APPENDIX 1 TO JUDGEMENT OF 23 JULY 2018 (as substituted on 26 July 2018)

OPEN INTRODUCTION TO CLOSED JUDGMENT

1. The closed part of the Judgment is in two parts

   Part 1: The closed section relating to the s.94 directions referred to in paragraph 53 of the Open Judgment where the function of this section is fully explained;

   Part 2: The closed section dealing with sharing of BCD/BPD and oversight of any such sharing.

2. In accordance with its legal obligation, the Tribunal has conducted as much of its proceedings in public as is possible, and will publish as much of its conclusions as is possible. Just as some of those proceedings were closed, so also it is intended to produce a closed judgment.

3. The questions now under consideration are whether the UKIC may lawfully share such bulk datasets with

   a. The security services of foreign powers ("foreign partners");
   b. Corporations and individuals with whom the UKIC may contract for the provision of services ("industry partners");
   c. Law Enforcement Agencies (LEAs) within the UK, for example HMRC or the police.

4. The Respondents do not confirm or deny that any such sharing has ever taken place or that it is contemplated. The Tribunal accepts that this is a lawful stance for them to take and proceeds on that basis. Nothing in this Judgment addresses what has actually

happened or which may actually happen. The open part of the Judgment proceeds on the assumption that such sharing may take place and considers

a. the legal test which should be applied before it could lawfully happen,
b. the safeguards which should be in place to render it lawful; and
c. the oversight regime which would ensure that (a) and (b) were effectively complied with.

5. This case does not concern the product of an investigation by the UKIC using BCD/BPD. That product will no longer be bulk data, but will be intelligence capable of being actioned like any other such intelligence. The sharing under consideration here is the sharing of "raw data". It does not follow from this that any such sharing must inevitably involve the sharing of the whole dataset because a degree of editing or filtering is conceivable which might reduce the intrusiveness of any such sharing. A dataset which has been filtered in this way, but which remains a bulk dataset, is sometimes called a "sub-set" in the documents.

<u>The open parts of the hearings</u>

6. The Tribunal has received open submissions from the Claimant based on certain aspects of sharing which have entered the public domain, and on inferences which have been drawn from material within their knowledge. Sometimes those inferences have the appearance of speculation, but in this context that is not a matter of proper criticism for obvious reasons. What is publicly known is that

a. Sharing of intelligence generally (as opposed to BCD/BPD in particular) has taken place with foreign partners. From this it is suggested that it is at least possible that the UKIC may at some stage contemplate sharing of BCD/BPD

and therefore that the lawfulness of such a step is not a merely theoretical issue.

b. There is a degree of access by industry partners to UKIC sites and systems. The UKIC must commission systems from external developers and manufacturers and for that purpose it is inevitable that they must work with such organisations and people.

c. In particular, GCHQ has a relationship with Bristol University which is in the public domain. The arrangement with Bristol University is that the Heilbronn Institute for Mathematical Research has a partnership arrangement with GCHQ. It uses GCHQ systems and the data does not leave those systems. The Director is a member of GCHQ staff and other GCHQ staff provide management and supervision of its operations. This may look like sharing with an external body, but in fact it is not. A minority only of the academic researchers have access to data derived from a sensitive database. That access is limited to operational data which has been narrowly focussed, which has remained under GCHQ control, which has been subject to full legal safeguards and which is restricted to GCHQ systems. In the form in which such access occurs, the data is no longer a bulk dataset.

A principal purpose of the work of parts of the UKIC is the supply of intelligence to LEAs. The power in s.19 CTA, see paragraph 73 of the open Judgment, exists in order to extend that activity to all material legitimately acquired by the UKIC even where it was acquired for one purpose and is shared for another. We accept that we should examine the contention that the UKIC may wish to supply raw BCD/BPD (as opposed to product) to LEAs as part of this activity as a hypothetical assumption.

7. The Claimant relies on the evidence of Dr. Gus Hosein (see paragraph 81 of the Judgment) which points to risks which have been identified in other spheres of activity where organisations have allowed access to, or control of, their systems to external bodies. We have borne that evidence in mind when reaching our conclusions. Commercial organisations such as those described by Dr. Hosein cannot rely on the criminal law to secure compliance by staff and contractors to the same extent as UKIC, and do not operate the same system of vetting of staff and contractors as is operated by the UKIC. The Tribunal concludes that it is these systems and controls which are critical in assessing the level of risk in permitting access, and accordingly the evidence of Dr. Hosein of how other organisations, which are less well protected in other ways, proceed is not decisive. The risk of negligent or malign misconduct by directly employed staff or external contractors cannot be excluded. The question is whether it is limited as far as reasonably possible by appropriate management.

8. The GCHQ witness was cross-examined about some of these issues in open, and the Claimant's submissions were informed by that exercise. That was an exceptional step taken by the Tribunal because of the concerns about his evidence dealt with in the open Judgment. The Claimant submitted that the Tribunal should conclude that external contractors always pose a higher risk than directly employed staff from the fact that Edward Snowden was not directly employed by the NSA at the time when he extracted and removed data. This contention was explored with the GCHQ witness in his evidence in open session and he replied that he did not accept it.

9. In relation to oversight, the Claimant was able to rely on the published reports of the Commissioners (ISCom and IOCC), who had that task prior to IPCO's inauguration on 1 September 2017. The relevant period in the light of the findings in the First Judgment is 4 November 2015- 31st August 2017 ("the relevant period"). Before that, the acquisition of BPD and BCD has been held unlawful already in the First Judgment. The Claimant also relied on correspondence and minutes and reports of inspections by IPCO, in this context as well as in support of the application to re-open in part the First Judgment.

10. In response to these submissions the Respondents made some submissions in open, but also made submissions in closed. The Tribunal heard evidence in closed and was assisted in that process by Mr. Glasson QC, Counsel to the Tribunal. Afterwards, Mr. Glasson assisted further by opening up and disclosing as much of what had been said in closed as was possible, which further assisted the Claimant in refining its submissions. Mr. Glasson was acting in these respects as Counsel to the Tribunal, but in a capacity which is independent of the Tribunal, and he is free to make such submissions as he considers necessary to ensure that the claim is fairly dealt with.

<u>The approach of the Tribunal</u>

11. The Tribunal considers that transparency is a prime consideration in dealing with claims of this kind. It is accepted by the Claimant, as it clearly must be, that full disclosure would defeat the object of the existence of the UKIC and endanger the security of the nation. Transparency must therefore be curtailed as far as is necessary, but only so far. We have endeavoured to achieve this goal and in that endeavour have engaged in a long and careful series of hearings, with extensive consideration between them of what must remain closed.

12. As far as possible, our conclusions on sharing and on the related question of re-opening the First Judgment on oversight are set out in the Open Judgment at paragraphs 61 to 85 and 95 to 111. The Tribunal has also prepared the Closed Judgment which determines the Claimant's submissions by reference to the evidence heard in closed session. The function of that Judgment is to inform those who can have access to it of our findings, and it will play its part in assisting the UKIC and IPCO in the process of constant improvement which is, or should be, inherent in any effective system of oversight. The fact that the Tribunal has prepared a reasoned decision on the evidence and submissions which it heard in closed should operate as a reassurance to the Claimant that their claims have been taken seriously and investigated by an independent Tribunal with the assistance, as we have said, of independent Counsel. The Tribunal did so on the basis of evidence given on oath or under affirmation. That is an important guarantee of honesty and reliability.

CONCLUSION:

13. The conclusion of the Tribunal, unanimous as to all issues save Issue 3A as set out in the Closed Judgment, is that since 5th November 2015 (14th October 2016 in respect of Issue 1) there are no systemic failures in the arrangements for the acquisition and use by UKIC of BCD/BPD or in the oversight regime which render any sharing unlawful, and that there is no basis to reopen the First Judgment, save as to the conclusions on Issue 1. In certain respects, the evidence adduced before the Tribunal has given rise to serious concerns which are addressed in the Closed Judgment. The conclusions of the Tribunal set out in the Open Judgment are consistent with its conclusions in the Closed Judgment. In respect

of Issue 3A, each of the dissenting Members has set out reasons for such dissent as annexures to the Closed Judgment.

14. The re-opening of a Judgment is a matter of discretion and we have reached our decision to refuse to do so for the reasons set out in paragraphs 95-112 of the Open Judgment and because

    a. The concerns affect an oversight regime which has now been replaced by an entirely new system. The IPA provides a new code for decision making in this area. IPCO has replaced the Commissioners whose effectiveness is in issue in this case.

    b. There is no evidence that any failings of oversight have in fact resulted in any unlawful use of data. We have not identified any person to whom a remedy should be granted.

    c. The failings concern only a limited area of one agency.

    d. The failings are now under the active scrutiny of IPCO which is fully aware of the matters of concern at GCHQ and which has the capacity to ensure that they are remedied.

    e. Our inquiry has involved a degree of re-opening of the conclusion and we are satisfied that no substantial benefit will accrue from any further consideration of these issues in the present context.

    f. The exercise which we have now conducted has involved a historical investigation which has produced valuable information which will inform future decision making by GCHQ and oversight by IPCO. We offer some observations on the evidence in the last part of the CLOSED Judgment which we hope will assist in that exercise. We consider that this adequately addresses what has been discovered, without re-opening the whole of the evidence which resulted in the First Judgment.

15. The conclusions of the Tribunal set out in the Open Judgment are consistent with its conclusions in the Closed Judgment. In respect of Issue 3A, each of the dissenting Members has set out reasons for such dissent as annexures to the Closed Judgment. The majority share concerns expressed in those dissenting opinions though the majority does not accept that they are a sufficient basis to affect our conclusion that the regime in respect of sharing BCD and BPD was compliant with Article 8.

16. The Tribunal has examined and determined the issues of the basis of the claim as it has been advanced. This is essentially a claim based on Article 8 rights of persons whose data has been acquired by UKIC as part of bulk datasets. It relates to a previous and superseded regime of oversight. This case concerns bulk datasets and Article 8 and our conclusions are made in that context.

17. The issue of foreign sharing of intelligence more generally is a matter of the greatest importance. The risk that a partner state may use intelligence from UKIC in a way which would be unlawful is a subject of concern, and may give rise to consideration of Articles 2 and 3 in addition to Article 8. Similarly, sharing of bulk datasets with a commercial or political organisation which might misuse them for commercial gain or political advantage is one which gives rise to a need for rigorous control and oversight. Nothing in our conclusions understates the importance of proper management and oversight of these potentially hazardous activities. The Tribunal has no reason to suppose that IPCO takes any different

view and confidently expects vigorous oversight of any such activities in future, whether they arise in the bulk dataset context or otherwise.