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## BRIEFING NOTE

### POST OFFICE LTD GENERAL COUNSEL

#### Briefing Note

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16<sup>th</sup> October 2013

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## History

1. Historically the Post Office was a division of the Royal Mail Group (RMG), however Post Office Ltd. (POL) was separated out of the RMG on the 1<sup>st</sup> April of 2012 and each became separate and unrelated organisations. Prior to separation it was RMG who conducted the prosecution of criminal offences committed by POL employees<sup>1</sup>, sub-Postmasters<sup>2</sup> (SPMR's) or clerks,<sup>3</sup> however post-separation POL assumed the role of prosecutor.
2. In general only three distinct offences are prosecuted by POL: Theft; False Accounting; and Fraud. Theft usually involves the direct appropriation of (usually) monies by those handling POL money. False Accounting and Fraud may be viewed as different types of the same species; the falsification of records so as to hide lost or stolen funds. In these cases SPMR's will assert that the Horizon Online (HOL) system has thrown up unexplained losses or shortages and, in fear of repayment or loss of contract,<sup>4</sup> they have falsified their accounts so as to hide the fact from POL.
3. The detection and successful prosecution of such offences is almost always dependent upon a proper analysis of HOL data and its effective presentation both to defence representatives and to the court. Accordingly it is imperative that the integrity and operation of HOL is demonstrably robust. To this end prosecutors have relied upon the statements of both POL Investigators and, where expert evidence is required, that of Fujitsu Services Ltd. In each case a formal statement (and testimony, if required) explaining HOL and those functions of HOL relevant to the particular prosecution is provided by the Lead Investigator. Where it is necessary to provide evidence and testimony dealing with the integrity of HOL and/or to explain technical aspects of the system and data, we have relied upon [REDACTED], an expert witness [REDACTED]  
[REDACTED].
4. Defendants are entitled to challenge any and all prosecution evidence, including expert evidence, and in so doing they are entitled to see any material in the possession of the

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<sup>1</sup> Those working in Crown Offices are employed by POL.

<sup>2</sup> Contracted to POL to provide Post Office services.

<sup>3</sup> Employed by SPMRs and often family-members of SPMRs.

<sup>4</sup> The contract requires the SPMR to repay any losses, howsoever incurred or by whom.

prosecutor<sup>5</sup> which might assist them in that task. This is the foundation for the duty of disclosure placed upon the prosecution. In complying with the duty a prosecutor must consider whether he (POL) is in possession of, or has access to, any material which "...might reasonably be considered capable of undermining the case for the prosecution ...or of assisting the case for the accused...."<sup>6</sup> The duty extends to examining any information of which the prosecutor becomes aware (and for these purposes this includes information which Post Office Ltd becomes aware of) so as to determine whether or not that test is met. The prosecutor must, at all times before the conclusion of the case, keep under review the question whether there is any information which must be provided to the defence.<sup>7</sup> This duty is on-going even after conviction and sentence.

5. This duty of disclosure also extends to any expert instructed by the prosecution to provide expert statement and/or testimony. That duty is set out thus:

*“....an expert witness possessed of material which casts doubt upon his opinion is under a duty to disclose the fact to the solicitor instructing him, who in turn has a duty to disclose that material to the defence. The duty extends to anything which might arguably assist the defence. Moreover, it is a positive duty.”<sup>8</sup>*

6. In the vast majority of cases prosecuted by RMG and latterly POL, HOL data represented the starting point for the investigation and provided the primary evidence against offenders. Very often in these cases a defendant would assert that losses were due to unexplained and false figures, transactions and balances in HOL and that accordingly they were innocent of any crime. In other cases defendants would say that, whilst they had taken no money from POL, they had falsified accounting records so as to hide or disguise otherwise inexplicable HOL data.

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<sup>5</sup> Or reasonably available to him

<sup>6</sup> CPIA 1996, ss.3&7

<sup>7</sup> Ibid, s.7A

<sup>8</sup> R. v. Ward, *supra*. and see paras.6-9 above.

## Second Sight

7. As the result of increasing concerns<sup>9</sup> raised by SPMR's and others and relating to the reliability and functionality of HOL, including allegations that the system had malfunctioned or had produced unexplained false balances and other shortages, in 2012<sup>10</sup> POL commissioned Second Sight Support Services Ltd. ("Second Sight") to enquire into the alleged problems. Second Sight's interim report was published on the 14<sup>th</sup> July 2013. They concluded that there were no system-wide problems with the HOL software but went on thus:<sup>11</sup>

- 6.4 In the course of our extensive discussions with POL over the last 12 months, POL<sup>12</sup> has disclosed to Second Sight that, in 2011 and 2012, it had discovered "defects" in Horizon online that had impacted 76 branches.
- 6.5 The first defect....impacted 62 branches. It was discovered in September 2010.
- 6.6 The second defect.....affected 14 branches....and generated discrepancies...including a ....shortfall...and a surplus.....
- 6.7 POL was unaware of this defect until, a year later after its first occurrence in 2011, it re-occurred.....
- 6.8 POL's initial investigations in 2012 failed to reveal the system defect and, because the cause could not be identified, the amount was written off.

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<sup>9</sup> Often by those alleged to have stolen or defrauded Post Office Ltd. of monies.

<sup>10</sup> Prior to the commissioning of the Second Sight Report a number of complainants had prevailed upon their Members of Parliament to raise the issue of HOL's integrity in the House.

<sup>11</sup> Second Sight's interim report published 8/7/2013, paras. indicated.

<sup>12</sup> In fact this disclosure was made by [REDACTED].

**The [REDACTED], or Lepton P.O. Report**

8. Shortly after the publication a further report, now referred to as the [REDACTED], or Lepton P.O. Report, came to light. This report was based upon a series of email passing between [REDACTED], a POL Security Fraud Analyst and [REDACTED] a member of the Fujitsu team. The emails appear to have been sent/received over the period 30<sup>th</sup> January 2013 to 13<sup>th</sup> February 2013. The essence of the contact is a 'question-and-answer' process between [REDACTED] and [REDACTED] in circumstances where [REDACTED] was enquiring into an apparent HOL issue at the Lepton SPSO. That issue was resolved: the importance of the report however was this: [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

**Consequences of Second Sight and [REDACTED]**

9. [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

10. [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] [REDACTED]  
[REDACTED]

Of primary importance was the fact that, had POL been possessed of this material during the currency of any particular prosecution, it would have undoubtedly been disclosable to the defence pursuant to POL's duty of disclosure.

11. Because a defendant is entitled to challenge any prosecution material, where (s)he asserts HOL failings as the source of any loss or shortage, (s)he would have been

entitled to the disclosure of the material [REDACTED]. Thus in any case where a prosecution relied upon HOL data as a primary source of evidence and the defendant was convicted<sup>13</sup>, the non-disclosure of this material has the potential to render a conviction unsafe.

**Chronology: post second Sight Interim Report.**

12. Cartwright King first became aware of the issue of bugs within HOL on 27<sup>th</sup> June 2013 and just prior to the commencement of the trial of R. v. [REDACTED], a SPMR alleged to have removed money from PO Card Accounts operated by elderly and vulnerable customers. We were instructed that a report commissioned from Second Sight by Post Office Ltd. and as yet unpublished, indicated that HOL may not be 'bug' free, and that at least one of the 'bugs' produced false-balance figures. Given that all of the data supporting this prosecution originated from HOL and other HOL-interfaced systems, we postponed the [REDACTED] trial.
13. Following the postponement of the [REDACTED] trial POL instructed prosecuting solicitors to commence a review of all POL prosecutions back to 1<sup>st</sup> January 2010 so as to determine whether or not any particular defendant's conviction might have been rendered unsafe by the non-disclosure of material revealed by Second Sight and [REDACTED] [REDACTED]. Much thought was given to the selection of the start-date, including such factors as proportionality; resourcing; transparency; and POL reputation. The view was taken that all of these considerations militated in favour of a date close to the initial HOL migration date of 2010.

**The Review process**

14. The purpose of the Review process was defined as being to identify those cases where, had we been possessed of the Second Sight and [REDACTED] reports during the currency of the prosecution, would we have then been required to disclose some or all of that material to the defence. We deliberately set a very low threshold for applying this test: if the material *might* have been disclosable then we would provide the Reports to the defendant so that he could consider whether or not to appeal against his

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<sup>13</sup> Either by trial or by guilty plea.

conviction. This test, and indeed the entire process, was directed towards the duty of any prosecutor to provide to a defendant any disclosable material.

15. The process adopted was thus: all of the cases were subjected to a 'sift' review in which those identified as being 'risk' cases were separated out and subjected to a 'Full Review'. The sift review was conducted by a qualified criminal solicitor and entailed the reviewer reading the case papers, identifying the issues and considering whether or not HOL was an issue. Sift Reviewers were required to have relevant criminal experience; in addition they received training in both POL prosecution practice and disclosure prior to commencing work on the Sift process.

16. Full Reviews were (and are) conducted by senior counsel experienced in prosecuting and defending criminal cases and disclosure issues. In each 'Full Review' case a full and detailed report was undertaken, considering every aspect of the case and reaching conclusions about POL's exposure. Where it was determined, again by a very low threshold test, that disclosure ought now to be made, the reports were disclosed to the defendant's representatives.

17. To date, [REDACTED] cases have been subject to a 'sift' review. The breakdown is as follows:

Statistics as at 16.10.13	Initial Sifts	Second Sifts	Fully Reviewed	[REDACTED] ADVISED	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]

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<sup>14</sup> 19 [REDACTED]

<sup>15</sup> Disclosure was advised in the case of [REDACTED] but not made as the case was discontinued

<sup>16</sup> Disclosure has been advised in [REDACTED] and [REDACTED] but not yet made as the disclosure letter is with [REDACTED] for approval. Disclosure will be required in the cases of [REDACTED] and [REDACTED] if these suspects are charged.

18. Where the Full Review required that we do so, we have disclosed the Second Sight Interim Report and the [REDACTED] Report to a small number of convicted defendants. We do not consider that all who have received this disclosure will launch an appeal – the cases against them were in any event strong and, whilst the material was properly disclosable, it remains only one factor amongst many. Thus far no convicted defendant has sought the leave of the Court of Appeal to challenge his conviction, however this may change.

19. We are also in the process of undertaking a ‘second sift’ review. This entails senior counsel reviewing all ‘sift’ reviews to ensure uniformity of approach and correctness of the original reviewer’s decision.

#### **The Future**

20. [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED].

21. We were also instructed to, [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED].

22. The benefits of [REDACTED] include the demonstrable auditability and transparency of POL’s [REDACTED].

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23. On the 8<sup>th</sup> July 2013 we advised POL that [REDACTED]  
[REDACTED]  
[REDACTED]. Accordingly POL instructed Cartwright King to identify [REDACTED] with the appropriate knowledge of HOL to provide such evidence

<sup>17</sup> E.g. Crown Prosecution Service; HM Revenue & Customs; The Environment Agency; Department for Work & Pensions; The Office of Fair Trading; The Serious Fraud Office etc.

That [REDACTED] would deal both with those cases presently under prosecution and any future HOL-reliant prosecutions. We have identified two; [REDACTED]  
[REDACTED], both [REDACTED], as the [REDACTED].  
[REDACTED] have agreed to take on this work

### **Scotland**

24. At the beginning of September, POL was informed that the Procurator Fiscal for Scotland (PF) had determined all POL prosecutions in Scotland should be terminated. He had arrived at this decision on the basis that, as POL were then unable to prove that HOL was wholly reliable, he was not in a position to seek the conviction of any defendant on potentially unreliable evidence. POL's main concern here was that of the intention to stop ALL cases and not just those which relied upon HOL-based evidence. Such a step would have [REDACTED] for POL.

25. CK senior counsel Simon Clarke and senior Solicitor Martin Smith and were asked by POL to attend upon the PF and to see if anything could be done to dissuade him from his stated course. [REDACTED] attended for POL. Having heard from CK and [REDACTED], the PF agreed that, rather than discontinue every case, he would review each case separately and a decision taken on the facts of individual cases. This amounted to a departure from his starting point that all POL prosecutions were to be terminated. In addition the PF agreed to adjourn every case for [REDACTED] to allow POL to [REDACTED]  
[REDACTED].

### **Discontinued Cases**

26. Following review, a number of HOL-reliant cases were discontinued, not least because we [REDACTED].

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### **Present state of affairs**

27. We believe that we are nearing the end of the Review process, certainly in relation to HOL cases going back to January 2010. We are certainly more confident now that [REDACTED]  
[REDACTED]  
[REDACTED].

### **Current & on-going prosecutions**

28. Prosecutions are presently subject to [REDACTED]

[REDACTED].

### **Documents**

29. We include in this Briefing the following documents:

- i. Counsels General Advice, 8<sup>th</sup> July 2013
- ii. [REDACTED]
- iii. Counsel's Advice re Expert Evidence ([REDACTED])
- iv. [REDACTED]
- v. Counsels Advice – “[REDACTED]”
- vi. Review Protocol for the Initial Sift and Full Review Process
- vii. Protocol for the Identification, Recording and Retention of Material which may be subject to Duties of Disclosure
- viii. Sample Full Review – R. v. [REDACTED]
- ix. Meeting Report – Scotland
- x. Draft Scope [REDACTED].
- xi. [REDACTED].

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