accordance with the relevant case law, including the legal principles outlined in *Stiedl v Enyo Law* [2011] EWHC 2649 (Comm).**

29 October 2014

[Exhibit 1] – Please note that paragraph numbers have been inserted and do not necessarily reflect the original documents.

The underlined parts of this document indicate that it has been gisted for OPEN<sup>i</sup>

## **How Do I Deal with Material Subject to Legal Professional Privilege (LPP)?**

### **Summary of key points**

- **This guidance is to assist Service lawyers called upon to advise in relation to potential LPP material after it is acquired, or which may need to be acted upon or may be relevant to legal proceedings.**
- **The definition of LPP is at para 10. However, it may be difficult to be certain whether the definition applies to any particular material and you should therefore adopt a precautionary approach (see paras 8-9).**
- **LPP material should be marked with the LPP caveat and entered on the Commissioners' log. LPP parts of a mixed document should be specifically identified where practicable. Non-LPP material should also be marked as such (full procedure set out at para 13).**
- **Decisions on action on/disclosure should be taken at senior management level or above, and with advice from a legal advisor (see paras 22-25).**
- **LPP material should not be read by external lawyers/counsel. If LPP material may be relevant to criminal or civil proceedings, you may need to reveal it to an independent lawyer for advice (see paras 32-37).**

### **Introduction**

1. Material subject to LPP is amongst the most sensitive sorts of information that may be obtained by the Security Service. The confidentiality of lawyer-client communications is fiercely guarded by the law and any departure from it in the national security context must be narrowly construed and strictly justified. This guidance is intended to assist you in advising on LPP matters. In cases of doubt or difficulty, please ensure you consult senior legal advisors.
2. The Service may obtain, retain or disclose LPP material only so far as necessary and proportionate for the proper discharge of its functions, in accordance with section 2(2)(a) of the Security Service Act 1989. For the application of these requirements, see the Director General's Arrangements made under section 2(2)(a), which can be found through a separate link. The sensitivity of LPP material is such that you should take particular care to ensure that the requirements of section 2(2)(a) are met in relation to it.
3. In preparation for advising on LPP matters you should also familiarise yourself with the relevant provisions of the RIPA Codes of Practice and the



[Exhibit 1] – Please note that paragraph numbers have been inserted and do not necessarily reflect the original documents.

Service's arrangements for handling LPP material available on a separate link.

4. This guidance does not cover other forms of confidential information.

#### **When might I need to think about LPP?**

5. In the course of your time as a legal adviser to the Service you are likely to be asked to advise whether a particular piece of intelligence attracts LPP. You will normally receive the intelligence in an e-mail from a legal assistant, who distributes LPP advisory work evenly between the lawyers.
6. You will also need to think about LPP when you are dealing with a case in which material needs to be reviewed for disclosure purposes (e.g. in a criminal prosecution or Control Order proceedings) and the material may include material subject to LPP.
7. This guidance does not cover the situation where you are asked to advise on the legal implications of applying for a RIPA authorisation/warrant in a case in which LPP material may be generated. If you are asked to advise in such a case you should consult the applicable RIPA Code of Practice and the relevant Service guidance available on a separate link.

#### **What should I do if I'm asked to determine whether material is subject to LPP?**

8. Whatever the source of the intelligence, you need to consider whether it falls within the definition of LPP (see below). Whilst you should of course seek to provide definitive advice, your lack of detailed knowledge of the context of the intelligence may mean that it is impossible for you to be certain whether the intelligence is or is not privileged. In such cases, you should seek additional context from the desk (and, where relevant, the transcriber). If after doing so you remain unsure, the sensitivity of the subject matter is such that you should adopt a precautionary approach and mark the material as LPP, given the potentially grave repercussions of getting the decision wrong (e.g. a successful abuse of process argument at a trial in which the material is relevant). As the RIPA Codes and the Service's arrangements for handling LPP material make clear, marking the material as LPP does not mean that it cannot be acted upon or disclosed, but **it does mean that the legal advisors will be consulted before this happens** so that we can ensure that nothing inappropriate is done with the material.
9. Where, therefore, an individual appears to be discussing the legal advice he has sought or received with an associate who is not a lawyer, the conversation should be **presumed to be legally privileged** and should be treated as such.

#### **Where will I find the definition of LPP?**

10. LPP is defined in section 10 of the Police and Criminal Evidence Act 1984 to cover:
  - (a) *communications between a professional legal adviser and his client or any person representing his client made in connection with the giving of legal advice to the client;*

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- (b) *communications between a professional legal adviser and his client or any person representing his client or between such an adviser or his client or any such representative and any other person made in connection with or in contemplation of legal proceedings and for the purposes of such proceedings; and*
- (c) *items enclosed with or referred to in such communications and made-*
  - (i) *in connection with the giving of legal advice; or*
  - (ii) *in connection with or in contemplation of legal proceedings and for the purposes of such proceedings, when they are in the possession of a person who is entitled to possession of them.*

11. It will usually be sufficient to have regard to this statutory definition, which is broad and comprehensive. If you need to look at the law more closely, then consult the LPP section of Archbold (criminal proceedings) or the White Book (civil proceedings). Passmore on Privilege is also a useful aid. These books set out the recent caselaw, which you can then look up in more detail.

**Suppose a document contains material which I decide is subject to LPP and also other material that, standing alone, would not be privileged. What should I advise?**

12. Where a document contains both LPP and non-LPP material, the Service's arrangements for handling LPP material will apply only to the former. It will not always be practicable to segregate the LPP parts (it may, for example, be difficult and onerous to do so in the case of a conversation peppered with legal advice), in which case the whole item should be treated as privileged; specific legal advice can subsequently be given in the event that action or disclosure is contemplated in relation to some part of the material. But where it is practicable to segregate, the caveat and the entry in the log of confidential information should clearly identify the part of the document to which it relates. Also action on or disclosure of the non-LPP material should be carried out in a way that protects the confidentiality of the lawyer-client relationship.

**What should I do if I decide that material is subject to LPP?**

13. The usual scenario is that you will receive an e-mail from a Security Service officer asking for advice on whether an attached document, often a transcript of a telephone call, contains LPP or other confidential material. You should:
- (a) Assess the contents of the document to determine whether it contains such material.
  - (b) Send a reply to the legal assistant **and** the transcriber or other originator with the following information:
    - **If the document contains LPP/confidential material** – inform the originator that it contains LPP/confidential material. Cut and paste the relevant caveat into your response remembering to include your email. Don't forget to amend the caveat as appropriate, and include any other comments that you want to make. If only part of the document is subject to LPP, then you should clearly mark this, e.g. by bracketing the relevant part of the document and adding a

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comment explaining the significance of the brackets and why you have inserted them.

- **If the document does not contain LPP/confidential material** – cut and paste the relevant 'caveat' into the document to indicate that this is the case. This is to indicate that the material has been assessed by the legal advisors and so to avoid duplication.
- (c) Where you have identified LPP/confidential material, you should **complete the log of confidential information**. You should explain what it is that you have examined and make any notes that are necessary to explain your decision (e.g. the document is a transcript of a telephone call and the transcriber told you that one of the parties is a lawyer, but this is not apparent from the transcript itself).
- (d) If you receive an email from the legal assistant which does not contain all the details necessary to complete the log of confidential material, you should either inform them, who will request the missing details from the originator, or request the details directly yourself.

**Should I decline to consider material for LPP and instead pass it to a colleague if I am advising on a matter to which the material relates?**

14. This will depend upon whether or not the individual is involved in legal proceedings against the Service.
15. Lawyers advised in March 2011 that there is no requirement to erect internal 'Chinese walls' between the lawyers for this purpose. They gave two reasons for this: first, the number and structure of the Service's lawyers is not conducive to a complete separation of functions; secondly, a degree of separation already exists in the fact that Service lawyers will not be instructing counsel directly (instructions usually being given by CPS, TSoI or another department), which guards against any LPP material inadvertently being used to give the Service an advantage in litigation.
16. We continue to rely on this advice in relation to criminal, SIAC, control order/TPIM and all other proceedings to which the Service is not a party and in which it is not instructing counsel directly. In such cases, there is no restriction on which Service lawyer may review the material. However, since this legal advice, the Service has become party to a growing number of legal proceedings, mostly civil claims brought against it by individuals. In these cases, the Service lawyer with conduct of the proceedings instructs counsel directly and the Service has a direct interest in the outcome of the proceedings. This does not give rise to a legal prohibition on the lawyer seeing LPP material relating to the proceedings. However, it has been decided that this should be avoided in order to safeguard against any risk of prejudice or accusation of abuse of process.
17. Accordingly, lawyers with conduct of legal proceedings to which the Service is a party should not see LPP material relating the proceedings. To achieve this, the lawyer should ensure that the legal proceedings spreadsheet is up-to-date as regards all proceedings or threatened proceedings. The legal assistant will refer to the spreadsheet in allocating potential LPP material to lawyers for assessment. Out of an abundance of caution, where the legal assistants do not allocate material to a lawyer dealing with particular

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proceedings to which the Service is a party, they will allocate it to a lawyer outside their team.

**Are there any circumstances in which LPP material should not be reported to the desk officer?**

18. Yes. **If it is clear that LPP material cannot be of intelligence value, or that the reporting of it would be clearly disproportionate, then you should inform the originator** (usually the transcribers in these circumstances) **and destroy the material**. It will usually be advisable to **consult the desk** before reaching such a conclusion. You must be especially careful where the material contains communications between a target and their lawyer about proceedings or prospective proceedings in which the Service is or will be involved. In such cases, the desk should have the material only if there is a clear intelligence reason for it to do so, as it is important that the Service is not open to criticism for using covert methods to gain an advantage in legal proceedings.
19. **If you are not sure** whether material is of intelligence value or whether its reporting is proportionate, you should **proceed cautiously**. Speak to the desk officer with responsibility for the investigation and reveal just enough information about the intelligence to enable the desk officer to determine whether the material is likely to be of intelligence value. If this is impracticable, you may need to ask the desk officer to come to see you and read the material and satisfy you that there is a sufficient intelligence justification for the material to be kept. Only send the material to the desk or allow it to be kept if you judge that an intelligence reason for doing so has been made out. It may be prudent to annotate the log of confidential material giving the reason why it has been retained (if this is not obvious).
20. **The log of confidential material should be completed whenever you assess that material is legally privileged**, irrespective of whether the material is subsequently passed to the desk or destroyed. The record on the log should include any decision taken to destroy the material.

**How quickly should I process LPP material?**

21. Routine material should be processed within (X) and urgent material should be turned around within (X), or earlier if required.

**What if I am asked whether LPP material can be acted upon or disclosed - when can I advise this is appropriate?**

22. It is vital that the confidentiality of lawyer-client communications is respected to the maximum extent possible consistent with national security requirements, and that nothing is done with LPP material which would either undermine the integrity of legal proceedings or breach Article 8 ECHR.
23. Thus when a desk officer asks whether LPP material can be disclosed to an outside agency, in advising on the requirements of section 2(2)(a) of the Security Service Act 1989 you should consider the following:

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- Is the proposed disclosure necessary for the protection of national security, or for another purpose specified in section 2(2)(a)?
  - Is it proportionate to the national security (etc) aim?
  - Will the disclosure be limited as far as possible so that the minimum amount of LPP material will be disclosed to the minimum number of people?
  - Will appropriate caveats be placed on the material? You will need to consider whether the material should be specifically caveated as subject to LPP. This is usually appropriate in order to minimise the risk of further dissemination, which might result in people involved in the legal proceedings subsequently having access to the material. So the material will usually need to be subject to the LPP caveat and the caveat that no action may be taken on it nor further disclosure made without the Service's authorisation. You should also consider whether the material needs any other caveats (e.g. is it subject to the Handling Arrangements for intercept product?)
24. In order to protect the integrity of any legal proceedings, then unless the circumstances are highly exceptional, LPP material related to a criminal investigation should not be disclosed to police officers involved in that investigation, in order not to prejudice future legal proceedings or give rise to Article 6 arguments, an abuse of process application etc. It follows from this that action on or disclosure is more likely to be acceptable if it does not involve disclosure of the LPP material itself. In this sort of case, the desk may need to disclose to a police officer who is not involved in the investigation and ask his/her advice on whether it is possible for the material to be actioned by someone outside of the investigation, or handled in some other way that is consistent with the purpose of the disclosure.
25. **Decisions on action on or disclosure should be made at senior management level, or higher where the sensitivity or difficulty of the case warrants it, and always in consultation with a legal advisor.** Any decision to disclose or take action should be recorded on the log of confidential material. This will require the desk to notify you when the material is disclosed so that you can complete the log. It will be prudent to include a brief justification in the entry.

#### **Can you give me an example?**

26. For example, if an individual who is investigated by the Service is the subject of criminal proceedings, and in the course of investigation the Service intercepts a forensic report prepared for the purpose of those proceedings then it might be justifiable to put information from that report into the Service's database for future use in intelligence investigations. However, this information would not be passed onto the police, in case they use it to gather further evidence or direct their own forensic experts in such a way as to refute the defence expert. In other words the Service mustn't use LPP material in a way that gives the appearance of enabling the State to gain an unfair advantage in current or future court proceedings.
27. Depending on the circumstances, this may be a difficult judgement to make and it may be prudent to discuss the options available in this type of case with other legal advisors, particularly those who have had prosecution

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experience, before giving your advice. In cases of doubt or difficulty, you should consult or inform the senior legal advisors.

**Can we use legally privileged intelligence as evidence in legal proceedings, for example in a control order case?**

28. We must not, under any circumstances, seek to rely on legally privileged material in evidence in legal proceedings. Doing so where the LPP belongs to the other party to the proceedings would be incompatible with Article 6 and could result in proceedings being stayed as an abuse of process. In the case of LPP material belonging to a third party, it would be highly likely to be both inadmissible and incompatible with Article 8.
29. It does not follow from this that desks may not take legally privileged material into account in forming their intelligence assessments. They may do so, and indeed should, to the full extent that the intelligence is relevant. But they should be warned that, should those assessments later need to be relied upon in legal proceedings, they will be unable to pray in aid the legally privileged material, nor even make any reference to it. This could well result in adverse findings in respect of Service assessments and knock-on consequences for the proceedings and possibly the Service's reputation.
30. While the Service has little choice as to the assessments on which it may need to rely when defending a civil claim, the choice is greater when it comes to building a control order or SIAC case. Lawyers advising in such cases will wish to consider carefully with Counsel the risks and benefits of using any assessment derived partly from LPP intelligence. In all cases, the lawyers and desk officers will need to ensure that no LPP material is relied upon or referred to in any submission, witness statement or supporting evidence\*\*\*.
31. SVAP appeals are somewhat different. These are not legal proceedings and there is an argument that LPP material which may have formed the basis for a vetting decision may be considered by the Panel. This argument is, however, untested and so caution should be exercised in considering whether to base a vetting decision or recommendation on LPP material. If there is any proposal to rely on such material before SVAP, senior legal advisors should be informed and consideration given to instructing counsel to advise.

**What should I do if a piece of LPP material needs to be considered for disclosure purposes?**

32. When a desk officer files a piece of LPP material on a paper or electronic file, it will be retained on the same basis as any other piece of intelligence. If the file then comes to be reviewed for the purpose of legal proceedings, e.g. by the CPS and/or prosecuting counsel, or by counsel for the Secretary of State in Control Order proceedings, then the LPP material will be seen by them unless steps are taken to remove it or warn them of its possible existence. Where the quantity of material to be revealed is relatively small, it may be practicable to identify and physically remove any LPP documents. If so, this should be done first. Please ensure that you follow the steps set out below for the different types of legal proceedings if it is possible that LPP material may be found on the files.

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### **Criminal proceedings**

33. Counsel (QC and QC) have advised the fundamental importance of neither prosecuting counsel nor the CPS (or other prosecuting authority) lawyer with conduct of a prosecution reading legally privileged material with any possible connection to the proceedings. Counsel/CPS conducting a review of our material for the purposes of their disclosure obligations should therefore be briefed as follows before they start their review, and a record should be made that the briefing has been given:
- (i) How to recognise immediately such legally privileged material in the file or through the IT viewing tool; and how not to confuse it with other categories of confidential material.**
  - (ii) Not to read the material once identified, because of the Article 6 ECHR and other risks and consequences associated with doing so. \***
  - (iii) To make a note of the serial numbers of the documents marked as LPP. In the case of electronic documents viewed through the IT viewing tool, counsel/CPS should be instructed to give LPP documents a unique red electronic flag. This will enable LPP material to be collated by the legal assistants for subsequent review (see below).**
34. In the unlikely event that prosecuting counsel is disinclined to follow our guidance, wishing instead to read any LPP material they come across, you should advise them of the legal advice that we have received.
35. Once the LPP material has been collated you should conduct a preliminary assessment of it. If you assess that any of the material has a bearing on the proceedings, or that there is a real possibility that it may do but you cannot be sure, then you should arrange for the material to be reviewed by an independent lawyer who is not otherwise involved in the case (eg another CPS CT Division lawyer). Review by an independent lawyer will not be necessary if you assess that there is no real possibility that the material has a bearing on the proceedings. You should consult a more senior lawyer (team leader or above) in difficult cases.
36. The purpose of a review by independent counsel is not to identify anything in the LPP material that might need to be disclosed to the defence: it is clear that such material is immune from disclosure where the privilege belongs to a third party (see *R v Derby Magistrates' Court, ex parte B* [1996] A.C. 487); and there can be no obligation to disclose defendant-privileged information, as he will already be aware of it. The purpose is instead twofold. First, it allows any non-privileged parts of a document containing some LPP material to be reviewed for disclosure purposes. Secondly, it enables an independent lawyer to identify anything in the privileged parts of the material which may undermine the prosecution case or assist the defence case, and to recommend what action should be taken in the interests of justice in order to ensure the fairness of the proceedings (e.g. by amendment of the prosecution case, or even, in an extreme case such as where a third party has revealed to his lawyer that he, rather than the defendant, had committed the offence, discontinuance of the prosecution).

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\* The first word of this paragraph is underlined in the original document.

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**Civil proceedings (including SIAC, Control Order and other special advocate proceedings and tribunals)**

37. Since the near absolute nature of legal privilege applies in civil law as much as in criminal law (see *Three Rivers District Council v Bank of England (No. 6)* [2005] 1 AC 610) **the steps in paragraphs 33-34 should also be followed in civil proceedings**, including those involving special advocates. The procedure will be different only in two respects. First, we will be engaging with the Home Office (or other interested department), TSol and counsel for the Secretary of State, rather than with the CPS and prosecuting counsel. Secondly, in the event that LPP material needs to be reviewed by an independent lawyer not involved in the case, it should go to a suitable lawyer within the department which is party to the proceedings (eg a HOLAB lawyer), or TSol, or if appropriate to independent counsel instructed by them.

**Where can I find the background to the Service's rules on handling LPP material?**

38. There is previous guidance relating to the handling of material subject to LPP.

Legal Advisers  
January 2014

\*\*\*From the context it is evident that the reference to "all cases" is intended to refer to SIAC/TPIM cases" – 29.10.14

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<sup>i</sup> In the original document the headings in bold are also underlined, the underlining has been removed to avoid confusion with the gists.



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The underlined parts of this document indicate that it has been gisted for  
OPEN<sup>i</sup>

## Annex A

### How Do I Deal with Material Subject to Legal Professional Privilege (LPP)?<sup>ii</sup>

#### Summary of key points

- **This guidance is to assist Service lawyers called upon to advise in relation to potential LPP material after it is acquired, or which may need to be acted upon or may be relevant to legal proceedings.**
- **The definition of LPP is at para 10. However, it may be difficult to be certain whether the definition applies to any particular material and you should therefore adopt a precautionary approach (see paras 8-9).**
- **LPP material should be marked with the LPP caveat and entered on the Commissioners' log. LPP parts of a mixed document should be specifically identified where practicable. Non-LPP material should also be marked as such (full procedure set out at para 13).**
- **Decisions on action on/disclosure should be taken at senior management level or above, and with advice from a legal advisor (see paras 22-25).**
- **LPP material should not be read by external lawyers/counsel. If LPP material may be relevant to criminal or civil proceedings, you may need to reveal it to an independent lawyer for advice (see paras 32-37).**

#### Introduction

1. Material subject to LPP is amongst the most sensitive sorts of information that may be obtained by the Security Service. The confidentiality of lawyer-client communications is fiercely guarded by the law and any departure from it in the national security context must be narrowly construed and strictly justified. This guidance is intended to assist you in advising on LPP matters. In cases of doubt or difficulty, please ensure you consult senior legal advisors.
2. The Service may obtain, retain or disclose LPP material only so far as necessary and proportionate for the proper discharge of its functions, in accordance with section 2(2)(a) of the Security Service Act 1989. For the application of these requirements, see the Director General's Arrangements made under section 2(2)(a), which can be found through a separate link. The sensitivity of LPP material is such that you should take particular care to ensure that the requirements of section 2(2)(a) are met in relation to it.
3. In preparation for advising on LPP matters you should also familiarise yourself with the relevant provisions of the RIPA Codes of Practice and the

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Service's arrangements for handling LPP material available on a separate link.

4. This guidance does not cover other forms of confidential information.

#### **When might I need to think about LPP?**

5. In the course of your time as a legal adviser to the Service you are likely to be asked to advise whether a particular piece of intelligence attracts LPP. You will normally receive the intelligence in an e-mail from a legal assistant who distributes LPP advisory work evenly between the lawyers.
6. You will also need to think about LPP when you are dealing with a case in which material needs to be reviewed for disclosure purposes (e.g. in a criminal prosecution or Control Order proceedings) and the material may include material subject to LPP.
7. This guidance does not cover the situation where you are asked to advise on the legal implications of applying for a RIPA authorisation/warrant in a case in which LPP material may be generated. If you are asked to advise in such a case you should consult the applicable RIPA Code of Practice and the relevant Service guidance available on a separate link.

#### **What should I do if I'm asked to determine whether material is subject to LPP?**

8. Whatever the source of the intelligence, you need to consider whether it falls within the definition of LPP (see below). Whilst you should of course seek to provide definitive advice, your lack of detailed knowledge of the context of the intelligence may mean that it is impossible for you to be certain whether the intelligence is or is not privileged. In such cases, you should seek additional context from the desk (and, where relevant, the transcriber). If after doing so you remain unsure, the sensitivity of the subject matter is such that you should adopt a precautionary approach and mark the material as LPP, given the potentially grave repercussions of getting the decision wrong (e.g. a successful abuse of process argument at a trial in which the material is relevant). As the RIPA Codes and the Service's arrangements for handling LPP material make clear, marking the material as LPP does not mean that it cannot be acted upon or disclosed, but **it does mean that the legal advisors will be consulted before this happens** so that we can ensure that nothing inappropriate is done with the material.
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*when they are in the possession of a person who is entitled to possession of them.*

11. It will usually be sufficient to have regard to this statutory definition, which is broad and comprehensive. If you need to look at the law more closely, then consult the LPP section of Archbold (criminal proceedings) or the White Book (civil proceedings). Passmore on Privilege is also a useful aid. These books set out the recent caselaw, which you can then look up in more detail.

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  - (a) Assess the contents of the document to determine whether it contains such material.
  - (b) Send a reply to the legal assistant **and** the transcriber or other originator with the following information:
    - **If the document contains LPP/confidential material** – inform the originator that it contains LPP/confidential material. Cut and paste the relevant caveat into your response remembering to include your email. Don't forget to amend

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23. Thus when a desk officer asks whether LPP material can be disclosed to an outside agency, in advising on the requirements of section 2(2)(a) of the Security Service Act 1989 you should consider the following:

[Exhibit 2] – Please note that paragraph numbers have been inserted and do not necessarily reflect the original documents.

- Is the proposed disclosure necessary for the protection of national security, or for another purpose specified in section 2(2)(a)?
  - Is it proportionate to the national security (etc) aim?
  - Will the disclosure be limited as far as possible so that the minimum amount of LPP material will be disclosed to the minimum number of people?
  - Will appropriate caveats be placed on the material? You will need to consider whether the material should be specifically caveated as subject to LPP. This is usually appropriate in order to minimise the risk of further dissemination, which might result in people involved in the legal proceedings subsequently having access to the material. So the material will usually need to be subject to the LPP caveat and the caveat that no action may be taken on it nor further disclosure made without the Service's authorisation. You should also consider whether the material needs any other caveats (e.g. is it subject to the Handling Arrangements for intercept product?)
24. In order to protect the integrity of any legal proceedings, then unless the circumstances are highly exceptional, LPP material related to a criminal investigation should not be disclosed to police officers involved in that investigation, in order not to prejudice future legal proceedings or give rise to Article 6 arguments, an abuse of process application etc. It follows from this that action on or disclosure is more likely to be acceptable if it does not involve disclosure of the LPP material itself. In this sort of case, the desk may need to disclose to a police officer who is not involved in the investigation and ask his/her advice on whether it is possible for the material to be actioned by someone outside of the investigation, or handled in some other way that is consistent with the purpose of the disclosure.
25. **Decisions on action on or disclosure should be made at senior management level, or higher where the sensitivity or difficulty of the case warrants it, and always in consultation with a legal advisor.** Any decision to disclose or take action should be recorded on the log of confidential material. This will require the desk to notify you when the material is disclosed so that you can complete the log. It will be prudent to include a brief justification in the entry.

#### Can you give me an example?

26. For example, if an individual who is investigated by the Service is the subject of criminal proceedings, and in the course of investigation the Service intercepts a forensic report prepared for the purpose of those proceedings then it might be justifiable to put information from that report into the Service's database for future use in intelligence investigations. However, this information would not be passed onto the police, in case they use it to gather further evidence or direct their own forensic experts in such a way as to refute the defence expert. In other words the Service mustn't use LPP material in a way that gives the appearance of enabling the State to gain an unfair advantage in current or future court proceedings.
27. Depending on the circumstances, this may be a difficult judgement to make and it may be prudent to discuss the options available in this type of case with other legal advisors, particularly those who have had prosecution

[Exhibit 2] – Please note that paragraph numbers have been inserted and do not necessarily reflect the original documents.

experience, before giving your advice. In cases of doubt or difficulty, you should consult or inform senior legal advisors.

**Can we use legally privileged intelligence as evidence in legal proceedings, for example in a control order case?**

28. We must not, under any circumstances, seek to rely on legally privileged material in evidence in legal proceedings. Doing so where the LPP belongs to the other party to the proceedings would be incompatible with Article 6 and could result in proceedings being stayed as an abuse of process. In the case of LPP material belonging to a third party, it would be highly likely to be both inadmissible and incompatible with Article 8.
29. It does not follow from this that desks may not take legally privileged material into account in forming their intelligence assessments. They may do so, and indeed should, to the full extent that the intelligence is relevant. But they should be warned that, should those assessments later need to be relied upon in legal proceedings, they will be unable to pray in aid the legally privileged material, nor even make any reference to it. This could well result in adverse findings in respect of Service assessments and knock-on consequences for the proceedings and possibly the Service's reputation.
30. While the Service has little choice as to the assessments on which it may need to rely when defending a civil claim, the choice is greater when it comes to building a control order or SIAC case. Lawyers advising in such cases will wish to consider carefully with Counsel the risks and benefits of using any assessment derived partly from LPP intelligence. In all cases, the lawyers and desk officers will need to ensure that no LPP material is relied upon or referred to in any submission, witness statement or supporting evidence\*\*\*.
31. SVAP appeals are somewhat different. These are not legal proceedings and there is an argument that LPP material which may have formed the basis for a vetting decision may be considered by the Panel. This argument is, however, untested and so caution should be exercised in considering whether to base a vetting decision or recommendation on LPP material. If there is any proposal to rely on such material before SVAP, senior legal advisors should be informed and consideration given to instructing counsel to advise.

**What should I do if a piece of LPP material needs to be considered for disclosure purposes?**

32. When a desk officer files a piece of LPP material on a paper or electronic file, it will be retained on the same basis as any other piece of intelligence. If the file then comes to be reviewed for the purpose of legal proceedings, e.g. by the CPS and/or prosecuting counsel, or by counsel for the Secretary of State in Control Order proceedings, then the LPP material will be seen by them unless steps are taken to remove it or warn them of its possible existence. Where the quantity of material to be revealed is relatively small, it may be practicable to identify and physically remove any LPP documents. If so, this should be done first. Please ensure that you follow the steps set out below for the different types of legal proceedings if it is possible that LPP material may be found on the files.

[Exhibit 2] – Please note that paragraph numbers have been inserted and do not necessarily reflect the original documents.

### **Criminal proceedings**

33. Counsel (QC and QC) have advised of the fundamental importance of neither prosecuting counsel nor the CPS (or other prosecuting authority) lawyer with conduct of a prosecution reading legally privileged material with any possible connection to the proceedings. Counsel/CPS conducting a review of our material for the purposes of their disclosure obligations should therefore be briefed as follows before they start their review, and a record should be made that the briefing has been given:
- (i) How to recognise immediately such legally privileged material in the file or through the IT viewing tool; and how not to confuse it with other categories of confidential material.**
  - (ii) Not to read the material once identified, because of the Article 6 ECHR and other risks and consequences associated with doing so.\***
  - (iii) To make a note of the serial numbers of the documents marked as LPP. In the case of electronic documents viewed through the IT viewing tool, counsel/CPS should be instructed to give LPP documents a unique red electronic flag. This will enable LPP material to be collated by the legal assistants for subsequent review (see below).**
34. In the unlikely event that prosecuting counsel is disinclined to follow our guidance, wishing instead to read any LPP material they come across, you should advise them of the legal advice we have received.
35. Once the LPP material has been collated you should conduct a preliminary assessment of it. If you assess that any of the material has a bearing on the proceedings, or that there is a real possibility that it may do but you cannot be sure, then you should arrange for the material to be reviewed by an independent lawyer who is not otherwise involved in the case (eg another CPS CT Division lawyer). Review by an independent lawyer will not be necessary if you assess that there is no real possibility that the material has a bearing on the proceedings. You should consult a more senior lawyer (team leader or above) in difficult cases.
36. The purpose of a review by independent counsel is not to identify anything in the LPP material that might need to be disclosed to the defence: it is clear that such material is immune from disclosure where the privilege belongs to a third party (see *R v Derby Magistrates' Court, ex parte B* [1996] A.C. 487); and there can be no obligation to disclose defendant-privileged information, as he will already be aware of it. The purpose is instead twofold. First, it allows any non-privileged parts of a document containing some LPP material to be reviewed for disclosure purposes. Secondly, it enables an independent lawyer to identify anything in the privileged parts of the material which may undermine the prosecution case or assist the defence case, and to recommend what action should be taken in the interests of justice in order to ensure the fairness of the proceedings (e.g. by amendment of the prosecution case, or even, in an extreme case such as where a third party has revealed to his lawyer that he, rather than the defendant, had committed the offence, discontinuance of the prosecution).



[Exhibit 2] – Please note that paragraph numbers have been inserted and do not necessarily reflect the original documents.

**Civil proceedings (including SIAC, Control Order and other special advocate proceedings and tribunals)**

37. Since the near absolute nature of legal privilege applies in civil law as much as in criminal law (see *Three Rivers District Council v Bank of England (No. 6)* [2005] 1 AC 610) **the steps in paragraphs 33 to 35 should also be followed in civil proceedings**, including those involving special advocates. The procedure will be different only in two respects. First, we will be engaging with the Home Office (or other interested department), TSol and counsel for the Secretary of State, rather than with the CPS and prosecuting counsel. Secondly, in the event that LPP material needs to be reviewed by an independent lawyer not involved in the case, it should go to a suitable lawyer within the department which is party to the proceedings (eg a HOLAB lawyer), or TSol, or if appropriate to independent counsel instructed by them.

**Where can I find the background to the Service's rules on handling LPP material?**

38. There is previous guidance relating to the handling of material subject to LPP.

Legal Advisers  
January 2014\*\*

\*\*\*From the context it is evident that the reference to “all cases” is intended to refer to SIAC/TPIM cases” – 29.10.14

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<sup>i</sup> In the original document the headings in bold are also underlined, the underlining has been removed to avoid confusion with the gists.

<sup>ii</sup> Apart from an amended cross-reference in the summary at the beginning and the insertion of a date at the end, this is the same as the policy at Exhibit 1.

\* The first word of this paragraph is underlined in the original document.

\* This date does not appear in the original document.

[Exhibit 3] – Please note that paragraph numbers have been inserted and do not necessarily reflect the original documents.

The underlined parts of this document indicate that it has been gisted for  
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## **Annex B: Official Guidance on the Handling Arrangements for LPP material (for all Service Officers)**

The aim of this policy is to provide guidance to Service staff on how to recognize and handle material subject to legal professional privilege ("LPP material").

### **Audience**

All Service staff who may handle LPP material.

### **Principles**

This guidance explains the purpose and importance of LPP, explains the handling arrangements for LPP material that apply within the Service, and sets out the circumstances in which the Service may use and disclose LPP material.

### **Summary**

This document sets out the Service's arrangements for handling material subject to legal professional privilege (LPP).

### **Legal Professional Privilege**

2. The purpose of LPP is to ensure that individuals can consult a lawyer in confidence without fear that what they or the lawyer says or writes will later be used against them in court. LPP is therefore fundamental to the rights to privacy and a fair trial, and to the rule of law. The way it operates is to prevent certain communications from being used in evidence or disclosed to the other side in legal proceedings. The protected communications are (a) those between a lawyer and his client or the client's representative for the purpose of giving legal advice and (b) those between a lawyer, his client or the client's representative and any other person in connection with and for the purposes of legal proceedings.

### **Handling of LPP material**

3. There is no bar on LPP material being reported to desks, but to ensure that it is treated as the law requires, it may only be actioned or disclosed with LA approval. The Service's arrangements for handling LPP material are as follows:

4. Staff are issued with separate guidance to enable them to identify possible LPP material. Any material so identified is not reported straight to the desk<sup>1</sup>, but is first sent to LAs for assessment as to whether it is subject to LPP. If it is, they will caveat

[Exhibit 3] – Please note that paragraph numbers have been inserted and do not necessarily reflect the original documents.

the material with a stamp reading as follows:

WARNING

LEGALLY PRIVILEGED MATERIAL:

CONSULT LAs BEFORE TAKING ACTION

5. If the material is not subject to LPP, it will be annotated to that effect. The material is then returned by the LAs to be sent on to the desk.

6. Any material caveated as LPP, may not be acted upon without LA approval. "Action" for this purpose includes disclosure to an outside body.

### **Other Material**

7. Desks will sometimes receive material which has not yet been examined for LPP purposes.

8. In deciding whether to seek LA advice, desk officers should apply the following test: Could the material be a communication, or a record of a communication -

(a) to which a lawyer (e.g. a solicitor or barrister) is a party; or

(b) which has been sent, received or made in connection with legal proceedings (whether already under way or in contemplation)?

9. If a desk officer receives material which satisfies this test (and has not already been examined for LPP purposes), they should forward it to legal advisors to caveat or annotate it as appropriate. The material will then be returned to the desk.

### **RIPA/ISA Codes of Practice**

10. The codes of practice under RIPA and the Intelligence Services Act impose a number of additional safeguards in relation to LPP material, over and above those which apply to the handling of ordinary private information. These include -

- a strict definition of the circumstances in which an application may be made for an interception or intrusive surveillance warrant, or a directed surveillance or CHIS authorisation, which is likely to result in the acquisition of LPP material;

- a requirement, in certain circumstances, for enhanced authorisation from the Secretary of State before eavesdropping on legal consultations or tasking a CHIS to report LPP information.

- a requirement to notify the Interception Commissioner or the Intelligence Services Commissioner (as appropriate) of any case in which a lawyer is the subject of a warrant or authorisation; and

- a requirement to report to the relevant Commissioner all cases in which LPP or other confidential material is reported and/or disseminated to an outside body.

11. Desk officers should make themselves familiar with the provisions of the codes of practice. They should seek management or LA advice if they are in doubt as to how these provisions apply.

[Exhibit 3] – Please note that paragraph numbers have been inserted and do not necessarily reflect the original documents.

### **What restrictions apply to the use of LPP material?**

12. In principle, and subject to the normal requirements of necessity and proportionality, LPP material may be used just like any other item of intelligence, e.g. to generate enquiries, mount a surveillance operation or task an agent. Where necessary and proportionate it may also be disclosed to an outside body. The only restriction is the requirement for LA approval before any such action is taken or disclosure is made. This is due to the particular sensitivity attaching to LPP material, and the need to test thoroughly the justification for any proposed use of it. When considering a request for approval, LAs will be concerned in particular to check –

- that the action is justified under the terms of the Security Service Act, any handling arrangements applying to the type of material in question (where the material was obtained under a warrant), and the applicable statutory code of practice;
- that the use which will be made of the LPP material is proportionate to the object to be achieved and consistent with the purpose of LPP protection (i.e. there is no risk of prejudicing the fairness of legal proceedings); and
- where the action will involve disclosure of the material, that the disclosure will be kept to the necessary minimum and made subject to appropriate caveats as regards access, handling and action on.

13. It follows that LA approval is more likely to be given if the proposed action will not involve disclosure of the LPP material itself.

### **Conclusion**

14. If the Service is to meet its legal responsibilities it is essential that LPP material is promptly identified and handled in accordance with the arrangements set out above. So please -

- be alert to the possibility that your desk will receive LPP material which has not yet been identified; and
- ensure that you seek LA advice before taking action on identified LPP material.

15. Further guidance on LPP matters can be sought from any of the LAs.

Legal Adviser, 29 July 2011

1 Unless the urgency of the case requires it, in which case the material is sent directly to the desk with the temporary caveat, "WARNING: Potentially LPP material - consult LAs before taking action" and, in tandem, sent to LAs for assessment.

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<sup>i</sup> In the original document the headings in bold are also underlined, the underlining has been removed to avoid confusion with the gists.

[Exhibit 4] – Please note that paragraph numbers have been inserted and do not necessarily reflect the original documents.

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### **Annex C: PROCEDURE FOR HANDLING MATERIAL THAT MAY BE SUBJECT TO LPP AND/OR CONFIDENTIAL MATERIAL - ADVICE FOR INTELLIGENCE ANALYSTS**

If you believe that your conversation may contain either LPP or Confidential Material, there is a certain procedure that must be followed.

#### **DEFINITION AND PURPOSE OF (LPP)**

##### **Legal Professional Privilege**

1. The purpose of LPP is to ensure that individuals can consult a lawyer in confidence without fear that what they or the lawyer says or writes will later be used against them in court. LPP is therefore fundamental to the rights to privacy and a fair trial, and to the rule of law. The way it operates is to prevent certain communications from being used in evidence or disclosed to the other side in legal proceedings.

**You should normally refer any material which appears to contain discussion of legal proceedings or the substance of any legal advice.** Proceedings may include prosecution for any offence, civil action such as seeking legal redress for a grievance or relating to family law, immigration and specialist proceedings such as SIAC or measures such as TPIMs. (This is not however a definitive list.) Additionally LAs have asked that we refer any conversation between the following:

(a) those between a lawyer and his client or the client's representative for the purpose of giving legal advice

(b) those between a lawyer, his client or the client's representative and any other person in connection with and for the purposes of legal proceedings.

NB: If you ascertain that one of the speakers is a Lawyer or a representative of a Law firm please mention this as a comment in your transcript. In doing so this will ensure your transcript is dealt with efficiently and quickly by the LAs.

The trigger for referral should be the content of the discussion but you should err on the side of caution, the LAs would rather see material when you are in doubt. There is no bar on LPP material ultimately being reported to investigators within the Service but it must be treated in accordance with RIPA and the Codes of Practice. Therefore it must only be actioned or disclosed further with the prior approval of the LAs.

[Exhibit 4] – Please note that paragraph numbers have been inserted and do not necessarily reflect the original documents.

[May 2008]

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<sup>i</sup> In the original document the headings in bold are also underlined, the underlining has been removed to avoid confusion with the gists.

[Exhibit 5] – Please note that paragraph numbers have been inserted and do not necessarily reflect the original documents.

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**Guidance for Counsel/External lawyers reviewing Security Service material: Guidance relating to LPP material**

1. LPP material may be generated in the course of an investigation and may be included in the material that is made available for review, as there is no way of separating it from the corporate record.
2. You should be able to clearly identify the existence of any LPP material. In the case of paper files, documents should be marked (at the top of the document) with a caveat which states the following:

**WARNING: CONTAINS LEGALLY PRIVILEGED/CONFIDENTIAL MATERIAL. CONSULT A LEGAL ASSISTANT BEFORE TAKING ACTION.**

In the case of the electronic Counsel viewing tools, LPP material should be labelled as such in the subject bar for that individual document (if opened, the document will also contain the LPP caveat at the top as for paper documents).

3. Should you identify any LPP material, please **do not review it** but please **make a note of** its serial number/location. If the material is held on an electronic viewing tool, please mark it with an electronic flag and make a note of the reference. This will enable any LPP material to be collated by the relevant Service LA for subsequent review.
4. The material will initially be reviewed by a Service LA, but if necessary (i.e. if the material is potentially relevant to the issues in the proceedings), the LA will arrange for it to be reviewed by an independent lawyer (e.g. a CPS lawyer not instructed in the case, different Counsel).
5. This procedure has been specifically approved. If you consider that a different approach should be taken in your case, the Service will need to consult them before you do so.

[May 2012]\*

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<sup>i</sup> In the original document the heading in bold are also underlined, the underlining has been removed to avoid confusion with the gists.

\* This date does not appear on original document.

[Exhibit 6] – Please note that paragraph numbers have been inserted and do not necessarily reflect the original documents.

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## **How Do I Deal with Material Subject to Legal Professional Privilege (LPP)?**

### **Summary of key points**

- **This guidance is to assist Service lawyers called upon to advise in relation to potential LPP material after it is acquired, or which may need to be acted upon or may be relevant to legal proceedings.**
- **The definition of LPP is below. However, it may be difficult to be certain whether the definition applies to any particular material and you should therefore adopt a precautionary approach (see paras 8-9).**
- **LPP material should be marked with the LPP caveat and entered on the Commissioners' log. LPP parts of a mixed document should be specifically identified where practicable. Non-LPP material should also be marked as such (full procedure set out at para 13).**
- **Decisions on action on/disclosure should be taken at senior management level or above, and with advice from a legal advisor (see paras 19-22).**
- **LPP material should not be read by external lawyers/counsel. If LPP material may be relevant to criminal or civil proceedings, you may need to reveal it to an independent lawyer for advice (see paras 29-34).**

### **Introduction**

1. Material subject to LPP is amongst the most sensitive sorts of information that may be obtained by the Security Service. The confidentiality of lawyer-client communications is fiercely guarded by the law and any departure from it in the national security context must be narrowly construed and strictly justified. This guidance is intended to assist you in advising on LPP matters. In cases of doubt or difficulty, please ensure you consult senior legal advisors.
2. The Service may obtain, retain or disclose LPP material only so far as necessary and proportionate for the proper discharge of its functions, in accordance with section 2(2)(a) of the Security Service Act 1989. For the application of these requirements, see the Director General's Arrangements made under section 2(2)(a), which can be found through a separate link. The sensitivity of LPP material is such that you should take particular care to ensure that the requirements of section 2(2)(a) are met in relation to it.
3. In preparation for advising on LPP matters you should also familiarise yourself with the relevant provisions of the RIPA Codes of Practice and the



[Exhibit 6] – Please note that paragraph numbers have been inserted and do not necessarily reflect the original documents.

Service's arrangements for handling LPP material available on a separate link.

4. This guidance does not cover other forms of confidential information.

#### **When might I need to think about LPP?**

5. In the course of your time as a legal adviser to the Service you are likely to be asked to advise whether a particular piece of intelligence attracts LPP. You will normally receive the intelligence in an e-mail from a legal assistant, who distribute LPP advisory work evenly between the lawyers.
6. You will also need to think about LPP when you are dealing with a case in which material needs to be reviewed for disclosure purposes (e.g. in a criminal prosecution or Control Order proceedings) and the material may include material subject to LPP.
7. This guidance does not cover the situation where you are asked to advise on the legal implications of applying for a RIPA authorisation/warrant in a case in which LPP material may be generated. If you are asked to advise in such a case you should consult the applicable RIPA Code of Practice and relevant Service guidance available on a separate link.

#### **What should I do if I'm asked to determine whether material is subject to LPP?**

8. Whatever the source of the intelligence, you need to consider whether it falls within the definition of LPP (see below). Whilst you should of course seek to provide definitive advice, your lack of detailed knowledge of the context of the intelligence may mean that it is impossible for you to be certain whether the intelligence is or is not privileged. In such cases, you should seek additional context from the desk (and, where relevant, the transcriber). If after doing so you remain unsure, the sensitivity of the subject matter is such that you should adopt a precautionary approach and mark the material as LPP, given the potentially grave repercussions of getting the decision wrong (e.g. a successful abuse of process argument at a trial in which the material is relevant). As the RIPA Codes and the Service's arrangements for handling LPP material make clear, marking the material as LPP does not mean that it cannot be acted upon or disclosed, but **it does mean that the legal advisors will be consulted before this happens** so that we can ensure that nothing inappropriate is done with the material.
9. Where, therefore, an individual appears to be discussing the legal advice he has sought or received with an associate who is not a lawyer, the conversation should be **presumed to be legally privileged** and should be treated as such.

#### **Where will I find the definition of LPP?**

10. LPP is defined in section 10 of the Police and Criminal Evidence Act 1984 to cover:

[Exhibit 6] – Please note that paragraph numbers have been inserted and do not necessarily reflect the original documents.

- (a) *communications between a professional legal adviser and his client or any person representing his client made in connection with the giving of legal advice to the client;*
- (b) *communications between a professional legal adviser and his client or any person representing his client or between such an adviser or his client or any such representative and any other person made in connection with or in contemplation of legal proceedings and for the purposes of such proceedings; and*
- (c) *items enclosed with or referred to in such communications and made-*
  - (i) *in connection with the giving of legal advice; or*
  - (ii) *in connection with or in contemplation of legal proceedings and for the purposes of such proceedings, when they are in the possession of a person who is entitled to possession of them.*

11. It will usually be sufficient to have regard to this statutory definition, which is broad and comprehensive. If you need to look at the law more closely, then consult the LPP section of Archbold (criminal proceedings) or the White Book (civil proceedings). Passmore on Privilege is also a useful aid. These books set out the recent caselaw, which you can then look up in more detail.

**Suppose a document contains material which I decide is subject to LPP and also other material that, standing alone, would not be privileged. What should I advise?**

12. Where a document contains both LPP and non-LPP material, the Service's arrangements for handling LPP material will apply only to the former. It will not always be practicable to segregate the LPP parts (it may, for example, be difficult and onerous to do so in the case of a conversation peppered with legal advice), in which case the whole item should be treated as privileged; specific legal advice can subsequently be given in the event that action or disclosure is contemplated in relation to some part of the material. But where it is practicable to segregate, the caveat and the entry in the log of confidential information should clearly identify the part of the document to which it relates. Also action on or disclosure of the non-LPP material should be carried out in a way that protects the confidentiality of the lawyer-client relationship.

**What should I do if I decide that material is subject to LPP?**

13. The usual scenario is that you will receive an e-mail from a Security Service officer asking for advice on whether an attached document, often a transcript of a telephone call, contains LPP or other confidential material. You should:
  - (a) Assess the contents of the document to determine whether it contains such material.
  - (b) Send a reply to the legal assistant **and** the transcriber or other originator with the following information:
    - **If the document contains LPP/confidential material** – inform the originator that it contains LPP/confidential material. Cut and paste the relevant caveat into your response remembering to include your email. Don't forget to amend the caveat as appropriate, and include any other comments that you want to

[Exhibit 6] – Please note that paragraph numbers have been inserted and do not necessarily reflect the original documents.

make. If only part of the document is subject to LPP, then you should clearly mark this, e.g. by bracketing the relevant part of the document and adding a comment explaining the significance of the brackets and why you have inserted them.

- **If the document does not contain LPP/confidential material** – cut and paste the relevant ‘caveat’ into the document to indicate that this is the case. This is to indicate that the material has been assessed by the legal advisors and so to avoid duplication.
- (c) Where you have identified LPP/confidential material, you should **complete the log of confidential information**. You should explain what it is that you have examined and make any notes that are necessary to explain your decision (e.g. the document is a transcript of a telephone call and the transcriber told you that one of the parties is a lawyer, but this is not apparent from the transcript itself).
- (d) If you receive an email from the legal assistant which does not contain all the details necessary to complete the log of confidential material, you should either inform them, who will request the missing details from the originator, or request the details directly yourself.

**Should I decline to consider material for LPP and instead pass it to a colleague if I am advising on a matter to which the material relates?**

14. No. Lawyers advised in March 2011 that there is no requirement to erect internal ‘Chinese walls’ between the lawyers for this purpose. They gave two reasons: first, the number and structure of the Service’s lawyers is not conducive to a complete separation of functions and, secondly, a degree of separation already exists in the fact that Service lawyers will not normally be instructing counsel directly (instructions usually being given by CPS, TSoI or another department), which guards against any LPP material inadvertently being used to give the Service an advantage in litigation.

**Are there any circumstances in which LPP material should not be reported to the desk officer?**

15. Yes. **If it is clear that LPP material cannot be of intelligence value, or that the reporting of it would be clearly disproportionate, then you should inform the originator** (usually the transcribers in these circumstances) **and destroy the material**. It will usually be advisable to **consult the desk** before reaching such a conclusion. You must be especially careful where the material contains communications between a target and their lawyer about proceedings or prospective proceedings in which the Service is or will be involved. In such cases, the desk should have the material only if there is a clear intelligence reason for it to do so, as it is important that the Service is not open to criticism for using covert methods to gain an advantage in legal proceedings.
16. **If you are not sure** whether material is of intelligence value or whether its reporting is proportionate, you should **proceed cautiously**. Speak to the desk officer with responsibility for the investigation and reveal just enough information about the intelligence to enable the desk officer to determine whether the material is likely to be of intelligence value. If this is impracticable, you may need to ask the desk officer to come to see you and read the material and satisfy you that there is a sufficient intelligence

[Exhibit 6] – Please note that paragraph numbers have been inserted and do not necessarily reflect the original documents.

justification for the material to be kept. Only send the material to the desk or allow it to be kept if you judge that an intelligence reason for doing so has been made out. It may be prudent to annotate the log of confidential material giving the reason why it has been retained (if this is not obvious).

17. **The log of confidential material should be completed whenever you assess that material is legally privileged**, irrespective of whether the material is subsequently passed to the desk or destroyed. The record on the log should include any decision taken to destroy the material.

#### **How quickly should I process LPP material?**

18. Routine material should be processed within (X) and urgent material should be turned around within (X), or earlier if required.

#### **What if I am asked whether LPP material can be acted upon or disclosed - when can I advise this is appropriate?**

19. It is vital that the confidentiality of lawyer-client communications is respected to the maximum extent possible consistent with national security requirements, and that nothing is done with LPP material which would either undermine the integrity of legal proceedings or breach Article 8 ECHR.
20. Thus when a desk officer asks whether LPP material can be disclosed to an outside agency, in advising on the requirements of section 2(2)(a) of the Security Service Act 1989 you should consider the following:
  - Is the proposed disclosure necessary for the protection of national security, or for another purpose specified in section 2(2)(a)?
  - Is it proportionate to the national security (etc) aim?
  - Will the disclosure be limited as far as possible so that the minimum amount of LPP material will be disclosed to the minimum number of people?
  - Will appropriate caveats be placed on the material? You will need to consider whether the material should be specifically caveated as subject to LPP. This is usually appropriate in order to minimise the risk of further dissemination, which might result in people involved in the legal proceedings subsequently having access to the material. So the material will usually need to be subject to the LPP caveat and the caveat that no action may be taken on it nor further disclosure made without the Service's authorisation. You should also consider whether the material needs any other caveats (e.g. is it subject to the Handling Arrangements for intercept product?)
21. In order to protect the integrity of any legal proceedings, then unless the circumstances are highly exceptional, LPP material related to a criminal investigation should not be disclosed to police officers involved in that investigation, in order not to prejudice future legal proceedings or give rise to Article 6 arguments, an abuse of process application etc. It follows from this that action on or disclosure is more likely to be acceptable if it does not involve disclosure of the LPP material itself. In this sort of case, the desk may need to disclose to a police officer who is not involved in the investigation and ask his/her advice on whether it is possible for the material

[Exhibit 6] – Please note that paragraph numbers have been inserted and do not necessarily reflect the original documents.

to be actioned by someone outside of the investigation, or handled in some other way that is consistent with the purpose of the disclosure.

22. **Decisions on action on or disclosure should be made at senior management level, or higher where the sensitivity or difficulty of the case warrants it, and always in consultation with a legal advisor.** Any decision to disclose or take action should be recorded on the log of confidential material. This will require the desk to notify you when the material is disclosed so that you can complete the log. It will be prudent to include a brief justification in the entry.

#### **Can you give me an example?**

23. For example, if an individual who is investigated by the Service is the subject of criminal proceedings, and in course of investigation the Service intercepts a forensic report prepared for the purpose of those proceedings then it might be justifiable to put information from that report into the Service's database for future use in intelligence investigations. However, this information would not be passed onto the police, in case they use it to gather further evidence or direct their own forensic experts in such a way as to refute the defence expert. In other words the Service mustn't use LPP material in a way that gives the appearance of enabling the State to gain an unfair advantage in current or future court proceedings.
24. Depending on the circumstances, this may be a difficult judgement to make and it may be prudent to discuss the options available in this type of case with other legal advisors, particularly those who have had prosecution experience, before giving your advice. In cases of doubt or difficulty, you should consult or inform the senior legal advisors.

#### **Can we use legally privileged intelligence as evidence in legal proceedings, for example in a control order case?**

25. We must not, under any circumstances, seek to rely on legally privileged material in evidence in legal proceedings. Doing so where the LPP belongs to the other party to the proceedings would be incompatible with Article 6 and could result in proceedings being stayed as an abuse of process. In the case of LPP material belonging to a third party, it would be highly likely to be both inadmissible and incompatible with Article 8.
26. It does not follow from this that desks may not take legally privileged material into account in forming their intelligence assessments. They may do so, and indeed should, to the full extent that the intelligence is relevant. But they should be warned that, should those assessments later need to be relied upon in legal proceedings, they will be unable to pray in aid the legally privileged material, nor even make any reference to it. This could well result in adverse findings in respect of Service assessments and knock-on consequences for the proceedings and possibly the Service's reputation.
27. While the Service has little choice as to the assessments on which it may need to rely when defending a civil claim, the choice is greater when it comes to building a control order or SIAC case. Lawyers advising in such cases will wish to consider carefully with Counsel the risks and benefits of using any assessment derived partly from LPP intelligence. In all cases, the lawyers

[Exhibit 6] – Please note that paragraph numbers have been inserted and do not necessarily reflect the original documents.

and desk officers will need to ensure that no LPP material is relied upon or referred to in any submission, witness statement or supporting evidence\*\*\*.

28. SVAP appeals are somewhat different. These are not legal proceedings and there is an argument that LPP material which may have formed the basis for a vetting decision may be considered by the Panel. This argument is, however, untested and so caution should be exercised in considering whether to base a vetting decision or recommendation on LPP material. If there is any proposal to rely on such material before SVAP, senior legal advisors should be informed and consideration given to instructing counsel to advise.

**What should I do if a piece of LPP material needs to be considered for disclosure purposes?**

29. When a desk officer files a piece of LPP material on a paper or electronic file, it will be retained on the same basis as any other piece of intelligence. If the file then comes to be reviewed for the purpose of legal proceedings, e.g. by the CPS and/or prosecuting counsel, or by counsel for the Secretary of State in Control Order proceedings, then the LPP material will be seen by them unless steps are taken to remove it or warn them of its possible existence. Where the quantity of material to be revealed is relatively small, it may be practicable to identify and physically remove any LPP documents. If so, this should be done first. Please ensure that you follow the steps set out below for the different types of legal proceedings if it is possible that LPP material may be found on the files.

**Criminal proceedings**

30. Counsel (QC and QC) have advised the fundamental importance of neither prosecuting counsel nor the CPS (or other prosecuting authority) lawyer with conduct of a prosecution reading legally privileged material with any possible connection to the proceedings. Counsel/CPS conducting a review of our material for the purposes of their disclosure obligations should therefore be briefed as follows before they start their review, and a record should be made that the briefing has been given:

**(i) How to recognise immediately such legally privileged material in the file or through the IT viewing tool; and how not to confuse it with other categories of confidential material.**

**(ii) Not to read the material once identified, because of the Article 6 ECHR and other risks and consequences associated with doing so.<sup>ii</sup>**

**(iii) To make a note of the serial numbers of the documents marked as LPP. In the case of electronic documents viewed through the IT viewing tool, counsel/CPS should be instructed to give LPP documents a unique red electronic flag. This will enable LPP material to be collated by the legal assistants for subsequent review (see below).**

31. In the unlikely event that prosecuting counsel is disinclined to follow our guidance, wishing instead to read any LPP material they come across, you should advise them of the legal advice that we have received.

[Exhibit 6] – Please note that paragraph numbers have been inserted and do not necessarily reflect the original documents.

32. Once the LPP material has been collated you should conduct a preliminary assessment of it. If you assess that any of the material has a bearing on the proceedings, or that there is a real possibility that it may do but you cannot be sure, then you should arrange for the material to be reviewed by an independent lawyer who is not otherwise involved in the case (eg another CPS CT Division lawyer). Review by an independent lawyer will not be necessary if you assess that there is no real possibility that the material has a bearing on the proceedings. You should consult a more senior lawyer (team leader or above) in difficult cases.
33. The purpose of a review by independent counsel is not to identify anything in the LPP material that might need to be disclosed to the defence: it is clear that such material is immune from disclosure where the privilege belongs to a third party (see *R v Derby Magistrates' Court, ex parte B* [1996] A.C. 487); and there can be no obligation to disclose defendant-privileged information, as he will already be aware of it. The purpose is instead twofold. First, it allows any non-privileged parts of a document containing some LPP material to be reviewed for disclosure purposes. Secondly, it enables an independent lawyer to identify anything in the privileged parts of the material which may undermine the prosecution case or assist the defence case, and to recommend what action should be taken in the interests of justice in order to ensure the fairness of the proceedings (e.g. by amendment of the prosecution case, or even, in an extreme case such as where a third party has revealed to his lawyer that he, rather than the defendant, had committed the offence, discontinuance of the prosecution).

**Civil proceedings (including SIAC, Control Order and other special advocate proceedings and tribunals)**

34. Since the near absolute nature of legal privilege applies in civil law as much as in criminal law (see *Three Rivers District Council v Bank of England (No. 6)* [2005] 1 AC 610) **the steps in the paragraphs above should also be followed in civil proceedings**, including those involving special advocates. The procedure will be different only in two respects. First, we will be engaging with the Home Office (or other interested department), TSol and counsel for the Secretary of State, rather than with the CPS and prosecuting counsel. Secondly, in the event that LPP material needs to be reviewed by an independent lawyer not involved in the case, it should go to a suitable lawyer within the department which is party to the proceedings (eg a HOLAB lawyer), or TSol, or if appropriate to independent counsel instructed by them.

**Where can I find the background to the Service's rules on handling LPP material?**

35. There is previous guidance relating to the handling of material subject to LPP.

Legal Advisers  
April 2011

\*\*\*From the context it is evident that the reference to "all cases" is intended to refer to SIAC/TPIM cases" – 29.10.14

[Exhibit 6] – Please note that paragraph numbers have been inserted and do not necessarily reflect the original documents.

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<sup>i</sup> In the original document the headings in bold are also underlined, the underlining has been removed to avoid confusion with the gists.

<sup>ii</sup> The first word of this paragraph is underlined in the original document.



[Exhibit 7] – Please note that paragraph numbers have been inserted and do not necessarily reflect the original documents.

The underlined parts of this document indicate that it has been gisted for  
OPEN!

## **How Do I Deal with Material Subject to Legal Professional Privilege (LPP)?**

### **Summary of key points**

- **This guidance is to assist Service lawyers called upon to advise in relation to potentially LPP material after it is acquired, or which may need to be acted upon or may be relevant to legal proceedings.**
- **The definition of LPP is at para 10. However, it is often difficult to be certain and you should therefore adopt a precautionary approach (see paras 8-9).**
- **LPP material should be marked with the LPP caveat and entered on the Commissioners' log. LPP parts of a mixed document should be specifically identified where practicable. Non-LPP material should also be marked as such (full procedure set out at para 13).**
- **Where you are advising the Service in relation to ongoing legal proceedings, you should not assess material relating to a person who is, or is likely to be, involved in those proceedings. To this end, the legal assistant maintains a table of current proceedings and must be advised of any new proceedings as well as the termination of current proceedings. (See paras 14-15).**
- **Decisions on action on/disclosure should be taken at senior management level or above, and with advice from a legal advisor (see paras 20-23).**
- **LPP material should not be read by external lawyers/counsel in the case. Where any LPP material is considered likely to be relevant to the proceedings, you should consider revealing it to independent counsel/lawyer instead (see paras 30-34).**

### **Introduction**

1. Material subject to LPP is amongst the most sensitive sorts of information that may be obtained by the Security Service. The confidentiality of lawyer-client communications is fiercely guarded by the law and any departure from it in the national security context must be narrowly construed and strictly justified. This guidance is intended to assist you in advising on LPP matters. In cases of doubt or difficulty, please ensure you consult senior legal advisors.
2. The Service may obtain, retain or disclose LPP material only so far as necessary and proportionate for the proper discharge of its functions, in accordance with s.2(2)(a) of the Security Service Act 1989. For the

[Exhibit 7] – Please note that paragraph numbers have been inserted and do not necessarily reflect the original documents.

application of these requirements, see the Director General's Arrangements made under s.2(2)(a), which can be found through [a separate link](#). The sensitivity of LPP material is such that you should take particular care to ensure that the requirements of s.2(2)(a) are met in relation to it.

3. In preparation for advising on LPP matters you should also familiarise yourself with the relevant provisions of the RIPA Codes of Practice and the Service's arrangements for handling LPP material [available on a separate link](#).
4. This guidance does not cover other forms of confidential information.

### **When might I need to think about LPP?**

5. In the course of your time as a legal adviser to the Service you are likely to be asked to advise whether a particular piece of intelligence attracts LPP. You will normally receive the intelligence in an e-mail from a [legal assistant](#), who distribute LPP advisory work evenly between the lawyers.
6. You will also need to think about LPP when you are dealing with a case in which material needs to be reviewed for disclosure purposes (e.g. in a criminal prosecution or Control Order proceedings) and the material may include material subject to LPP.
7. This guidance does not cover the situation where you are asked to advise on the legal implications of applying for a RIPA authorisation/warrant in a case in which LPP material may be generated. If you are asked to advise in such a case you should consult the applicable RIPA Code of Practice and relevant Service guidance [available on a separate link](#).

### **What should I do if I'm asked to determine whether material is subject to LPP?**

8. Whatever the source of the intelligence, you need to consider whether it falls within the definition of LPP (see below). Whilst you should of course seek to provide definitive advice, your lack of detailed knowledge of the context of the intelligence may mean that it is impossible for you to be certain whether the intelligence is or is not privileged. In such cases, you should seek additional context from the desk (and, where relevant, the transcriber). If after doing so you remain unsure, the sensitivity of the subject matter is such that you should adopt a precautionary approach and mark the material as LPP, given the potentially grave repercussions of getting the decision wrong (e.g. a successful abuse of process argument at a trial in which the material is relevant). As the RIPA Codes and the Service's arrangements for handling LPP material make clear, marking the material as LPP does not mean that it cannot be acted upon or disclosed, but **it does mean that LAs will be consulted before this happens** so that we can ensure that nothing inappropriate is done with the material.
9. Where, therefore, an individual appears to be discussing the legal advice he has sought or received with an associate who is not a lawyer, the conversation should be **presumed to be legally privileged** and should be treated as such.

[Exhibit 7] – Please note that paragraph numbers have been inserted and do not necessarily reflect the original documents.

### **Where will I find the definition of LPP?**

10. LPP is defined in section 10 of the Police and Criminal Evidence Act 1984 to cover:
  - (a) *communications between a professional legal adviser and his client or any person representing his client made in connection with the giving of legal advice to the client;*
  - (b) *communications between a professional legal adviser and his client or any person representing his client or between such an adviser or his client or any such representative and any other person made in connection with or in contemplation of legal proceedings and for the purposes of such proceedings; and*
  - (c) *items enclosed with or referred to in such communications and made-*
    - (i) *in connection with the giving of legal advice; or*
    - (ii) *in connection with or in contemplation of legal proceedings and for the purposes of such proceedings,**when they are in the possession of a person who is entitled to possession of them.*
11. It will usually be sufficient to have regard to this statutory definition, which is broad and comprehensive. If you need to look at the law more closely, then consult the LPP section of Archbold (criminal proceedings) or the White Book (civil proceedings). Passmore on Privilege is also a useful aid. These books set out the recent caselaw, which you can then look up in more detail.

### **Suppose a document contains material which I decide is subject to LPP and also other material that, standing alone, would not be privileged. What should I advise?**

12. Where a document contains both LPP and non-LPP material, the Service's arrangements for handling LPP material will apply only to the former. It will not always be practicable to segregate the LPP parts (it may, for example, be difficult and onerous to do so in the case of a conversation peppered with legal advice), in which case the whole item should be treated as privileged; specific legal advice can subsequently be given in the event that action or disclosure is contemplated in relation to some part of the material. But where it is practicable to segregate, the caveat and the entry in the log of confidential information should clearly identify the part of the document to which it relates. Also action on or disclosure of the non-LPP material should be carried out in a way that protects the confidentiality of the lawyer-client relationship.

### **What should I do if I decide that material is subject to LPP?**

13. The usual scenario is that you will receive an e-mail from a Security Service officer asking for advice on whether an attached document, often a transcript of a telephone call, contains LPP or other confidential material. You should:
  - (a) Assess the contents of the document to determine whether it contains such material.

[Exhibit 7] – Please note that paragraph numbers have been inserted and do not necessarily reflect the original documents.

- (b) Send a reply to the legal assistant **and** the transcriber or other originator with the following information:
- **If the document contains LPP/confidential material** – inform the originator that it contains LPP/confidential material. Cut and paste the relevant caveat into your response remembering to include your email. Don't forget to amend the caveat as appropriate, and include any other comments that you want to make. If only part of the document is subject to LPP, then you should clearly mark this, e.g. by bracketing the relevant part of the document and adding a comment explaining the significance of the brackets and why you have inserted them.
  - **If the document does not contain LPP/confidential material** – cut and paste the relevant 'caveat' into the document to indicate that this is the case. This is to indicate that the material has been assessed by the legal advisors and so to avoid duplication.
- (c) Where you have identified LPP/confidential material, you should **complete the log of confidential information**. You should explain what it is that you have examined and make any notes that are necessary to explain your decision (e.g. the document is a transcript of a telephone call and the transcriber told you that one of the parties is a lawyer, but this is not apparent from the transcript itself).
- (d) If you receive an email from the legal assistant which does not contain all the details necessary to complete the log of confidential material, you should either inform them, who will request the missing details from the originator, or request the details directly yourself.

**Are there circumstances in which I should decline to consider LPP and instead pass the material to a colleague?**

14. Yes. It is important that you do not assess for LPP any material relevant to legal proceedings on which you are advising the Service (whether criminal, civil or other proceedings). For example, if you are dealing with the disclosure issues arising in a criminal prosecution, then another lawyer should be asked to advise whether that target's intercepted communications may be subject to LPP. The purpose of this "Chinese wall" is to guard against exposure to information which might give you (and thus arguably the prosecution) an unfair advantage, e.g. by knowing something about the target's possible defence. The procedure applies from when proceedings are initiated; there is no reason why a lawyer advising desk officers, say, in relation to an investigation should not review for LPP material relating to that investigation, even if it is anticipated that the investigation may result in proceedings.
15. The legal assistant keeps a table listing current proceedings and the Service lawyer dealing with them. The legal assistants use this to ensure that material is not passed to a lawyer involved in any proceedings with which the subject is known to be connected. **Lawyers must ensure that this table is kept up-to-date.** The legal assistants should therefore be informed as soon as you become aware that proceedings have been initiated, or sooner if you have advance warning.

**Are there any circumstances in which LPP material should not be passed on to the intelligence desk?**

[Exhibit 7] – Please note that paragraph numbers have been inserted and do not necessarily reflect the original documents.

16. Yes. **If it is clear that LPP material cannot be of intelligence value then you should inform the originator** (usually the transcribers in these circumstances) **and destroy the material**. You must be especially careful where the material contains communications between a target and their lawyer about proceedings or prospective proceedings in which the Service is or will be involved. In such cases, the desk should have the material only if there is a clear intelligence reason for it to do so, as it is important that the Service is not open to criticism for using covert methods to gain an advantage in legal proceedings.
17. If you are not sure whether material is of intelligence value, you should proceed cautiously. Speak to the desk officer with responsibility for the investigation and reveal just enough information about the intelligence to enable the desk officer to determine whether the material is likely to be of intelligence value. If this is impracticable, you may need to ask the desk officer to come to see you and read the material and satisfy you that there is an intelligence reason for the material to be kept. Only send the material to the desk or allow it to be kept if you judge that an intelligence reason for doing so has been made out. It may be prudent to annotate the LPP giving the reason why it has been retained (if this is not obvious).
18. **The log of confidential material should be completed whenever you assess that material is legally privileged**, irrespective of whether the material is subsequently passed to the desk or destroyed. The record on the log should include any decision taken to destroy the material.

#### **How quickly should I process the LPP material?**

19. Routine material should be processed within (X) and urgent material should be turned around within (X), or earlier if required.

#### **What if I am asked whether LPP material can be acted upon or disclosed - when can I advise this is appropriate?**

20. It is vital that the confidentiality of lawyer-client communications is respected to the maximum extent possible consistent with national security requirements, and that nothing is done with LPP material which may undermine the integrity of legal proceedings.
21. Thus when a desk officer asks whether LPP material can be disclosed to an outside agency, in advising on the requirements of section 2(2)(a) of the Security Service Act 1989 you should consider:
  - Will the proposed disclosure be limited as far as possible so that the minimum amount of LPP material will be disclosed to the minimum number of people?
  - Will appropriate caveats be placed on the material? You will need to consider whether the material should be specifically caveated as subject to LPP. This is usually appropriate in order to minimise the risk of further dissemination, which might result in people involved in the legal proceedings subsequently having access to the material. So the material will usually need to be subject to the LPP caveat and the caveat that no

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action may be taken on it nor further disclosure made without the Service's authorisation. You should also consider whether the material needs any other caveats (e.g. is it subject to the Handling Arrangements for intercept product?)

22. In order to protect the integrity of any legal proceedings, then unless the circumstances are highly exceptional, LPP material related to a criminal investigation should not be disclosed to police officers involved in that investigation, in order not to prejudice future legal proceedings or give rise to Article 6 arguments, an abuse of process application etc. It follows from this that action on or disclosure is more likely to be acceptable if it does not involve disclosure of the LPP material itself. In this sort of case, the desk may need to disclose to a police officer who is not involved in the investigation and ask his/her advice on whether it is possible for the material to be actioned by someone outside of the investigation, or handled in some other way that is consistent with the purpose of the disclosure.
23. **Decisions on action on or disclosure should be made at senior management level, or higher where the sensitivity or difficulty of the case warrants it, and always in consultation with a legal advisor.** Any decision to disclose or take action should be recorded on the log of confidential material. This will require the desk to notify you when the material is disclosed so that you can complete the log. It will be prudent to include a brief justification in the entry.

#### **Can you give me an example?**

24. For example, if an individual who is investigated by the Service is the subject of criminal proceedings, and in course of investigation the Service intercepts a forensic report prepared for the purpose of those proceedings then it might be justifiable to put information from that report into the Service's database for future use in intelligence investigations. However, this information would not be passed onto the police, in case they use it to gather further evidence or direct their own forensic experts in such a way as to refute the defence expert. In other words the Service mustn't use LPP material in a way that gives the appearance of enabling the State to gain an unfair advantage in current or future court proceedings.
25. Depending on the circumstances, this may be a difficult judgement to make and it may be prudent to discuss the options available in this type of case with other legal advisors, particularly those who have had prosecution experience, before giving your advice. In cases of doubt or difficulty, you should consult or inform the senior legal advisors.

#### **Can we use legally privileged intelligence as evidence in legal proceedings, for example in a control order case?**

26. We must not, under any circumstances, seek to rely on legally privileged material in evidence in legal proceedings. Doing so where the LPP belongs to the other party to the proceedings would be incompatible with Article 6 and could result in proceedings being stayed as an abuse of process. In the case of LPP material belonging to a third party, it would be highly likely to be both inadmissible and incompatible with Article 8.

[Exhibit 7] – Please note that paragraph numbers have been inserted and do not necessarily reflect the original documents.

27. It does not follow from this that desks may not take legally privileged material into account in forming their intelligence assessments. They may do so, and indeed should, to the full extent that the intelligence is relevant. But they should be warned that, should those assessments later need to be relied upon in legal proceedings, they will be unable to pray in aid the legally privileged material, nor even make any reference to it. This could well result in adverse findings in respect of Service assessments and knock-on consequences for the proceedings and possibly the Service's reputation.
28. While the Service has little choice as to the assessments on which it may need to rely when defending a civil claim, the choice is greater when it comes to building a control order or SIAC case. Lawyers advising in such cases will wish to consider carefully with Counsel the risks and benefits of using any assessment derived partly from LPP intelligence. In all cases, the lawyers and desk officers will need to ensure that no LPP material is relied upon or referred to in any submission, witness statement or supporting material\*\*\*.
29. SVAP appeals are somewhat different. These are not legal proceedings and there is an argument that LPP material which may have formed the basis for a vetting decision may be considered by the Panel. This argument is, however, untested and so caution should be exercised in considering whether to base a vetting decision or recommendation on LPP material. If there is any proposal to rely on such material before SVAP, senior legal advisors should be informed and consideration given to instructing counsel to advise.

**What should I do if a piece of LPP material needs to be considered for disclosure purposes?**

30. When a desk officer files a piece of LPP material on a paper or electronic file, it will be retained on the same basis as any other piece of intelligence. If the file then comes to be reviewed for the purpose of legal proceedings, e.g. by the CPS and/or prosecuting counsel, or by counsel for the Secretary of State in Control Order proceedings, then the LPP material will be seen by them unless steps are taken to remove it or warn them of its possible existence. Where the quantity of material to be revealed is relatively small, it may be practicable to identify and physically remove any LPP documents. If so, this should be done first. Please ensure that you follow the steps set out below for the different types of legal proceedings if it is possible that LPP material may be found on the files.

**Criminal proceedings**

31. Counsel (QC) have confirmed the fundamental importance of neither prosecuting counsel nor the CPS (or other prosecuting authority) lawyer with conduct of a prosecution reading legally privileged material with any possible connection to the proceedings. Counsel/CPS conducting a review of our material for the purposes of their disclosure obligations should therefore be briefed as follows before they start their review, and a record should be made that the briefing has been given:
  - (i) **How to recognise immediately such legally privileged material in the file or through the IT viewing tool; and how not to confuse it with other categories of confidential material.**

[Exhibit 7] – Please note that paragraph numbers have been inserted and do not necessarily reflect the original documents.

**(ii) Not to read the material once identified, because of the Article 6 ECHR and other risks and consequences associated with doing so.**<sup>ii</sup>

**(iii) To make a note of the serial numbers of the documents marked as LPP. In the case of electronic documents viewed through the IT viewing tool, counsel/CPS should be instructed to give LPP documents a unique red electronic flag.** This will enable LPP material to be collated by the legal assistants for subsequent independent review (see below).

32. Once the LPP material has been collated, it will normally be appropriate to have it reviewed by an independent lawyer who is not otherwise involved in the case (eg another CPS CT division lawyer), *unless* it is clear from a preliminary assessment of the material that it is manifestly immaterial to any issue in the case. This preliminary assessment should be conducted by a legal advisor, though, for reasons given above, not the legal advisor who is dealing with the Service's interest in the prosecution.
33. The purpose of a review by independent counsel is not to identify anything in the LPP material that might need to be disclosed to the defence: it is clear that such material is immune from disclosure where the privilege belongs to a third party (see *R v Derby Magistrates' Court, ex parte B* [1996] A.C. 487); and there can be no obligation to disclose defendant-privileged information, as he will already be aware of it. The purpose is instead twofold. First, it allows any non-privileged parts of a document containing some LPP material to be reviewed for disclosure purposes. Secondly, it enables independent counsel to identify anything in the privileged parts of the material which may undermine the prosecution case or assist the defence case, and to recommend what action should be taken in the interests of justice in order to ensure the fairness of the proceedings (e.g. by amendment of the prosecution case, or even, in an extreme case such as where a third party has revealed to his lawyer that he, rather than the defendant, had committed the offence, discontinuance of the prosecution).

**Civil proceedings (including SIAC, Control Order and other special advocate proceedings and tribunals)**

34. Since the near absolute nature of legal privilege applies in civil law as much as in criminal law (see *Three Rivers District Council v Bank of England (No. 6)* [2005] 1 AC 610) **steps (i) to (iii) above should also be adopted in civil proceedings**, including those involving special advocates. The procedure will differ only in the fact that we will be engaging with the Home Office (or other interested department), Treasury Solicitors and counsel for the Secretary of State, rather than the CPS and prosecuting counsel.

**Where can I find the background to the Service's rules on handling LPP material?**

35. There is previous guidance relating to the handling of material subject to LPP.



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\*\*\*From the context it is evident that the reference to “all cases” is intended to refer to SIAC/TPIM cases” – 29.10.14

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<sup>i</sup> In the original document the headings in bold are also underlined, the underlining has been removed to avoid confusion with the gists.

<sup>ii</sup> The first word of this paragraph is underlined in the original document.

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[Exhibit 8] – Please note that paragraph numbers have been inserted and do not necessarily reflect the original documents.

The underlined parts of this document indicate that it has been gisted for OPEN<sup>1</sup>

### How do I deal with LPP?

#### When might I be asked/need to think about LPP?

1. In the course of your time as a legal adviser to the Service you might be asked to advise whether a particular piece of intelligence attracts LPP.
2. You will also need to think about LPP when you are involved in dealing with a case where material needs to be reviewed for disclosure purposes and that case includes material subject to LPP (e.g. a criminal prosecution, control order, employment law case).
3. This guidance does not cover the situation where you are asked to advise on the legal implications of applying for a RIPA authorisation/warrant in a case where it is likely/possible that LPP material may be generated. If you are asked to advise in such a case then consult the further guidance available at [\(specify\)](#).

#### What should I do if I'm asked to determine whether material is subject to LPP?

4. You may be asked to assess whether a piece of intelligence is subject to LPP. You will normally be passed the intelligence in hard copy by a member of the legal assistants team (who usually distribute such material evenly between the lawyers, avoiding those who are involved in casework connection with the particular investigation – see paragraph 7).
5. Whatever the source of the intelligence, you need to consider whether the material falls within the definition of LPP. Whilst you should make every effort to provide definitive advice, the sensitivity of the subject matter is such that, if in doubt, you should err on the side of caution by stamping the material as LPP, given the potentially grave repercussions of getting the decision wrong (e.g. abuse of process arguments at a trial in which the material is relevant). Stamping the material does not mean that it cannot be acted upon or disclosed, but it **does mean that LAs will be consulted before this happens** so that we can ensure that nothing inappropriate is done with the material.

#### Where will I find the definition of LPP?

6. LPP is defined by PACE 1984, section 10, for the purposes of [what???) and it will usually be sufficient to have regard to this statutory definition, which is broad and comprehensive. If you need to look at the law more closely then consult the LPP section of Archbold (criminal proceedings) or the White Book (civil proceedings). These set out the recent caselaw which you can then look up in more detail. A guidance note setting out the relevant case law was written by a legal advisor in (?check year) and can be found on the LPP file (insert reference).

(copy out section 10 of PACE)

## DRAFT

[Exhibit 8] – Please note that paragraph numbers have been inserted and do not necessarily reflect the original documents.

**I am satisfied that the document contains LPP material – but does this mean the whole document is privileged? What about the details surrounding the LPP material, are these privileged too?**

7. It is usually relatively easy to assess whether a particular document contains material subject to LPP. But often documents containing such material also contain other material that, standing alone, would not be privileged. That material could be of intelligence value. What should you do in such cases?

**When should I decline to consider LPP and pass the material to a colleague?**

8. It is important to decline to assess the material for LPP in a case where you are (or are likely to be) the legal adviser representing the Service in legal proceedings to which the material may be relevant (whether criminal, civil or other proceedings). The legal assistants are alert to the need to pass material for assessment to lawyers who are not involved in proceedings in this way. But you should be aware of the issue in case something gets through the legal assistant filter.

**What should I do if I decide that material is subject to LPP?**

9. If you decide that material is subject to LPP then you should use the rubber stamp (available from legal assistants) and stamp it at the top of the document. The stamp says:

“WARNING  
LEGALLY PRIVILEGED MATERIAL!  
CONSULT LAs BEFORE TAKING ACTION”

10. You should initial at the side of the stamp and put the date alongside it. If only part of the document is subject to LPP then you should clearly mark this (e.g. by bracketing only one telephone call or by marking one paragraph).
11. **You should then fill in the confidential material log** (say where this can be found) detailing what it is that you have examined and any notes that are necessary to explain your decision (e.g. perhaps the transcriber told you that one of the parties to the call was a lawyer, but this is not apparent from the document itself)<sup>ii</sup>.
12. You should then return the material to the person who sent it to LAs (unless some other arrangement has been agreed in advance).

**Are there any circumstances where LPP material should not be passed on to the intelligence desk?**

13. Yes. **If it is obvious that the material cannot be of intelligence interest then you should inform the sender** (usually transcribers in these circumstances) **and destroy the material.**
14. In cases where you are not sure whether material is of intelligence interest, but believe it or not, you will need to tread carefully. Speak to the desk officer with responsibility for the investigation and reveal just sufficient

## DRAFT

[Exhibit 8] – Please note that paragraph numbers have been inserted and do not necessarily reflect the original documents.

information regarding the intelligence to enable the desk officer to make a judgement about whether the material is likely to be of intelligence interest. Only send the material to the desk if you judge that the intelligence case has been made. **The confidential material log should always be filled in** regardless of whether the material is sent to the desk or destroyed (explain where this is found).<sup>iii</sup>

### **What should I do if I am asked whether LPP material can be acted upon or disclosed - when can I advise this is appropriate?**

15. The underlying purpose of all the measures outlined in this document is to ensure that the confidentiality attaching to lawyer-client communications is only overridden if there is a real national security requirement to do so **and** the resulting action does not undermine the integrity of legal proceedings. When legally privileged communications are sent to a desk officer, the material has already been given wider dissemination than would normally be permissible. Thus when a desk officer asks for a view on whether the material can be acted on or disclosed to an outside agency there are several matters to consider:
  - Is it *really necessary* for the purpose of protecting national security to disclose the material, so that the action or disclosure is justified under the terms of the Security Service Act? Or is the reality that it would be nice to do so or interesting for the recipients?
  - If it is necessary to disclose, will the disclosure be limited as far as possible so that the minimum number of people are given knowledge of the material?
  - If disclosure is necessary, will appropriate caveats be put on the material to be acted on or disclosed? For example, you will need to consider whether the material should be specifically caveated as subject to LPP (usually yes, as to do otherwise might risk further dissemination and might lead people involved in the legal proceedings reviewing it at a later date to be prejudiced by it). Thus usually the material will need to be subject to the LPP caveat and the caveat that no action may be taken on it nor further disclosure made without the Service's authorisation. You should also consider whether the material needs any other caveats (e.g. is it subject to Handling Arrangements for intercept product?)
  - If action is to be taken or disclosure made, you must ensure that the integrity of any legal proceedings is protected. For example, disclosure of LPP material related to a criminal investigation should usually not be made to police officers involved with that investigation (in order not to prejudice future legal proceedings, Article 6 arguments, abuse of process etc). It follows from this that action on/disclosure is more likely to be acceptable if it does not involve disclosure of the LPP material itself. In this sort of case the desk may need to disclose to a police officer who is not involved in the investigation and ask his/her advice on whether it is possible for the material to be actioned by someone outside of the investigation or other alternative. [

## DRAFT

[Exhibit 8] – Please note that paragraph numbers have been inserted and do not necessarily reflect the original documents.

16. If you advise that action on/disclosure is appropriate, then you should note your advice on the confidential material log (reference to log) and tell the desk to notify you when the material is disclosed so that you can enter this on the log as well.

### Can you give me an example?

17. For example, if an individual who is investigated by the Service is the subject of criminal proceedings, and in the course of investigation the Service intercepts a forensic report prepared for the purpose of those proceedings then it might be justifiable to put information from that report into the Service's database for future use in intelligence investigations. However, this information would not be passed onto the police, in case they use it to gather further evidence or direct their own forensic experts in such a way as to refute the defence expert. In other words, we mustn't use LPP material in a way that gives the appearance of enabling the State to gain an unfair advantage in current or future court proceedings.
18. Depending on the circumstances, this may be a difficult judgement to take and it may be prudent to discuss the options available in this type of instance with other LAs, particularly those who have had prosecution experience, before giving your advice. In cases of doubt or difficulty, you should consult or inform senior legal advisors.

### What should I do if a piece of LPP material needs to be considered for disclosure purposes?

19. When a desk officer files a piece of LPP material on a paper or electronic file it will be kept in the same way as any other piece of intelligence. If that file then comes to be reviewed for the purpose of legal proceedings, e.g. by Prosecution Counsel or by Counsel in control order proceedings, then that material will be seen by them unless steps are taken to remove it or warn them of its possible existence. Please ensure that you follow the steps set out below for the different types of legal proceedings if it is possible that LPP material may be found on the files.

### In criminal proceedings?

20. [Awaiting advice from QC]

### In civil proceedings?

20. [Ditto]

### Where can I find the background to the Service's rules on handling LPP material?

- 21 There is previous guidance relating to the handling of material subject to LPP.

**DRAFT**

[Exhibit 8] – Please note that paragraph numbers have been inserted and do not necessarily reflect the original documents.

**What official guidance is there on LPP for the whole Service?**

22. LA has recently issued an updated circular on LPP.

[May 2008]

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<sup>i</sup> In the original document the headings in bold are also underlined, the underlining has been removed to avoid confusion with the gists.

<sup>ii</sup> The underlining in this paragraph is from the original document.

<sup>iii</sup> The underlining in this paragraph is from the original document.

[Exhibit 9] – Please note that paragraph numbers have been inserted and do not necessarily reflect the original documents.

The underlined parts of this document indicate that it has been gisted for OPEN

## RESTRICTED

### HANDLING ARRANGEMENTS FOR MATERIAL SUBJECT TO LEGAL PROFESSIONAL PRIVILEGE

1. This document sets out the Service's arrangements for handling material subject to legal professional privilege (LPP). **Compliance with the arrangements is essential if the Service is to comply with its legal responsibilities. All staff who may handle LPP material need to be familiar with them.**

#### Legal Professional Privilege

2. The purpose of LPP is to ensure that individuals can consult a lawyer in confidence without fear that what they or the lawyer says or writes will later be used against them in court. LPP is therefore fundamental to the right to a fair trial, and to the rule of law. The way it operates is to prevent certain communications from being used in evidence or disclosed to the other side in legal proceedings. The protected communications are (a) those between a lawyer and his client or the client's representative for the purpose of giving legal advice and (b) those between a lawyer, his client or the client's representative and any other person in connection with and for the purposes of legal proceedings.

#### Handling of LPP material

3. There is no bar on LPP material being reported to desks, but to ensure that it is treated as the law requires, it may only be actioned or disclosed with LA approval. The Service's arrangements for handling LPP material are as follows:

#### Material processed by intelligence analysts

Material processed by intelligence analysts will be examined by them in order to identify whether it may be subject to LPP.

The staff referred to above are issued with separate guidance to enable them to identify possible LPP material. Any material so identified will not be reported directly to the desk but will be sent to LAs, who will decide whether it is subject to LPP<sup>1</sup>. If it is, LAs will caveat the material with a stamp reading as follows:

**WARNING**

**LEGALLY PRIVILEGED MATERIAL**

**CONSULT LAs BEFORE TAKING ACTION**

[Exhibit 9] – Please note that paragraph numbers have been inserted and do not necessarily reflect the original documents.

If the material is *not* subject to LPP, LAs will annotate it to that effect. The material will then be sent to the desk. If it has been caveated, no action may be taken on it without LA approval. "Action" for this purpose includes disclosure to an outside body.

### **Other Material**

Desks will sometimes receive material which has not yet been examined for LPP purposes. **In such cases it is the responsibility of the receiving desk officer to identify whether LA advice on LPP is needed, and if it is, to seek that advice.**

In deciding whether to seek LA advice, desk officers should apply the following test:

- **Could the material be a communication, or a record of a communication (a) to which a lawyer (e.g. a solicitor or barrister) is a party or (b) which has been sent, received or made in connection with legal proceedings (whether already under way or in contemplation)?**
- If a desk officer receives material which satisfies this test (and has not already been examined for LPP purposes), they should forward it at once to LAs, who will caveat or annotate it as appropriate. The material will then be returned to the desk.

***A guide to these arrangements, in the form of a flow chart, is attached.***

### **RIPA Codes of Practice**

4. The RIPA Codes of Practice impose a number of additional safeguards in relation to LPP material (and also other 'confidential material' as defined in the Codes). These include:

- a strict definition of the circumstances in which an application may be made for an interception or intrusive surveillance warrant, or a directed surveillance or CHIS authorisation, which is likely to result in the acquisition of LPP material<sup>2</sup>;
- a requirement to notify the Interception Commissioner or the Intelligence Services Commissioner (as appropriate) of any case in which a lawyer is the subject of a warrant or authorisation; and
- a requirement to report to the relevant Commissioner all cases in which LPP or other confidential material is retained and/or disseminated to an outside body.

Desk officers should make themselves familiar with the provisions of the Codes, which can be found on the [internet](#).



[Exhibit 9] – Please note that paragraph numbers have been inserted and do not necessarily reflect the original documents.

### **What restrictions apply to the use of LPP material?**

5. In principle LPP material may be used just like any other item of intelligence, e.g. to generate enquiries, mount a surveillance or task an agent. Where necessary it may also be disclosed to an outside body. The only restriction is the requirement for LA approval before any such action is taken. This is due to the sensitivity attaching to LPP material, and the need to test thoroughly any proposed use of it. When considering a request for approval, LAs will be concerned in particular to check:

- that the action is justified under the terms of the Security Service Act, any handling arrangements applying to the type of material in question (where the material was obtained under a warrant), and the applicable RIPA Code of Practice;
- that the use which will be made of the LPP material is proportionate to the object to be achieved; and
- where the action will involve disclosure of the material, that the disclosure will be kept to the necessary minimum and made subject to appropriate caveats as regards access, handling and action on.

It follows that LA approval is more likely to be given if the proposed action will not involve disclosure of the LPP material itself.

### **Conclusion**

6. If the Service is to meet its legal responsibilities it is essential that LPP material is promptly identified and handled in accordance with the arrangements set out above. **So please:**

- **be alert to the possibility that your desk will receive LPP material which has not yet been identified, and**
- ensure that you seek LA advice before taking action on identified LPP material.

7. **Further guidance on LPP matters can be sought from any of the LAs.**

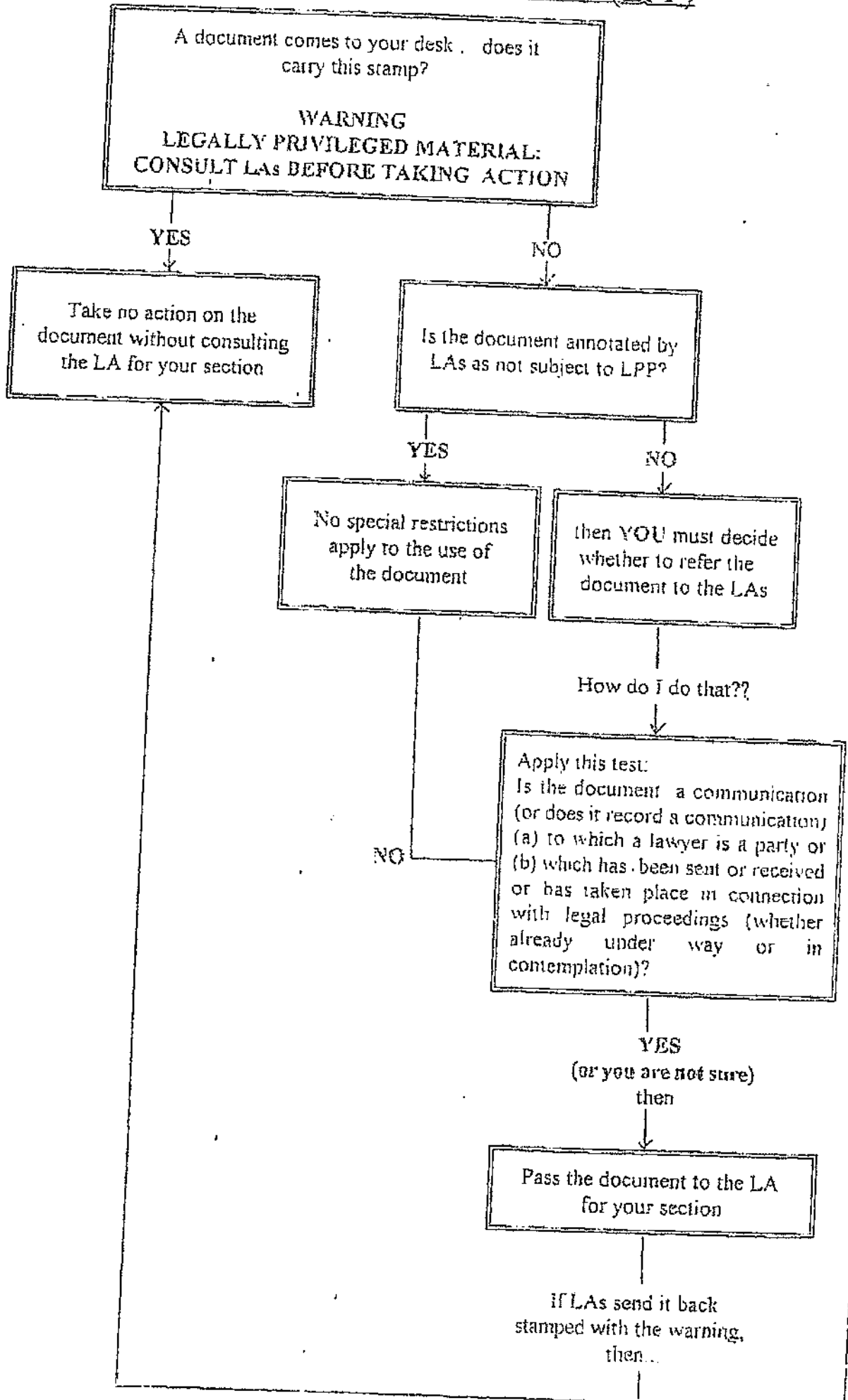
**Legal Adviser**

**February 2008**

<sup>1</sup>In cases where the material is time-critical it may be sent to the desk and LAs in parallel.

<sup>2</sup>These limitations do not formally cover applications for property warrants, but Service policy is nonetheless to apply to these applications as well.

# LEGAL PROFESSIONAL PRIVILEGE (LPP)



[Exhibit 10] – Please note that paragraph numbers have been inserted and do not necessarily reflect the original documents.

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## **New Procedure for Handling LPP and/or Confidential Material**

### **Guidance for Legal Assistants and the Legal Advisors**

The system for processing possible LPP and confidential material from intelligence analysts has changed. The new system will aim to manage all requests electronically. The following process should be followed for all soft copy requests for LPP or Confidential Material determination.

The system will work as follows:

1. Intelligence analysts will identify any material they believe contains LPP or confidential material and e-mail it to the newly created shared legal assistant in-box. A legal assistant will e-mail the material to a lawyer according to capacity, subject expertise and/or through an informal rota system. Legal assistants are not responsible for the management of the LPP/confidential material once it is sent to a lawyer and will assume it has been dealt with.
2. Intelligence analysts will have highlighted the document with the words  
**“Sent to a legal advisor for LPP/Confidential Material confirmation by an intelligence analyst”**
3. The lawyer will then add the appropriate caveat from an icon at the top of their screen. The caveat will identify whether the document does or does not contain LPP or confidential material and as well as the date and the email of the legal advisor. This caveat will overwrite the intelligence analysts’ statement (see 2) above).
4. Since the document will be in ‘comment only’ mode the lawyer will need to add any comments using the comments icon. As an example, you may wish to use the comment-only function in the following ways:
  - If the lawyer has marked the call as LPP or confidential and but parts of the call are NOT LPP or confidential, then the lawyer should highlight those parts and add a comment saying "This part of the call is not subject to LPP/is not Confidential Material".
  - If the lawyer has a comment that applies to the whole document then it should be added at the top of the document underneath the caveat. For example, if the document is being marked as LPP based on an assumption that might be wrong, the lawyer should explain that at the top of the document, e.g. "I have marked this as LPP on the basis that UM is SMITH's lawyer. If he is not, then this call would not be subject to LPP." "
5. Lawyers should then e-mail the document back to the originating transcriber directly. It will be clear which transcriber sent the document from the e-mail header sent to them by a legal assistant. On occasion, the transcriber will nominate an alternative recipient for e.g. if they are on leave.
6. Lawyers should continue to record such material on the log of confidential material.

[Exhibit 10] – Please note that paragraph numbers have been inserted and do not necessarily reflect the original documents.

- A senior legal advisor has agreed that all routine enquiries should be dealt with within (X) and urgent enquiries within (X) of receipt.

**PROCEDURE FOR HANDLING MATERIAL THAT MAY BE SUBJECT TO LPP  
AND/OR CONFIDENTIAL MATERIAL  
Advice for Intelligence Analysts**

1. If you believe that your conversation may contain either LPP or confidential material, there is a certain procedure that must be followed. This document provides the definitions of both LPP and confidential material and sets out procedures for intelligence analysts to follow.

Legal Professional Privilege (LPP)

2. LPP operates to prevent certain sorts of material from being used in evidence or disclosed to the other side in the course of legal proceedings. Its purpose is to ensure that individuals can obtain legal advice without fear that their communications will later be used against them. Conversations (or parts of conversations) about legal matters may be subject to legal professional privilege and so subject to special handling arrangements. LPP protects:

- a. Communications between a lawyer and his client or the client's representative for the purpose of giving legal advice.
- b. Communications between a lawyer, his client or the client's representative and any other person in connection with and for the purposes of legal proceedings.

**Process for Intelligence Analysts**

1. Listen to the conversation to determine whether it contains information of intelligence value.
2. If the conversation contains LPP or confidential material but **does not** contain information of security interest, you should not transcribe the call but simply write "*nothing of security interest*" on the record which should then be stored. **You do not need to do anything else.**
3. If you believe the conversation contains LPP or confidential material and is of security interest, you should just note "*details available from LAs*" and then pass the record to the desk officer. Now move to point 4.
4. Transcribe the call which may contain LPP or confidential material: Note the following:
  - a. Each possible LPP/confidential material call **must** be transcribed on a separate piece of record. Do not put several calls on one single piece of record as this can lead to problems if one call is not deemed to contain either LPP or confidential material.

[Exhibit 10] – Please note that paragraph numbers have been inserted and do not necessarily reflect the original documents.

- b. The transcript of the call should have the start and end time of the call in the header.
  - c. Complete the header as fully as possible, including entering your pin number and paying particular attention to **extension number**. Record without your extension number will not be dealt with since the lawyer may not know how to contact you.
  - d. Click on 'LPP' from the data entry tool on your tool bar and the following will appear in red on the record document:  
**“Sent to LA for LPP/Confidential Material confirmation by intelligence analyst”**
  - e. Close document. Highlight document and right click to give you the option to change access to comment only. Please select this option before sending to the shared legal assistant mail in-box.
  - f. If it is not immediately clear from the transcript which caller is the legal then please add this as a comment on the document.
5. If the call appears urgent, you **must** agree the urgency of the call with your team leader (or another team/group leader in their absence). If the call has been agreed as urgent then please title the e-mail as such (cc'ing your team leader). If it is very urgent then please call a legal assistance in advance. Please do not mark it as urgent in any other circumstances.
  6. The legal assistant will forward the report to a lawyer who will consider whether the report contains LPP or confidential material. The lawyer may call you to discuss the contents further. The lawyer will then remove the marking and add the appropriate LPP caveat. The caveat will identify whether the document does or does not contain LPP material as well as the date and the lawyer.
  7. The lawyer will e-mail the report back to the originating transcriber. Please highlight on the accompanying e-mail if you are going to be on annual leave and who the report should be sent to in your absence. You should only do this if it is important the report is returned quickly.
  8. In the case of 'sensitive' operations, please follow filing procedures agreed in advance with desk officers.

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<sup>i</sup> In the original document the headings in bold are also underlined, the underlining has been removed to avoid confusion with the gists.

[Exhibit 11] – Please note that paragraph numbers have been inserted and do not necessarily reflect the original documents.

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**Extract of SIS Handling Guidance**

(Current, implemented Sept 2011 but a version existed prior to this date which it has not been possible to locate)

1. Given the sensitivity of intercept operations and the unique nature of the intelligence content, there are a number of regulations surrounding the writing, issuing and distribution, and filing of reports. These regulations are based on RIPA, the Lawful Intercept Code of Practice and have been agreed with the SIS legal advisers and the Intercept Commissioner.

2. This information has been written in consultation with SIS lawyers.

3. The Code (para 3.2) provides that confidential information consists of:

matters subject to legal privilege

confidential personal information

confidential journalistic material

4. Legal privilege can be identified as legal advice by any individual, agency or organisation qualified to do so as well as information about legal proceedings that can amount to litigation privilege. It should be noted that this privilege falls away if the communications are to further a criminal purpose. It can be difficult to identify whether information is subject to legal privilege and where there is doubt about this the legal advisers should be consulted on the content (in particular if the “furthering a criminal purposes” exemption is being considered).

5. The Regulation of Investigatory Powers Act 2000 (the Act) does not provide any special protection for confidential information, however the Code (para 3.5) provides that additional safeguards should be put in place. A warrant application should mention if it is likely that there will be collateral interception of confidential information and this should be taken into account by the Secretary of State when considering the application (para 3.6). It is possible that it may become apparent from the interception product that interception of confidential material has taken place that was not anticipated. This should be recorded in the target Feedback Sheet along with a brief description of what type of confidential information was discussed – this should be included in any renewal submission. Where the confidential information is not relevant to the operation it should not be retained.

6. Neither the Code nor the Act prevents confidential material that would be relevant from an operational point of view from being transcribed or reported, however it is expected that additional safeguards would apply (para 3.5 of the Code).

7. Safeguards would include – seeking legal and policy advice on whether it is necessary within the meaning of the Act to retain, transcribe and report the material; placing the privileged material caveat on reports; keeping a record of these reports in the Feedback Sheet. An example of a caveat might be:

“The information contained in this report may be legally professionally privileged and must not be disseminated further without prior consultation with the legal section.”

8. The Code (para 3.6) requires that where legal privilege material has been intercepted and retained this must be reported to the Intercept Commissioner during his inspection and the material made available to him if he requests it. There is no requirement to report to the Intercept Commissioner other types of confidential material that have been reported or any material that has not been reported. However, it may be an additional useful safeguard to report all such instances to the Intercept Commissioner.

### *Feedback Sheets*

9. It is important to have a record of what reports have been issued and to whom as well as what action (if any) was taken on them. Transcribers should therefore create a Feedback Sheet for each warrant.

10. This feedback sheet will facilitate:

- Monitoring intercept of privilege comms. Intercept of privilege comms needs to be assessed in the warrant renewal process and during the Intercept Commissioner's 6 monthly visits.
- Recording the number of reports issued during a specific period and what action was taken on them. This info is needed to justify a warrant renewal.
- Recording the distribution of intercept reports for auditing purposes.

11. It is important to record whether privilege comms are intercepted on target lines as this information must be provided in a warrant renewal submission as this is a factor in the proportionality of the intercept.

- You do not need to record details of individual calls
- You do not need to record any content from the calls
- You need to note what type of privilege comms took place
- You may also want to note whether this type of call is generally listened to or discarded immediately.

12. If you receive a report that you do not think is appropriate for you to read, you must report this to the transcriber so that the distribution list can be updated.

13. RIPA section 15 safeguards state that dissemination should be "limited to the minimum that is necessary for the authorised purpose of the intercept warrant." The sections below establish the considerations necessary for distributing both raw material and processed material.

14. The distribution of intercept reports must be kept to the minimum necessary. An intercept report must therefore not be shared beyond the original distribution list without prior consultation with the relevant transcribers and/or warrant sponsoring officer.

[Exhibit 12] – Please note that paragraph numbers have been inserted and do not necessarily reflect the original documents.

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**Extract of SIS handling arrangements in relation to any material covered by LPP in litigation against SIS**

1. The material will be passed to a senior legal adviser (and in their absence, their nominated deputy) to advise, first, whether the material does attract LPP and second to ensure that the LPP material is not passed to those legal advisers/policy officers/other SIS officers (see Annex B attached for detailed list) advising the Service (or in any other way involved) in connection with its defence to civil legal proceedings.
2. The senior legal adviser (and in their absence, their nominated deputy) will ensure that the material is not distributed more widely to those dealing with the operation unless there is, either, an over-riding intelligence requirement, or, the information contains references to SIS or Security Service staff and indicates that information concerning members of staff was in the hands of extremists, in which case action may need to be taken to protect staff.
3. Where the material is not disseminated for either reason described in paragraph 2 above the LPP material will either be held securely by the senior legal adviser (or in their absence, their nominated deputy, pending the senior legal adviser's return) or destroyed. A substantive record will be kept of all stages of this process.



[Exhibit 13] – Please note that paragraph numbers have been inserted and do not necessarily reflect the original documents.

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**Extract from SIS's General Procedure Manual dated August 2008**

(Agreed clarification 29/10/2014: This document formed part of SIS' applicable policies from August 2008 until September 2011)

*Interception of Communications Subject to Legal Privilege etc.*

1. Confidential communications between a lawyer and client, or a representative of the client, in connection with the giving of legal advice are privileged. The rule also applies to material which does not itself contain or seek such advice but which is related to legal proceedings. Detailed guidelines for the consideration of applications for interception operations which may involve the interception of legally privileged communications are available from a legal adviser or from the policy team. Special care must be taken where a lawyer is the subject of the proposed warrant.

2. During the course of any interception operation, material subject to legal privilege shall not be transcribed, retained or copied unless it is necessary for one of the authorised purposes in section 5(3) of RIPA. Intelligence Analysts must notify their Section Head as soon as they become aware that the interception of legally privileged communications has taken place, whether or not such communications are transcribed. In turn, the relevant Section Head must notify SIS legal advisers and colleagues that interception of legally privileged communications has commenced. The Section Head must seek advice from the relevant SIS legal adviser **before any dissemination of such material takes place by means of reporting**, and thereafter any subsequent retention or dissemination of such material must be accompanied by a clear warning that it is subject to legal privilege; the material must be appropriately safeguarded and must be destroyed as soon as it is no longer necessary for one of the authorised purposes under Section 15(4) of RIPA. Additional safeguards apply to the dissemination of any legally privileged material to an outside body.

[Exhibit 14] – Please note that paragraph numbers have been inserted and do not necessarily reflect the original documents.

The underlined parts of this document indicate that it has been gisted for OPEN

# Compliance Guide - Review and Retention

## Principles

- 1. RIPA requires GCHQ to have arrangements to minimise retention of intercepted data and any material derived from it.
- 2. GCHQ implements this safeguard through policy by specifying maximum periods of retention for categories of intercepted material; the policy also caters for exceptional needs.
- 3. Material kept beyond default periods must be reviewed and re-justified, in most cases annually.
- 4. GCHQ treats all operational data as if it were obtained under RIPA.
- 5. Very little data is kept for legal purposes alone.

## Retention limits

- 6. This Compliance Guide and the Operations Data Retention Policy (DRP) set out GCHQ's arrangements for minimising retention in accordance with the RIPA safeguards. The DRP achieves this by setting default maximum limits for storage of Operations data.
- 7. The overall policy is summarised as:

GCHQ specifies maximum retention periods for different categories of data which reflect the nature and intrusiveness of the particular data at issue. The periods so specified do not usually exceed 2 years for intercepted material. Any exceptions will be subject to there being a justified operational need to retain the data, with authorisation from a GCHQ Policy official. Retention periods for data regarded as more intrusive are agreed with GCHQ Policy, who will take a view on the proportionality and the necessity of retaining the data, and may impose other limitations on access to the data.

## Retention for legal reasons

- 8. GCHQ retains only the minimum necessary to account for its actions.

<b>Record type</b>	<b>Storage period</b>
Warrant records: application, renewal, modification and cancellation	Indefinite

[Exhibit 14] – Please note that paragraph numbers have been inserted and do not necessarily reflect the original documents.

Targeting records	2 years
Audit logs of database queries	2 years
Public record archive	See Records Management Guidance

[Exhibit 15] – Please note that paragraph numbers have been inserted and do not necessarily reflect the original documents.

# Compliance Guide - Targeting

## Scope

1. This section is aimed at analysts conducting targeting of established and development targets. It explains the legal and policy requirements for authorising targeting, depending on the location and nationality of your target. It provides guidance on procedures that you must follow to ensure the legal compliance of your targeting.

## Analyst responsibility

2. You are responsible for the legality of your targeting.

3. Your responsibility lasts until you pass ownership to another person or until a selector is deactivated. It is your responsibility to make the new owner of your selectors aware of any legal or policy issues when you hand over ownership.

4. You are expected to make a reasonable judgement based on your current knowledge that ensures that your targeting meets the criteria for conducting legally compliant targeting. You must take appropriate action as soon as you acquire new information that changes your previous judgement.

5. It is your responsibility to make relevant analysts aware of any significant changes that may affect the legality of your targeting of selectors, or mean that additional authorisation is required to examine the content of communications.

6. You should regularly review your targeting to ensure that that it continues to meet an intelligence requirement and amend your judgement if necessary.

## Legal basis for targeting

7. For targeting to be compliant with the law every selector must be:

- Specifically authorised if that is required by law on the grounds of location
- necessary for one of GCHQ's Sigint purposes:
  - national security (NS)
  - economic well being (EWB) of the UK (provided it also meets the NS purpose)
  - prevention and detection of serious crime (SC)  
(in addition to meeting a specific intelligence requirement on the certificate)
- proportionate

8. A policy authorisation is required if your target is sensitive on grounds of location or nationality.

## Demonstrating proportionality

[Exhibit 15] – Please note that paragraph numbers have been inserted and do not necessarily reflect the original documents.

9. You must demonstrate that your targeting is proportionate. This concept is explained generally in the Overview. When targeting selectors you should specifically apply your judgement to:

- targeting the minimum number of individuals to meet the requirement
- considering whether other less intrusive means could achieve the desired result
- balancing the expected intelligence gain against the intrusion into the individual's right to privacy
- targeting only those selectors that you believe will meet the intelligence requirement
- considering whether collateral intrusion into other individuals' communications is likely and whether this can be justified to meet the requirement

10. For every selector, you must record your judgement (HRA justification) that clearly explains the reason for the targeting. You should keep the proportionality of the targeting under review and amend the justification or cease targeting if the activity no longer meets an intelligence requirement.

## **Indirect targeting**

11. Indirect targeting is the targeting of a selector used by one individual to acquire the communications of another - the target. If the individual is of interest only because of the intelligence derived from their communications with your target, you must be able to justify why it is necessary and proportionate to intercept this individual's communications.

## **Reviewing targeting**

12. It is your responsibility to maintain the legality of your targeting.

13. A review of selectors on sustained targeting is mandatory at least once every year.

14. A review of target development selectors is mandatory at least every three months. If there is sufficient justification, target development selectors should be placed onto sustained collection. If not, they should be deactivated or, exceptionally, extended for up to a further three months.

15. A review of selectors covered by a warrant, legal or policy authorisation should be conducted each time the authorisation is submitted for renewal.

16. The review should establish whether:

- it is necessary and proportionate to continue to intrude on the individual's privacy
- your original HRA justification continues to support the basis for that intrusion - you should amend it if necessary
- there has been any intelligence output from the selector to justify the continued intrusion into the target's privacy
- there are other reasons that could justify the continued intrusion, if there has not been any output
- there are sufficient resources to process and examine any intercept.

[Exhibit 15] – Please note that paragraph numbers have been inserted and do not necessarily reflect the original documents.

17. You must briefly record your reason for continuing to target the selector by updating the HRA justification.

## **Unauthorised targeting**

18. If you believe that unauthorised targeting may have occurred, you must immediately contact your Legal and Policy Lead or Mission Legalities and Assurance Team. If it turns out that the targeting was not properly authorised, Mission Legalities and Assurance Team will advise on an appropriate course of action.

### **Targeting lawyers' communications**

19. You may in principle target the communications of lawyers. However, you must give careful consideration to necessity and proportionality, because lawyer-client communications are subject to special protection in UK law on grounds of confidentiality known as Legal Professional Privilege. If you intend to or have inadvertently targeted lawyers' communications, and it seems likely that advice to a client will or has been intercepted, you must consult Legal at GCHQ who will seek LA advice. Further information is in Communications Containing Confidential Information.

[Exhibit 16] – Please note that paragraph numbers have been inserted and do not necessarily reflect the original documents.

# Compliance Guide - Communications Containing Confidential Information

## Principles

1. The RIPA Interception of Communications Code of Practice stipulates that greater regard should be had for privacy issues where the subject of the interception might reasonably assume a high degree of privacy or where confidential information is involved. GCHQ must therefore demonstrate to a higher level than normal that the acquisition, analysis, retention and dissemination of intelligence from such communications as is necessary and proportionate.
2. The Human Rights Act and the European Convention on Human Rights also protect the rights to a fair trial, free press and freedom of religion.
3. **To ensure compliance with the Code of Practice and Government Policy, you must follow the stipulations laid out below and in the linked policies.**

## What is confidential?

4. **Material that is legally privileged.** This covers the provision of legal advice by any individual, agency or organisation qualified to do so, and is not necessary lost when this legal advice is shared by the recipient. Communications made with the intention of furthering a criminal purpose are not privileged but privilege does apply for the provision of proper legal advice to someone suspected of criminal offence.
5. Legal Privilege is fundamental to the right to a fair trial and the rule of law, as it allows an individual or entity to consult a lawyer in confidence without fear that what passes between them will be later used against them in court. The interception and reporting of legally privileged communications carries the inherent risk that it may influence the conduct of legal proceedings and adversely affect the course of justice, particularly when the Crown is party to the legal proceedings.

## Targeting/collection of confidential communications

6. If you wish to target the communications of a lawyer or other legal professional or other communications that are likely to result in the interception of confidential information you must:
  - Have reasonable grounds to believe that they are participating in or planning activity that is against the interests of national security, the economic well-being of the UK or which in itself constitutes a serious crime.

[Exhibit 16] – Please note that paragraph numbers have been inserted and do not necessarily reflect the original documents.

7. If you find that you have inadvertently targeted a selector used by a lawyer and you wish to continue targeting it, you should consult Mission Legalities and Assurance Team.



[Exhibit 17] – Please note that paragraph numbers have been inserted and do not necessarily reflect the original documents.

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## **Analysis of confidential communications**

1. You should not transcribe, retain or otherwise analyse intercept containing confidential information unless you have reasonable grounds to believe it is necessary on the grounds of national security, economic well-being of the UK or preventing or detecting a serious crime.

## **Reporting/dissemination of intelligence from confidential communications**

2. Intelligence based on the interception of confidential information can only be disseminated in accordance with GCHQ Reporting Policies on the sensitive professions and proportionality. Any intelligence that may potentially be confidential must be submitted for mandatory Sensi-Check. Non-Intelligence Policy team staff are not empowered to release such information themselves unless as per agreement with the Intelligence Policy team.

[Exhibit 18] – Please note that paragraph numbers have been inserted and do not necessarily reflect the original documents.

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## **GCHQ Intelligence Sharing and Release Policy (September 2013)**

### **The RIPA Code of Practice, HRA and confidential communications**

1. The GCHQ Compliance Guide explains that the RIPA Interception of Communications Code of Practice stipulates that greater regard should be had for privacy issues where the subject of the interception might reasonably assume a high degree of privacy or where confidential information is involved. This means that there are certain categories of communication where a particularly high threshold of proportionality must be applied to the release of the content, because the content of the communication would ordinarily be considered confidential (in the common sense of the word) or otherwise privileged. These categories are:

- Legally privileged communications

#### *Legally privileged communications*

2. The GCHQ Compliance Guide has a full explanation of Legal Privilege (LP) as it pertains to the courts of the UK. The concept of LP applies to the provision of professional legal advice by any individual, agency or organisation qualified to do so – it can include legal advice given by non-lawyers, or passed via a third party, i.e. it does not simply apply to “the communications of lawyers”. The purpose of LP is to ensure that individuals are able to consult a lawyer in confidence without fear that what passes between them will later be used against them in court. LP is therefore fundamental to the right to a fair trial and the rule of law. LP material cannot be released to a customer who may be party to the legal case in question, because this would breach the principle that a client cannot be obliged to reveal privileged material to the court, and may undermine the case. For more details see the Disclosure Policy. However, LP does not apply to communications made with the intention of furthering a criminal purpose (whether the lawyer is acting unwittingly or culpably).

#### **The ‘sensitive professions’**

3. The judgement of whether it is proportionate to include the contents of any of these categories of communication in a GCHQ release must take account of their particular sensitivity and any associated risks. It is likely that any release deemed proportionate will be more limited, controlled and highly classified than would be the case had the same content been derived from other types of communication. The judgement of proportionality in these cases is reserved to the GCHQ Intelligence Policy Team, and all reporting containing any of the above categories of communication must be submitted for sensi-check. For the sake of simplicity, in order to ensure that all relevant material is submitted and assessed, reports featuring *any* communications by members of the following ‘sensitive professions’ must be submitted for sensi-check before issue:

- Lawyers or legal advisers

[Exhibit 18] – Please note that paragraph numbers have been inserted and do not necessarily reflect the original documents.

4. If the GCHQ Intelligence Policy Team considers it proportionate in a particular case to release legally privileged or confidential communications, the reporter will be instructed to apply one of the following rubrics to the report, to help demonstrate that GCHQ has taken account of the communications' sensitivity and the heightened threshold of proportionality:

*This report contains material that may be subject to legal professional privilege, and onward dissemination/Action On is not to be taken without reverting to GCHQ.*

5. The sensitivity of the protected categories of communication is not mitigated by disguising or removing the identity or occupation of the communicant. But neither is there a 'ban' on identifying or reporting on members of the 'sensitive professions' – it may well be proportionate to report these communications in certain circumstances. Reporters should also remember that the additional sensitivity attaches to the content of the communications, not to the fact of the communication having taken place. 'Events' reports featuring the 'sensitive professions' do not require mandatory sensi-check.

[Exhibit 19] – Please note that paragraph numbers have been inserted and do not necessarily reflect the original documents.

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## **GCHQ Intelligence Sharing and Release Policy (September 2013)**

### **Quality Assurance Processes**

#### **Sensi-checking**

1. Reports must be submitted for sensi-check if the Reporting Quality Checker is in any doubt (or wishes to check) that a release is compliant with Intelligence Sharing & Release Policy. For certain categories of material, the decision on whether release or inclusion in a release satisfies policy requirements is reserved to the GCHQ Intelligence Policy Team, and Reporting Quality Checkers are not authorised to release the material without sensi-check. The categories of material where sensi-check is always mandatory are specified in the relevant sections of this policy, and listed below for convenience. From time to time, additional categories of material may temporarily be mandate for sensi-check, as advised by the GCHQ Intelligence Policy Team.

*Mandatory sensi-check categories*

#### **1) Communications of 'sensitive professions'**

- a. Lawyers or legal advisers;

#### **Managing release errors**

2. If a report is found to contain errors or to be non-compliant with policy, it should either be modified or cancelled as soon as possible.

[Exhibit 20] – Please note that paragraph numbers have been inserted and do not necessarily reflect the original documents

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## **GCHQ Sensi Checking How To Guide (December 2013)**

### **Legal Privilege**

1. The RIPA Code of Practice, cementing HRA, requires us to more carefully consider the necessity and proportionality of reporting material that is subject to Legal Professional Privilege (LPP). To ensure this additional consideration, we mandate that all reporting containing content containing content relating to a lawyer/legal advisor (i.e. not where the Legal angle is only from Events) is submitted for Sensi-Check. Reporters and Reporting Quality Checkers are not qualified nor permitted to decide whether:
  - a. The communications are privileged – this is reserved for Legal Advisors (LA) or to Sensi-Checkers using the guidance below;
  - b. Reporting the privileged communications is necessary and proportionate – this is reserved for Sensi-Checkers (acting on Legal Advice if appropriate) and cannot be delegated back to reporters. The act of Sensi-Checking such reporting is not sufficient to meet the Code of Conduct and it is vital that the additional consideration required is given and recorded.
2. We also have to ensure that privileged material does not find its way into court or to government lawyers who may be handling the case.

*Is the material privileged?*

3. The first task is to decide whether the material is privileged, and then to determine whether it is necessary and proportional. There are some cases in which a decision on the first can be made by a Sensi-Checker, but often LA will need to make the decision. For all cases where the material is legally privileged, the second decision can only be made by LA. To determine whether the material is privileged consider the following questions:
- 4 **Question 1: Is a communicant is a lawyer or legal advisor, or is passing information from a lawyer or legal advisor?**
  - a. Yes. We know this either because the reporter has told us in their comments to Sensi-Check, or because this is clear from the report content. The LPP caveat may be required. Move to Q2;
  - b. Yes, if the subject of the report is a trainee in a legal practice, acting under supervision of a qualified lawyer. Move to Q2;
  - c. Yes, if there is an intermediary passing confidential legal advice, or if the defendant is representing themselves. Move to Q2;
  - d. Maybe. Move to Q2;
  - e. No, stop here. The caveat is not required and LA do not need to be consulted.
5. **Question 2: Is it legal advice?**
  - a. Yes. Move to Q3;
  - b. Maybe. Move to Q3;
  - c. No. It may be tax or business advice or a lawyer speaking on a completely unrelated subject. Stop here; the caveat is not required and LA do not need to be consulted.

[Exhibit 20] – Please note that paragraph numbers have been inserted and do not necessarily reflect the original documents

**6. Question 3: Is it confidential?**

- a. Yes. If the confidential nature of the call is either stated or implied. The expectation of confidentiality lies with the client. It is possible for a “few” people to know about the advice and for it to still remain confidential. You must send the report to LA as per the next paragraph;
  - b. No. If the client has made the advice “widely” known about, the advice is no longer confidential. Once advice is declared to court, it is no longer confidential. Stop here. The caveat is not required and LA do not need to be consulted;
  - c. Maybe. You must send the report to LA as per the next paragraph.
7. Criminality – if the advice is to be used to further criminal purpose, even if the lawyer is not aware of this, privilege does not attach, but such reports should be sent to LA for their guidance.

*Sending reports to LA*

8. Reports must be sent to LA unless you are certain that the caveat is not required. When sending to LA you need to provide the report in PDF and as much information on what you’re asking of them as possible relating to the caveat, requirement the report is designed to meet, how the distribution has been chosen and why the detailed content of the report is appropriate. If necessary, gain more information from the reporter and/or Reporting Quality Checker. Email all this to LA’s Pas (names are contained in the Note in the Sensi-Checking Jive Group). It is good practice to include the Reporter’s Sensi comments and you may be asked for these if you don’t.

*Reporting the material*

9. The guidance of LA should be followed regarding whether the material can be reported, in what level of detail and to whom. Where they allow Sensi-Checkers to use discretion this must be exercised in accordance with their advice. LA will advise whether the following caveat should be added to the report:

*This report contains material which may be subject to legal professional privilege and onward dissemination/Action On is not to be taken without reverting to GCHQ.*

*Sensi-Check exemptions*

10. Where a target/subject is a lawyer but where the material obtained from interception of them is routinely not privileged (See Reporting & Release Policy Log record 32), a Sensi-Check exemption can be given with approval from H/Reporting and Release Policy or TL/Reporting and Release Policy. Conditions of the exemption will control when reporting on such targets does or does not need to be Sensi-Checked. The exemption must be recorded in the GCHQ Intelligence Policy Team decision log.

[Exhibit 21] – Please note that paragraph numbers have been inserted and do not necessarily reflect the original documents.

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## **GCHQ Reporting Policy - Sensitive Professions (December 2010)**

### **Overview**

- All reports containing intelligence involving a member of any of the sensitive professions must be submitted to the Reporting Policy Team prior to issue.

### **Key Points**

1. The Sensitive Professions are:

- Lawyer and other legal professionals

2. Reports involving lawyers require a justification and a tighter distribution than normal.

3. Confidentiality vs. privacy – all targets have a reasonable expectation of privacy with regards their communications, as set out under the Human Rights Act 1998; however, this is distinct from the additional expectation of confidentiality where a target is talking to a lawyer.

4. Content vs. events – the following rules apply only to reports containing content. A report including only the events of communications with a member of one of the sensitive professions on one end does not require mandatory sensicheck.

5. Even if you do not name or make reference to a member of the sensitive professions being on one end of the communications, if it is content it is still sensitive and must still be sensichecked.

### **Preparation of reports**

6. It is very important that you notify the Reporting Policy Team as soon as you put a report in this category in for sensicheck, as they will almost always need to discuss such reports with GCHQ's Legal Advisers (LA). Please make it very clear in your sensicheck comments who the sensitive profession is; and always include a good justification as to why you want to report this material and what your intelligence requirement is – LA will ask for this detail. This will speed up the process for you.

7. Remember you can also consult your colleagues for advice on how the report should be written and focused.

8. Always consider whether it is necessary to report the information, and keep the level of detail and the distribution to a minimum.

### **Details**

#### **Lawyers (including legal professionals, judges etc.)**

[Exhibit 21] – Please note that paragraph numbers have been inserted and do not necessarily reflect the original documents.

9. Communications between lawyers and their clients anywhere in the world, particularly in advance of legal proceedings, are sensitive and may attract Legal Professional Privilege (LPP).

10. UK law makes it clear that the provision of legal advice by any lawyer to a client is legally privileged. This includes governmental legal advisers providing advice to governments, and may extend to legal advice provided by non-lawyers where this advice is given under the supervision of a qualified legal adviser.

11. LPP also attaches to legal advice passed via a third party (e.g. a friend passing a lawyer's advice to someone in prison; someone discussing their lawyer's advice with a family member) wherever there is an expectation of confidentiality.

12. All of the above must be sensi-checked. A good business requirement and a tight distribution will be required for the Reporting Policy Team to allow the issue of reports giving details of discussions between lawyers and their clients. Please include a business case when you submit your report. If an item gives details that may be relevant to an individual's case where HMG is likely to be a party, it may well be difficult to provide this information to all customers, and it cannot be provided to those who are directly involved in these or future proceedings. This is because a client cannot be obliged to reveal privileged material to the court and so giving intelligence containing privileged material would breach this rule and potentially prejudice the case. Please see the Disclosure webpages for further details.

13. If your report involves a statesman who also happens to be a lawyer, please seek Reporting Policy input.



[Exhibit 22] – Please note that paragraph numbers have been inserted and do not necessarily reflect the original documents.

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## **REPNOTE 27: RECOGNITION OF SENSITIVE ITEMS (LAST REVISED AUGUST 1999)**

### **KEY POINTS:**

- This Repnote should be read in conjunction with Repnote 28 (Procedure for handling sensitive reports)
- From time to time, you will need to report intercept that is potentially sensitive
- This Repnote lists the types of material GCHQ considers to be sensitive
- Repnote 28 covers the actions to be carried out when you want to report sensitive material

### **GUIDELINES**

1. Lawyers. Communications between or mentioning lawyers and their clients anywhere in the world. Under Home Office guidelines, the provision of advice by any lawyer to any client is legally privileged.

[Exhibit 23] – Please note that paragraph numbers have been inserted and do not necessarily reflect the original documents.

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## **REPNOTE 28: PROCEDURE FOR HANDLING SENSITIVE REPORTS (AUGUST 1999)**

### **KEY POINTS:**

- This Repnote should be read in conjunction with Repnote 27 (Recognition of Sensitive Items)
- From time to time, you will need to report intercept that is potentially sensitive
- Sensitive reports need to be referred to GCHQ's Intelligence Policy team's sensicheck team prior to issue.
- This Repnote covers the actions to be carried out when you want to report sensitive material
- Repnote 27 lists the types of material GCHQ considers sensitive

### **GUIDELINES**

1. Role of the line manager. Common sense must play a major role in the identification of sensitive items, which need to be referred to GCHQ's Intelligence Policy team's sensicheck team if the reporter has doubts about an item, he should refer it to his line manager who will decide whether:

- the material meets an intelligence requirement, and
- its sensitivity requires GCHQ Intelligence Policy Team approval before issuing.

2. If both the above criteria are met the item should be forwarded to GCHQ's Intelligence Policy team's sensicheck team for guidance on how to issue ("the sensicheck procedure"). Exceptionally GCHQ's Intelligence Policy team may agree a temporary arrangement for a particular line of reporting to be issued without consultation. Where a line of traffic regularly contains the same sensitivities and can be given a standard handling, reporting areas can ask GCHQ's Intelligence Policy team for permission to issue reports without consultation. Request should be submitted in writing.

3. Handling of minor sensitivities. Reports can handle certain sensitivities in reports by sensible drafting in consultation with their line managers:

### **IF YOU SUSPECT A REPORT MAY BE SENSITIVE**

4. Reporting sections must not discuss the content of a potentially sensitive report with any non-GCHQ personnel before it has been sensichecked (Repnote 27). This could alert customers who should not receive the report to its existence, or precipitate action by a customer before due consideration has been given to the sensitivities at issue.

5. Lawyers. Only in exceptional circumstances will the sensicheck team allow the issue of items giving details of discussions between lawyers and their clients (see repnote 27). There must be evidence of criminal activity by the lawyer. Even in this

[Exhibit 23] – Please note that paragraph numbers have been inserted and do not necessarily reflect the original documents.

case, if an item gives details that may be relevant to an individual's defence in a British criminal court, it will not be sent to customers involved in his prosecution.

6. Further consultation by the sensicheck team. The sensicheck team will balance the intelligence value of the item against its sensitivity. For a report to be issued, its intelligence value must clearly outweigh its sensitivity. The sensicheck team may consult the Head of the Intelligence Policy team, the Head of Operations Policy, GCHQ's Director of Operations or customer departments for advice on how to handle certain politically sensitive items. Procedures for such consultation are set out in detail in reprobe 30.

[Exhibit 24] – Please note that paragraph numbers have been inserted and do not necessarily reflect the original documents.

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## **GCHQ Sensi Checking Guide (in use January 2010)**

### **Legal Professional Privilege (LPP)**

1. This sensitivity primarily applies where we come across communications between a lawyer (of any nationality) and his/her client, and where the lawyer is providing legal advice, particularly where that advice is being passed in advance of legal proceedings.
2. It can also cover comms between the client and another individual when they are discussing advice that has been given by a lawyer and they have expectation of privacy (so not for instance if a target emails 20 people, but if it seems to be a 'private' conversation).
3. Any reporting containing comms of a lawyer/legal advisor must be run past LA to allow them to make a decision on whether there is legal advice in the report; if there is, it is subject to LPP and the following caveat must be added

*“This report contains material which may be subject to legal professional privilege and onward dissemination/Action On is not to be taken without reverting to GCHQ”*

Reporting that is events only, or simply mentions a lawyer is not included in the above advice (for example, an events report or where an individual says “I’m meeting my lawyer, John Smith tomorrow”). Not saying in the report that it is a lawyer doesn’t make it OK!

4. Once the decision has been made, put as much response as necessary and add the caveat in the sensi check comments, then approve/pend back to reporter.
5. Interesting to note that the RIPA Commissioner asks to see all examples of reporting which meet infringement levels.

## **Extracts from Presentation, undated**

### **Slide One - Title Page**

#### Transcription – Evidential Briefing

Introduction to Audio Evidence

### **Slide Two**

Conversations to look out for...with legal figures

Any conversation between two individuals about a legal matter or legal advice from a lawyer, is known as Legal Professional Privilege (LPP)

### **Slide Three**

Practical

1. Read through the background of the Operation
2. Read through the explanation of LPP
3. Read through the segments of speech from the audio
4. Identify which speeches match the conditions of LPP

NOTE: Some speeches may not fit any of these conditions and some speeches could fit into two or more conditions.

### **Slide Four**

LPP – What to do next

- Your report should be saved and not submitted.
- Select the appropriate category from the drop down menu on your report ie LPP, journalistic etc. The sensitive portion of the report will automatically route a lawyer
- The lawyer will then do one of the following:
  - Attach a caveat to the report and tick share
  - Decide if content is not LPP and tick share
  - Delete the product and the report

Transcript: Extract from an e-learning training package of an introductory course for transcribers

#### LPP Procedures (Legal matters)

If you believe that the conversation you are listening to may contain LPP material there is a certain procedure that must be followed. The following provides the definition of LPP and sets out procedure for audio analysts to follow.

#### Definition and purpose of LPP

LPP operates to prevent certain sorts of material from being used in evidence or disclosed to the other side in the course of legal proceedings. Its purpose is to ensure that individuals can obtain legal advice without fear that their communications will later be used against them.

Conversations (or parts of conversations) about legal matters may be subject to legal professional privilege and so subject to special handling arrangements. LPP is fundamental to the right to a fair trial, and to the rule of law.

- a) Communications between a lawyer and his client or the client's representative for the purpose of giving legal advice
- b) Communications between a lawyer, his client or the client's representative and any other person in connection with and for the purposes of legal proceedings

The audio analyst may discuss the content of a conversation about legal matters with their management and LAs, legal advisors. The audio analyst must not discuss the content of the conversation with anyone else, including the investigator.

The following instructions currently apply to LPP material:

All material that you consider to be potentially LPP should be marked as such by ticking the appropriate sensitivity box on the system and submitting as usual.

The urgent box should also be ticked to ensure that the system deals with the ingest of the material into the Lawyers queue as a matter of urgency. Under the new process you will no longer need to email material via Outlook to the LAs.

Exhibit 27 - Please note that paragraph numbers have been inserted and do not necessarily reflect the original documents. The underlined parts of this document indicate that it has been gisted for OPEN.

## **NEW LAWYER: INDUCTION AND MENTORING**

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1. All new Legal Advisors (LAs) will have attended the induction programme run by training section. Different posts will of course have different induction requirements and new LAs will have different levels of experience. In addition to agreeing job and development objectives, line managers should arrange an induction programme tailored to the individual's needs. For this purpose they should discuss with new LAs what approach to learning they would find most helpful. This document is simply intended to provide some additional guidance on:

- a. what line managers should provide/arrange, including the training courses which it may benefit new LAs to attend;
- b. the further sources of guidance and information available to them, both in electronic and hard copy form; and
- c. the mentoring arrangements that will be put in place to support new lawyers on joining.

### **Ongoing guidance**

2. Line managers must ensure that new LAs know how to deal with routine business and some of the specific tasks/processes that they will be expected to carry out as LAs. This will include:

1. The procedure for dealing with LPP/confidential material.

### **MENTORING**

3. For this purpose, mentoring is the process by which a new lawyer is supported and guided through their initial joining period by a more experienced colleague (mentor). There are numerous benefits to the mentoring system: the new lawyer feels welcomed into the section and supported as they learn about what may be required from them, and the mentor, in acting as role model and coach, is able to enhance their own skills in developing others.

11 January 2012

[Exhibit 28]

## **Example of the practice referred to in para 49 of the Respondent's 29 October Revised Response**

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Handling – to avoid staff being exposed both to potentially LPP traffic and involved in the litigation...

- The team handling the litigation is:
  - [four named individuals]
  - PLUS: [two named individuals]
- The team handling the sensi requests is
  - All those in the reporting and release team
  - PLUS: [one named individual]
- NO information about any LPP material must be seen by the litigation team. Escalation of sensi reports must only go to [the individual named in the second bullet point above in relation to the team handling sensi requests].