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3 April 2014

Ref: AH/2265/001/LCA

BY WAY OF FAX AND COURIER (3 COPIES)

Mrs Fatoş Araci
Deputy Registrar
European Court of Human Rights
Council of Europe
67075 Strasbourg-CEDEX
France

RE: Request for Leave to Submit Written Comments, Application No. 58170/13 (*Big Brother Watch and Others v. The United Kingdom*)

Dear Deputy Registrar Araci:

In accordance with Rule 44(3)(a) of the Rules of the Court, the Center for Democracy & Technology (CDT) and the Pen American Center, Inc. (PEN American) respectfully request leave to submit written comments on specific points related to Application No. 58170/13 (*Big Brother Watch and Others v. The United Kingdom*). The Chamber chose to give priority to this application pursuant to Rule 41 on 9 January 2014.

Permission is sought to intervene by way of written comments. In order to assist in the preparation of submissions, counsel have been instructed on a *pro bono* basis.

Interest of CDT and PEN American in the Proceedings

The organisations seeking leave to intervene jointly in these proceedings have long histories of working to support civil liberties and media freedom, both online and off.

CDT is a non-governmental organisation devoted to defending global online civil liberties and human rights, with offices in Washington, DC, Brussels and San Francisco. It is dedicated to keeping the Internet open, innovative, and free, and committed to finding forward-looking and technically sound solutions to the most pressing challenges facing the Internet. Since its founding 20 years ago, CDT has played a leading role in shaping the policies, practices and norms that have empowered individuals to more effectively use the Internet as speakers, entrepreneurs, and active citizens.

PEN American is a non-governmental organisation of writers that includes poets, playwrights, essayists, novelists, editors, screenwriters, journalists, literary agents, and translators. PEN American is based in New York City and has approximately 3,700 members. It is important to note that PEN American is a separate legal person from English PEN, one of the applicants in the present case, although both organisations are affiliated with PEN International, the global writers' organisation with 144 centers in more than 100 countries in Europe, Asia, Africa, Australia, and the Americas. PEN American works along with the other chapters of PEN International to advance literature and to protect the freedom of the written word wherever it is imperiled. It advocates for writers all over the world. PEN American brings special expertise with respect to the effect of surveillance on writers' free expression rights and, through its international network, has a wealth of specialist knowledge with respect to international practices and standards on freedom of expression and the media.

As a result of their specific experience with respect to matters relevant to media and Internet freedom worldwide, CDT and PEN American consider that they are particularly well placed to assist the Court through submissions by way of a third party intervention.

CDT and PEN American believe this case is fundamentally important to the ongoing debate regarding mass surveillance activities by governments, and raises an essential question of whether such broad surveillance practices are compatible with human rights.

General Scope of the Intervention

In the context of the present application, CDT and PEN American consider that they are in a position to provide the Court with particular submissions relevant to the following issues.

In the event that the Court considers the proportionality of the interference with Article 8 rights which the applicants allege to have occurred, the Court will need to take into account not only the specific Article 8 rights on which the applicants rely, but also the broader rights implications of the UK government's actions. A proper assessment of the actions of the alleged unlawful interference with the applicants' Article 8 rights must take into account not only the direct impact of surveillance on privacy rights, but also the indirect – but no less significant – chilling effect that surveillance has on the willingness of writers, journalists, publishers, human rights defenders and others to communicate with sources, share information, and fearlessly publish in the exercise of the right of freedom of expression. CDT and PEN American consider that, given their detailed knowledge of the online media environment, they are particularly well placed to provide submissions on this point to assist the Court in this necessary aspect of its proportionality assessment.

In addition, CDT and PEN American consider that the wider impact of surveillance activities on the utility of the Internet as a reliable and efficient means of communication is likely to be relevant to the Court's proportionality assessment. For instance, CDT and PEN American are aware that surveillance activities have provoked surveillance avoidance policies and strategies, which have the potential to affect adversely not only the privacy rights of individual users, but the efficiency of communication on the Internet in general. As a result of their detailed knowledge of the management of information online, CDT and PEN American believe that their submissions on these matters may further assist the Court in its assessment of the proportionality of any interference alleged by the applicants.

Further, in considering the proportionality of the interference with Article 8 rights represented by the UK government's receipt of information produced via the United States National Security Agency's PRISM and UPSTREAM programs, the Court will need to consider the rules and procedures governing the dissemination of such information. On 17 January 2014, the US President, Barack Obama, announced a series of reforms in this regard, issuing a Presidential Policy Directive (PPD-28) to implement them. PPD-28 is intended to extend certain rules relating to the retention and dissemination of private information pertaining to non-US citizens. The Court may wish to have regard to these rules in its assessment of the proportionality of any interference with the applicants' Article 8 rights, since these rules have an impact upon the way in which the private information of non-US citizens is likely to be dealt with in the future. Given the unique legal and technical expertise of CDT and PEN American in the area of Internet and media information security and management, they will be able to provide an explanation of the relevant developments in the United States, which may assist the Court in its assessment task.

Yet further, in assessing the lawfulness of the UK government's surveillance activities, the Court may wish to consider the approaches adopted worldwide to similar issues. The Court may consider it of assistance to consider how jurisdictions outside the UK have balanced matters of privacy, free expression, and national security in judging what is, and what is not, appropriate for government surveillance. CDT and PEN American, due to their experience and reach outside the UK in this field, respectfully submit that they are able to provide the necessary comparative legal submissions to enable the Court to ensure that its analysis is informed by comparable legal thinking on similar issues worldwide.

For the reasons set out above, CDT and PEN American respectfully request permission to intervene jointly in this case by way of written comments. CDT and PEN American are conscious of the need to avoid duplication in submissions and believe that the issues likely to be covered in the contemplated intervention will cover areas to which the Court would not be directed by the applicants but which may, they respectfully submit, assist the Court in arriving at its conclusions in a case of great significance for privacy and Internet freedom. The submission would be limited to a maximum of 10 pages, and would be filed by courier and submitted via fax to 0033 3 88 41 27 30. The Court is invited to direct its response to this application, and any questions that pertain to it, to Mr. Nojeim at the address above, and to gnojeim@cdt.org.

Sincerely,



Gregory T Nojeim
Senior Counsel and Director, Project on Freedom, Security and Technology
Centre for Democracy and Technology



Katy Glenn Bass
Deputy Director, Free Expression Programs
PEN American Center, Inc.