The Right Honourable Gordon Brown MP
10 Downing Street
LONDON

Dear Prime Minister,

INTERCEPT AS EVIDENCE

In his Written Ministerial Statement of 10 December the Home Secretary set out the findings of the work programme set in train by the original Privy Council Review. Although this found that the model envisaged would not be legally viable, the Government reaffirmed its commitment to, if possible, implement the use of intercept as evidence and committed itself to further scoping analysis, to be completed prior to the Easter recess.

The WMS also acknowledged the role of the Advisory Group of Privy Counsellors (Lord Archer of Sandwell, Sir Alan Beith, Michael Howard and myself) and asked that it continue to advise officials tasked with taking this work forward. A copy of our terms of reference, which are centred on ensuring that the operational requirements necessary for public protection and national security are respected, is attached.

We remain of the view that a viable model for the use of intercept as evidence in criminal trials would be a valuable prize. At the same time we recognise that identifying and implementing a model for IAE consistent with fair trials and the operational requirements we set out in the original review is necessarily challenging.

I enclose a report, endorsed by all four members of the Advisory Group, on the further scoping analysis undertaken. Despite intensive effort on the part of officials in seeking a way forward, none of the three areas identified for further activity has yielded a clear way forward:

- In two of these, exploring the scope for enhancing judicial oversight sufficiently to ensure that trial judges are confident that fairness has been maintained and for technology to facilitate disclosure review, the legal and practical difficulties seem likely to be insurmountable. In the latter case, nonetheless, developments over the longer term may offer some scope for its use to help mitigate the operational burdens involved.

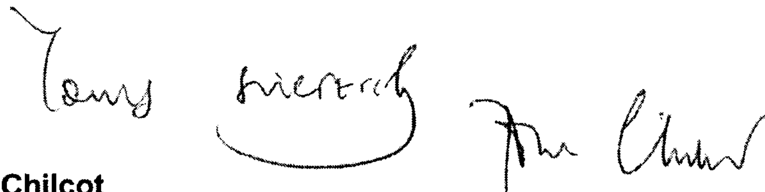
- In the third area, that of full retention of intercepted material, but alternative review mechanisms, the problems, while challenging, seem less categorical. Here approaches exist which could be legally viable, although the additional burdens involved would still violate some of the operational requirements, albeit less in terms of protecting sensitive techniques than broader capabilities. There also remains the wider question of the overall balance of advantage and risk likely to be involved.

On the basis of these findings we believe that any further work should focus on the area of alternative review, in particular so as to establish more clearly the extent of operational and financial impacts, and of the scope to mitigate them.

Before Christmas the Advisory Group was also asked to support the work of officials in looking at interception-related issues raised in the context of the Coroner's and Justice Bill. We have done so and are of the view that the proposals as enacted should be capable of meeting the operational requirements.

Finally, the members of the (all-party and non-party) Advisory Group are all firmly persuaded of the value of having such a body and believe that some such group should continue to advise on this complex set of questions, with their critical significance for national security and in the fields of counter terrorism and other serious crime.

A copy of this letter goes to the Home Secretary.



Rt Hon Sir John Chilcot
(on behalf of the Advisory Group of Privy Counsellors)

ANNEX: PRIVY COUNCIL ADVISORY GROUP TERMS OF REFERENCE

"In his statement to the House on 6 February 2008, the Prime Minister accepted the recommendation of the Chilcot Review that it should be possible to find a way of using some intercept material as evidence, providing certain key operational requirements can be met. He committed the Government to taking forward the necessary work to address how these operational requirements can best be met, and how to take into account the impact of new technology.

The Chilcot report sets out the operational requirements which any legal regime for intercept evidence would need to meet, in order to ensure that the UK's strategic intelligence capability was safeguarded and the ability of intelligence and law enforcement agencies to protect the public was not harmed (Chilcot, para 208). It also addresses the impact of new technology on interception and on legal models (chapter VI).

The role of the Chilcot Advisory Group is to provide advice to the Government's Implementation Team as they carry out this work, to ensure that the key objectives of safeguarding intelligence capability and protecting the public are not harmed as a scheme is developed.

The implementation team will consult the advisory group on its work programme and emerging findings on a regular basis, and at least three times during the course of the work – at the outset, as the plan is devised; part-way through the work to demonstrate progress; and towards the end of the work, before final advice is prepared for Ministers.

The advisory group will do their work on Privy Counsellor terms. They will be offered information in confidence, including information that may have a bearing on national security, in order that they can advise on the basis of good information; and they will respect that confidence and will not share or divulge the information to which they have been party.

FEB 2008"

INTERCEPT AS EVIDENCE – REPORT ON FURTHER SCOPING ANALYSIS

Background

The work programme to implement intercept as evidence (IAE) following the original Privy Council review[1] found that the 'PII[2] Plus' model would not be viable, in that it failed to reconcile the conditions needed for trials to remain fair with the operational requirements necessary to protect national security[3]. These findings were confirmed by a recent European Court of Human Rights case[4]. However, reflecting the potential gains from a workable IAE model the Government commissioned further scoping work to see whether a legally and operationally viable way ahead could be found and to provide a report back to Parliament prior to the Easter recess.

2. This report summarises the views of the Advisory Group of Privy Counsellors on the further work undertaken, and on the emerging findings. As before, the Advisory Group has been kept informed by officials on the direction and progress of the work undertaken.

3. In assessing the further work programme and the emerging findings the Advisory Group has been conscious:

- That the scoping analysis possible in the short period since Christmas, while sufficient to identify whether approaches are worth developing further, cannot provide a definitive picture on whether implementation would be practicable. Notably, while principle legal issues have been explored in depth there has been less time to work through all of the operational issues raised. We have also been aware that the possible financial implications could benefit from further elaboration.

- Of the importance, while seeking innovative solutions, of ensuring that the substance of the operational requirements, in terms of protecting interception capabilities and capacity, are adhered to.

4. Finally, in order to focus on the main issue of reconciling legal and operational viability, the analysis has not revisited the wider set of issues addressed within the initial work programme, including those of systems certification and of reversion.

The Approach Taken

5. Three areas of further work were identified in our December Report, those of:

- Further enhancing the judicial oversight available.

- Full retention of intercept material alongside alternative review requirements.

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[1] Privy Council Review of Intercept as Evidence Cm 7324, 30 January 2008
[2] Public Interest Immunity
[3] Intercept as Evidence A Report Cm 7760, December 2009
[4] Natunen v Finland

- Advanced technology, particularly in terms of making full retention and review more manageable.

6. Within these a range of specific options (see annex) were identified to ensure that an appropriately wide spectrum of approaches were assessed. These were then evaluated in terms of:

- Legal viability: the implications for the Criminal Procedures and Investigation Act 1996 (CPIA) and the European Convention on Human Rights (principally Articles 6, right to a fair trial, and Article 8, the right to privacy).

- Practicability: the key issues which would need to be addressed by implementation.

- The operational requirements: whether and how far current capabilities and capacity could be protected and the mitigations possible were the requirements to be infringed.

7. As before, independent external legal advice has been sought and its views reflected in the findings. And as has been the normal practice for a considerable time, there was also consultation with the senior judiciary. This covered the impact of the different approaches for the courts and the judiciary, including the practical aspects of any new powers or responsibilities to be imposed on judges.

Emerging Findings

8. Two of the alternative approaches (Enhanced Judicial Oversight and Examining Magistrates') considered since December attempt to reconcile the less-than full retention of intercept material with fair trial requirements by enhancing **judicial oversight** of agency retention decisions. They are intended to provide reassurance that agency policy and practice is not systematically biased against the defendant. However, independent legal advice is that they would fail to achieve the necessary equality of arms between prosecution and defence under an evidential regime. The result, as under the 'PII Plus' model, would be trial judges being likely to exclude intercept evidence or halt proceedings, even in cases where the prosecution was not itself seeking to rely on intercept material, including some cases that are already prosecuted successfully.

9. We judge that both approaches would also have significant practical consequences and implications for operational requirements. This is particularly true of the 'Examining Magistrates' approach which would necessitate a fundamental change in how serious crimes involving interception were investigated and which would raise very serious organisational and resource prioritisation challenges. These challenges appear less fundamental in the case of Enhanced Judicial Oversight but would nonetheless be considerable.

10. The remaining four approaches are based on requiring full retention of intercept material but seek to mitigate the resulting storage burdens and those of examination and review. The changing communications environment makes it difficult to reach definitive conclusions on the feasibility of **full retention**. However,

the scoping work undertaken suggests that although the scale of storage involved would be extremely large it seems possible, albeit costly. It would also be necessary to address the significant Article 8 (right to privacy) issues raised in an evidential regime, including through very rigorous controls on access.

11. Of the 'alternative review' options considered, the **'keys to the warehouse'** approach is, in our view, not viable. It would raise both right to privacy and fairness at trial issues, while in practice failing to reduce the burden of review. And the extensive sharing of intercept material with the defence, above and beyond that which occurs at present, would jeopardise interception capabilities and make trial processes more complex and time consuming.

12. There are also significant, albeit less fundamental, legal risks with **'review pursuant to defence-requests.'** In order to secure fairness, trial judges would be likely to order significant amounts of additional examination and review, resulting in additional operational burdens at that point. Significant delays at trial could also result. Fairness at trial could also be jeopardised by both prosecution and defence being unaware of exculpatory communications between co-conspirators.

13. In contrast, review based on **indexing, gisting and summarising** of intercept material, broadly consistent with the Criminal Procedure and Investigations Act, seems likely to be legally viable. But the very fact it is (essentially) based on existing legal processes means that significant practical challenges would be raised. Review would be very labour intensive – and require a large increase in prosecution and interception agency staffing. As such it would not be consistent with the operational requirements and to mitigate the impact on Agency capabilities and capacity it would need to be resourced in full. The sums would be very large, over and above those for the 'PII Plus' model. We would also need to watch the risk of damage to Agency 'agility', reflecting increased scale and bureaucracy in Agency processes.

14. Finally, we believe that advanced **technology-enabled review** does not at present offer a viable way forward. Some of the elements necessary for automatic review are already available or are being developed. Most notably, automatic voice to text programmes already exist and key-word search technologies are already widely used. However, existing programmes are not capable of handling intercept quality product with the necessary accuracy. And significant issues are likely to be raised by use of key word searching for voice material rather than documents. It must also be remembered that even if a technical solution (in whole or part) were identified it would require significant levels of funding.

15. Rapid ongoing technical change may in due course alter this judgement, but the nature of review, which is inherently case-specific and dependent on interpreting many different pieces and sources of information, makes this unlikely in the foreseeable future.

16. In addition to meeting the operational requirements, the Privy Council review underlined the importance of securing the confidence of international partners and Communication Service Providers (CSPs). The 'PII Plus' model raised considerable concern, for instance over protection of their staff, and it seems likely these would also remain for the approaches scoped above.

Conclusions

17. The Advisory Group remains of the view that the use of intercept as evidence in criminal proceedings would be a valuable prize but at the same time it believes that this must not be at the expense of the operational requirements necessary to protect a capability vital to the nation.

18. None of the approaches examined in this further phase of scoping work successfully reconcile the requirements for trials to remain fair with those necessary to protect the public and national security. In some cases the problems are such that further work is not justified. It is clear that the legal and operational challenges around the '**keys to the warehouse**' approach are insurmountable, and that '**enhanced judicial oversight**' is very unlikely to overcome the problems of unfairness at trial identified for the 'PII Plus' model. Similarly, **technology enabled review** does not at present offer a way forward – although it may in time potentially mitigate some of the operational burden involved in undertaking review.

19. This suggest that further work might most productively be focussed on two areas which assume full retention. '**Review pursuant to defence-requests**' would be problematic, but it may be worth exploring the extent of the issues raised and scope to address them consistent with the operational requirements. Similarly, '**indexing, gisting and summarising**' has the advantage of being broadly consistent with current CPIA processes and although not consistent with all of the operational requirements it would be worth examining the scale of possible impacts and scope to mitigate these.

20. It is, of course, likely to be for new or returning Ministers to consider next steps in the light of the ongoing security situation and economic climate. However, we believe that further work building on that done to date would be of value, the most promising avenues to explore being:

- Examining in more depth the operational, legal and public policy issues surrounding a full retention store.

- A more detailed assessment of the operational and financial impacts of alternative review based on either 'indexing, gisting and summarising' and 'review pursuant to defence-requests' .

- A validation of the findings on the prospects for technology enabled review to make full retention and review more manageable.

ADVISORY GROUP OF PRIVY COUNSELLORS
MARCH 2010

ANNEX A: THE DIFFERENT APPROACHES ASSESSED

A1. Six different approaches have been assessed. Of these, two are closely based upon the 'PII plus' model recommended of the Privy Council review and were explicitly designed to address the legal viability issues raised by absence of full or near-full retention of intercept material. These are:

- **Judicial Oversight**: two approaches intended to better reconcile ongoing deletion of material with 'fair trial' requirements:
    - **Enhanced Judicial Oversight:** building on the approach developed previously, but being mandatory, binding and conducted by serving judges or office holders with equivalent expertise and independence.
    - **'Examining Magistrates':** drawing on continental models for the direction of criminal investigations.

A2. In addition a further four, wider ranging, approaches have been examined, predicated on the need to fully retain intercept material but which explore the scope to mitigate the operational implications of this and of review. These are:

- **Full Retention and Alternative Review:** three approaches which, should full retention be necessary, seek nonetheless to mitigate review burdens:
    - **Indexing/ gisting/ summarising:** seeking to apply broadly CPIA-compliant processes to intercept material in as 'light-touch' a way as possible.
    - **'Review pursuant to defence-requests':** prosecution review for exculpatory material based primarily on key search identifiers suggested by the defence.
    - **'Keys to the warehouse':** the review conducted by the defence, based on the full (subject to security considerations) sharing of material by the prosecution
- **Full Retention & Technology-Enabled Review:** exploring whether advances in technology might help mitigate the burden of review, based on:
    - Full retention storage (also necessary for 'alternative review' above).
    - Automatic transcription/translation of voice material into machine-readable text
    - Keyword searching of the resulting text (following similar methods applied for current searches of 'high volume' seized media at present.