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**BRIEFING PAPER**

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# Access to journalists' sources

By Philip Ward


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# Summary

In late 2014 concerns emerged that the Metropolitan Police and Kent Police, in the course of their inquiries, had acquired journalists' communications data. The *Press Gazette* and the National Union of Journalists launched a 'Save our Sources' campaign setting out their concerns. The Interception of Communications Commissioner mounted an investigation. This came in the wake of a ruling by the European Court of Justice that identified, amongst other things, the lack of any exception in data communications law for communications that are subject to an obligation of professional secrecy.

Police access to such information is governed by the *Regulation of Investigatory Powers 2000* (RIPA), while the principle of journalistic privilege is enshrined in the *Police and Criminal Evidence Act 1984* (PACE). The recent controversies have been about the police using powers under RIPA rather than under PACE.

In February 2015, the Commissioner published his report into the use by police of RIPA to access journalists' communication records. His inquiry found that some 82 journalists had had their communications data obtained by police in three years. The Commissioner concluded that police forces "did not give due consideration to freedom of speech" and current Home Office guidelines did not sufficiently protect journalistic sources. He also recommended that police forces should be required to seek a judge's permission when seeking to discover a journalist's confidential source.

Under s71 of RIPA, the Home Secretary must issue codes of practice detailing how the Act is to be implemented. Following the Commissioner's report, the Government consulted publicly on the additional consideration that must be given to communications data requests relating to those in professions which handle confidential information (such as journalists). A revised code of practice was laid before Parliament in March 2015. The *Serious Crime Act 2015* amended RIPA to ensure that a code in relation to the prevention or detection of "serious crime" must include provision to protect the public interest in the confidentiality of journalistic sources.

Further protection for journalists is afforded by the European Convention on Human Rights and the *Contempt of Court Act 1981*. The "Bill of Rights" which was promised by the newly elected Conservative Government in 2015 may also include explicit protection.

In a substantial report published in June 2015, the Independent Reviewer of Terrorism Legislation called for updated legislation on surveillance to include additional protection for "privileged or confidential material".

The *Investigatory Powers Bill*, currently before Parliament, would require a public authority to obtain the approval of a "Judicial Commissioner" before obtaining communications data which would identify a journalist's source, unless there were an imminent threat to life.

This Briefing Paper deals with the law in England and Wales.

# 1. Background

Under what circumstances, if any, should the police be able to access journalists' confidential sources?

Police access to such information is governed by the *Regulation of Investigatory Powers 2000* (RIPA), while the principle of journalistic privilege is enshrined in the *Police and Criminal Evidence Act 1984* (PACE). The recent controversies have been about the police using powers under RIPA rather than under PACE.

On 8 April 2014 the European Court of Justice (ECJ) published its ruling making invalid the Data Retention Directive 2006/24/EC. This Directive had been transposed into UK law by way of secondary legislation and enabled communication service providers to retain communications data for law enforcement purposes for periods of between six months and two years. In response to the resulting uncertainty, the Government introduced the *Data Retention and Investigatory Powers Act 2014* (DRIPA), a fast-tracked piece of legislation passed by both Houses in July 2014.[1]

The ECJ ruling identified, amongst other things, the lack of any exception for communications that are subject to an obligation of professional secrecy.[2]

In July 2014 a UK Government Note on the ECJ judgment indicated that the Government would amend the code of practice for the acquisition and disclosure of communications data, ensuring that where there may be concerns relating to professions that handle privileged material additional consideration would be given to the level of intrusion.

## 1.1 Journalists' concerns

In late 2014 concerns emerged that communications data relating to journalists had been acquired as part of the Metropolitan Police's "Operation Alice" investigation (into the so-called "plebgate" affair[3]) and Kent Police's "Operation Solar" (relating to the trial of former Minister Chris Huhne and his wife for perverting the course of justice). In the latter case, the police used RIPA powers to obtain material from Associated Newspapers Limited (ANL). An earlier application by the police for access to the material under PACE had already failed because ANL had successfully claimed in court that journalistic privilege applied.[4]

The Press Gazette and the National Union of Journalists (NUJ) launched a 'Save our Sources' campaign setting out their concerns and initiated a petition to the Interception of Communications Commissioner.

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1 Commons Library Briefing Paper 6934, *The Data Retention and Investigatory Powers Bill*

2 Para 58 of the judgment

3 The altercation in 2012 between Andrew Mitchell, then Conservative Chief Whip, and police officers at the gates of Downing Street

4 For details see paras 4 to 6 of the Home Affairs Committee report, *Regulation of Investigatory Powers Act 2000*, 6 December 2014, HC711

# 2. What powers have been used?

## 2.1 RIPA

Interception of communications takes two forms: the collection and monitoring of *communications data* (e.g. records of who contacted whom, when, from where and for how long) and interception of the *content* of the communications themselves. Both are regulated under the *Regulation of Investigatory Powers Act 2000* (RIPA). For the collection and monitoring of communications data – which is the issue here – the relevant legislation is Part I Chapter 2 of RIPA. RIPA powers in general are summarised in a Commons Library Briefing Paper, *Interception of communications* (SN 6332): section 2.2 of the Library Paper describes how that Part of the Act is applied, which public authorities can make use of it, and what ranks within the police can authorise the monitoring of communications data. The Paper also covers the role of the Interception of Communications Commissioner in scrutinising how the powers are used by public authorities such as the police.

Under s71 of RIPA, the Home Secretary must issue codes of practice detailing how the Act is to be implemented. These associated codes of practice lay stress on the need for exercising investigatory powers in ways that are both necessary and proportionate.

## 2.2 PACE

The principle of journalistic privilege is enshrined in the *Police and Criminal Evidence Act 1984* (PACE). Under s9 a constable may obtain access to "excluded material" or "special procedure material" for the purposes of a criminal investigation by making an application under Schedule 1 of PACE. "Excluded material" includes (under section 11)

> (c) journalistic material which a person holds in confidence and which consists—
>
> (i) of documents; or
>
> (ii) of records other than documents.

Under Schedule 1, the police have to go to a Circuit Judge for a production order under a "Special Procedure"; the journalist will be given notice that the order has been applied for. The holders of the material, for instance journalists and their employers, can resist disclosure of such records by attending the hearing to argue against the order being granted.

Before making the order, a judge must be satisfied that there are reasonable grounds for believing that a serious offence has been committed; that the material sought would be admissible evidence in court; that other methods of obtaining it have been tried or deemed unachievable; and that production would be in the public interest.

Citing examples, a legal textbook observes that the "Special Procedure" "appears to give journalistic material useful protection. But judges have

interpreted it in a way which makes the protection less valuable than was hoped."[5]

## 2.3 *Terrorism Act 2000*

Applications for excluded material under PACE are rare. It is permissible, however, to gain access to excluded material under the provisions of the *Terrorism Act 2000*[6] provided that the material is sought for the purposes of a terrorism investigation, the officer has reasonable grounds to believe that the material will be of substantial value, and the officer has reasonable grounds for believing that the material should be produced.[7]

5 Mark Hanna and Mike Dodd, *McNae's essential law for journalists*, 21st edn, 2012, p401. It is worth noting, in passing, that the 2012 Leveson Report on the press suggested that the Home Office "consider and, if necessary, consult upon" proposals which would potentially have the effect of weakening protection for journalistic material under PACE (Executive Summary, para 68; Full report, vol 4, part J, chapter 2, para 9.11).

6 Schedule 5

7 Media Lawyers Association, Written evidence (IPB0010) submitted to the Joint Committee on the Draft Investigatory Powers Bill, 11 December 2015

# 3. The IOCC inquiry

On 6 October 2014, the (then acting) Interception of Communications Commissioner launched an inquiry to determine whether the acquisition of communications data had been used to identify journalistic sources.[8] He wrote to all Chief Constables and directed them, under section 58(1) of RIPA, to provide him with details of all investigations that had used powers under Chapter 2 of Part I of RIPA to acquire communications data to identify journalistic sources. He said that his office would undertake a full inquiry into these matters and report the findings to the Prime Minister and publish them.[9]

On 4 February 2015, after resuming his duties as Interception of Communications Commissioner, Sir Anthony May published his report into the use by police of RIPA to access journalists' communication records. His inquiry found that some 82 journalists had had their communications data obtained by police in three years. Sir Anthony concluded that police forces "did not give due consideration to freedom of speech" and current and Home Office guidelines did not sufficiently protect journalistic sources. He also recommended that police forces should be required to seek a judge's permission when seeking to discover a journalist's confidential source.[10]

The report was welcomed by both the Prime Minister and Home Secretary. Both indicated that the law would need reform but stopped short of promising immediate action.[11] The then Culture Secretary, Sajid Javid, reportedly went further, telling a lunch of Westminster political journalists:

> I want to see the law changed to make it happen during this Parliament, because there is no excuse for using anti-terror legislation to threaten legitimate reporting, no matter how awkward that reporting might be.[12]

The then Deputy Prime Minister (DPM) wrote to the Home Secretary in the wake of the Commissioner's report, urging that the law be tightened at the earliest opportunity. A spokesman for Mr Clegg said:

> The deputy prime minister has consistently said the accessing of the source of journalistic information should be signed off by a judge. He welcomes the recent conversion to this point of view by Conservatives including, most recently, the culture secretary.

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8 Sir Anthony May was involved in a road traffic accident in the summer of 2014 and suffered serious injuries. Sir Paul Kennedy was appointed as interim Commissioner by the Prime Minister to cover in Sir Anthony's absence. Sir Anthony resumed his duties in January 2015. See IOCCO press notice, 1 January 2015.

9 IOCCO press notice, *IOCCO launches inquiry into the use of RIPA powers to acquire communications data relating to the confidential sources of journalists*, 6 October 2014

10 Interception of Communication Commissioner's Office, *IOCCO inquiry into the use of Chapter 2 of Part 1 of the Regulation of Investigatory Powers Act (RIPA) to identify journalistic sources*, 4 February 2015

11 "Police will need judge's permission to access journalists' phone and email records", *Guardian*, 4 February 2015

12 "Culture Secretary backs calls for RIPA law change to protect journalists' sources before May General Election", *Press Gazette*, 5 February 2015

> He sees no reason why this should not be addressed as a matter of urgency by the coalition government. There is no point waiting around…[13]

[13] "Clegg urges May to pass law protecting journalistic sources from police", *Guardian*, 10 February 2015

# 4. The *Serious Crime Act 2015*

During the passage of the *Serious Crime Bill* in early 2015, Julian Huppert tabled two new clauses. One would have provided for judicial oversight of police and others' access to communications data which might identify journalists' sources. The other would have required the RIPA code of practice to protect the public interest in the confidentiality of journalists' sources and other privileged communications

The Government rejected Mr Huppert's amendment(s), but instead promised to introduce interim measures. A new Government clause was introduced and added to the Bill.[14] The then Minister, Karen Bradley, explained its intention:

> It provides that any code of practice issued under RIPA dealing with the use of RIPA investigatory powers in relation to the prevention or detection of serious crime should include provisions protecting the public interest and the confidentiality of journalists' sources. It also requires the Secretary of State to consult the commissioner and to have regard to any relevant reports that he has made.[15]

Ms Bradley said in a letter circulated to MPs ahead of Commons proceedings that this was an "interim solution" pending legislation in the new Parliament:

> Under the interim arrangements, law enforcement agencies (that is, the police, the National Crime Agency and HM Revenue and Customs) would be required to use production orders, which are judicially authorised, under the Police and Criminal Evidence Act 1984 (PACE) (or the equivalents in Scotland and Northern Ireland) for applications for communications data to determine journalistic sources until such time as the new primary legislation is in place.[16]

The Minister also said that the Government would "shortly" publish draft clauses that would form the basis of legislation in the next Parliament to reform RIPA.[17]

The debate threw up a potential conflict between the application of RIPA and that of PACE. In reply to a point raised by John McDonnell, Ms Bradley said:

> It has never been the practice in this country for those whose communications data are sought to be notified, and we do not intend to depart from that.[18]

Representatives of the press responded that, without prior notification, the Government's "interim arrangements" may deliver less than they promise. NUJ legal officer Roy Mincoff was quoted as saying:

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14 Now s83 of the *Serious Crime Act 2015*
15 HC Deb 23 February 2015 c97
16 "Save Our Sources victory: Government agrees interim curbs on police grabs of journalists' call records", *Press Gazette*, 20 February 2015
17 There was just one draft clause, which is online here. It appears on the gov.uk website among a list of "Overarching documents" on the *Serious Crime Act 2015*. Its purpose is described in a letter from the Minister.
18 HC Deb 23 February 2015 c110

> "Under the Police and Criminal Evidence Act journalists must be notified by the authorities of an application to access their material and sources and have the ability to object, a right of hearing before a judge and the possibility of an appeal.
>
> "The protections for journalists' data under RIPA must be no less than that provided by PACE."[19]

The outcome of parliamentary proceedings was section 83 of the *Serious Crime Act 2015*. The section inserts a new subsection (2A) into section 71 of RIPA. As explained above, section 71 of RIPA requires the Home Secretary to issue one or more codes of practice relating to the exercise and performance of, amongst other things, the powers and duties conferred under Part 1 of that Act.[20] The new section amends RIPA to require that the code of practice on the use of powers in Part 1 (prevention or detection of "serious crime") must include provision to protect the public interest in the confidentiality of journalistic sources.[21] It further requires the Secretary of State to consult the Interception of Communications Commissioner and to have regard to any relevant reports which he or she has made.

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19 "Government faces backlash over refusal to accept 'prior notification' for journalists on phone records grabs", *Press Gazette*, 27 February 2015

20 Part 1 of RIPA makes provision in respect of the interception of communications (Chapter 1 of Part 1) and the acquisition and use of communications data (Chapter 2 of Part 1).

21 Under RIPA, a serious crime is one for which an adult with no previous convictions could expect to receive a custodial sentence of three years or more.

# 5. The Home Affairs Committee inquiry

Meanwhile, on 6 December 2014, the Home Affairs Committee published the report of its inquiry into police forces' use of RIPA powers to acquire communications data in the course of investigations.[22] The Committee argued that current systems of oversight are inadequate and that any updated RIPA Code of Practice should contain special provisions for dealing with privileged information, such as journalistic material and material subject to legal privilege:

> 33. RIPA is not fit for purpose, with law enforcement agencies failing to routinely record the professions of individuals who have had their communications data accessed under the RIPA. The recording of information under RIPA is totally insufficient, and the whole process appears secretive and disorganised with information being destroyed afterwards. Whereas we acknowledge the operational need for secrecy both during investigations and afterwards (so that investigative techniques more broadly are not disclosed), we are concerned that the level of secrecy surrounding the use of RIPA allows investigating authorities to engage in acts which would be unacceptable in a democracy, with inadequate oversight. We recommend that the Home Office use the current review of the RIPA Code to ensure that law enforcement agencies use their RIPA powers properly.

[22] Home Affairs Committee, *Regulation of Investigatory Powers Act 2000*, 6 December 2014, HC711

# 6. The Code of Practice

## 6.1 In draft

In December 2014 the Coalition Government launched a consultation on an updated acquisition and disclosure of communications data code of practice as required under s71 of RIPA. The consultation sought views on the additional consideration that must be given to communications data requests relating to those in professions which handle confidential information (such as journalists).

In its response, the National Union of Journalists (NUJ) considered that the Code contained "no safeguards on accessing journalists' communications".[23] The NUJ came together with the Law Society, the Bar Council and the British Association of Social Workers as the 'Professionals for Information Privacy Coalition' to express a shared concern in response to the current proposals contained in the draft code of practice for RIPA. They called for a "rigorous statutory framework", rather than "mere codes of practice".[24] Editors of all the UK's national newspapers also wrote to the Prime Minister calling for the law to be reformed to prevent police from accessing journalists' phone records without the authorisation of a judge.[25]

## 6.2 Final version

During proceedings on the *Serious Crime Bill*, the then Minister, Karen Bradley, said that the Government would "shortly" publish a revised code of practice that took account of both the consultation responses and the IOCC recommendations. It would also contain "more detail on the factors to be considered in cases involving journalistic sources".[26] This revised Code was duly presented to Parliament on 4 March 2015 and came into force on 25 March.

The final Code covers two areas: "Communications data involving certain professions" (paras 3.72 to 3.77) and "Applications to determine the source of journalistic information" (paras 3.78 to 3.84).[27] Among the key points are the following:

- Communications data are not subject to professional privilege: "the fact a communication took place does not disclose what was discussed, considered or advised".

- Particular care must be taken when intruding on privacy or inhibiting freedom of expression. Applicants must weigh up necessity and proportionality and consider possible unintended consequences.

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23 NUJ News, *RIPA code of practice will not protect journalists or sources*, 10 December 2014

24 Law Society press release, *Call to protect professional communications*, 20 January 2015

25 "Editors call for reform of police access to journalists' records", *Financial Times*, 20 January 2015

26 HC Deb 23 February 2015 c111

27 Home Office, *Acquisition and disclosure of communications data: code of practice*, March 2015

- Applications of this kind must be recorded and flagged up to the Interception of Communications Commissioner.

- When applying to determine a journalist's source, there must be an "overriding requirement in the public interest".

- Until new legislation is in place providing for judicial authorisation, law enforcement agencies must use PACE procedures to apply for a production order.

- If and only if there is an immediate threat to life, agencies may continue to use the existing internal authorisation procedure under RIPA.

In July 2015, the Interception of Communications Commissioner reported that he was very concerned by "serious contraventions" of the code of practice.[28] His comments were prompted by two cases in the previous three months in which police forces had seized call and text logs from the phones of journalists or their sources without seeking prior judicial approval.[29]

## 6.3 The 2016 Code

Alongside the *Investigatory Powers Bill*, which was introduced into the Commons in March 2016,[30] the Government published a new draft Code of Practice on Communications Data.[31] The document includes a section on "Applications to identify or confirm the source of journalistic information" (paras 6.5 to 6.13). This new version reiterates the requirement to consider the public interest and assess necessity and proportionality, and flags up the proposed role of judicial authorisation:

> 6.6 Where a designated senior officer has granted an authorisation in relation to this purpose in circumstances other than in relation to an immediate threat to life, for instance a warning of an imminent terrorist incident being telephoned to a journalist or newspaper office, the public authority must apply to a Judicial Commissioner for an order under section 66 [sic][32] of the Act approving the authorisation. The authorisation will not take effect until such time as a Judicial Commissioner has made an order approving it.

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28 *Half-yearly report of the Interception of Communications Commissioner*, HC 308, 16 July 2015, para 3.21

29 "Police break new snooping rules to target journalists", *Times*, 17 July 2015

30 See below section 9.2

31 Home Office, *Communications data: draft code of practice*, spring 2016

32 The relevant provision is clause 68 of the *Investigatory Powers Bill* as introduced.

# 7. Other rights

## 7.1 The European Convention

Article 10 of the European Convention on Human Rights guarantees freedom of expression. This Article, which journalists traditionally look to as a bulwark of press freedom, includes the right "to receive and impart information and ideas without interference by public authority". The Convention was incorporated into UK law by the *Human Rights Act 1998* and individuals can require any UK court to consider their rights under the Convention in the context of any case. The power may be subject to restrictions "prescribed by law" and "necessary in a democratic society" for purposes such as preserving national security or preventing crime.[33]

In the so-called "plebgate" affair, the Metropolitan Police had accessed the call records of *Sun* journalists in order to identify police sources. When the Investigatory Powers Tribunal considered a case arising from this in December 2015, they judged that the Met had acted within the then-existing rules in three out of four cases. However, in the Tribunal's view, the authorisations were not compatible with Article 10 of the European Convention because the law as it stood did not take into account the reporters' right to freedom of expression and the importance of protecting confidential sources.[34]

In January 2016 the Court of Appeal considered the case of David Miranda, who was detained at Heathrow airport in 2013 for carrying files related to information obtained by the US whistleblower Edward Snowden. The authorities had used powers contained in schedule 7 of the *Terrorism Act 2000* allowing travellers to be questioned to find out whether they appear to be terrorists. Mr Miranda contended that the police's actions were unlawful because the stop power was exercised for a purpose not permitted by the statute and was therefore in breach of the European Convention. Although the court accepted that the use of the power *in this instance* was justified, the judges made the general point that

> The stop power, if used in respect of journalistic information or material, is incompatible with article 10 of the Convention because it is not "prescribed by law" as required by article 10(2). The power is not subject to sufficient legal safeguards to avoid the risk that it will be exercised arbitrarily. (…) It will be a matter for Parliament to decide how to provide such a safeguard. The most obvious safeguard would be some form of judicial or other independent and impartial scrutiny conducted in such a way as to protect the confidentiality in the material.[35]

They also observed that

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33 Article 10(2)

34 "Surveillance court says Met grabs of Sun reporters' call records 'not compatible' with human rights law", *Press Gazette*, 18 December 2015. The full judgment is available online: Case No: IPT/14/176/H (17 December 2015.)

35 *David Miranda v Secretary of State for the Home Department* (summary)

> If journalists and their sources can have no expectation of confidentiality, they may decide against providing information on sensitive matters of public interest.[36]

## 7.2 The "Bill of Rights"

Following their victory in the 2015 General Election, the Conservatives pledged to replace the *Human Rights Act 1998* with a British Bill of Rights.[37] The party's election manifesto stated the following:

> Because the work of the free press is so important we will offer explicit protection for the role of journalists via the British Bill of Rights and we will ban the police from accessing journalists' phone records to identify whistleblowers and other sources without prior judicial approval.[38]

A Commons Library Paper describes what progress has been made in implementing this idea.[39]

## 7.3 Contempt of court

The *Contempt of Court Act 1981* provides what is sometimes referred to as a "shield law" to protect journalistic activity. Section 10 states:

> No court may require a person to disclose, nor is any person guilty of contempt of court for refusing to disclose, the source of information contained in a publication for which he is responsible, unless it be established to the satisfaction of the court that disclosure is necessary in the interests of justice or national security or for the prevention of disorder or crime.

A legal textbook suggests that "the protection the section gives journalists has not proved to be as great as many had hoped".[40]

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36 [2016] EWCA Civ 6 (full judgment) para 113 (19 January 2016)
37 Lords Library Note 2015/16, *Human rights and civil liberties in the United Kingdom*, section 3.2
38 Conservative Election Manifesto 2015, p42
39 Commons Library Briefing Paper 7193, *A British Bill of Rights?* (section 6)
40 Mark Hanna and Mike Dodd, *McNae's essential law for journalists*, 21st edn, 2012, p399

# 8. The Anderson Review

David Anderson QC, the Independent Reviewer of Terrorism Legislation, was required by the *Data Retention and Investigatory Powers Act 2014* to conduct an independent review of the operation and regulation of investigatory powers, with specific reference to the interception of communications and communications data. His brief included reporting on "the effectiveness of existing legislation (including its proportionality) *and the case for new or amending legislation*".[41] His report was published and laid before Parliament on 11 June 2015.[42] It called for RIPA and related legislation to be replaced with a new law that would be both "comprehensive" and "comprehensible" and for the three existing Commissioners' offices[43] to be replaced by an Independent Surveillance and Intelligence Commissioner (ISIC). Among the Report's 124 recommendations to Government were three concerning "privileged or confidential material" (p297):

> 67. When the communications data sought relates to a person who is known to be a member of a profession that handles privileged or confidential information (including medical doctors, lawyers, journalists, Members of Parliament or ministers of religion), the new law should provide for the DP[44] to ensure that (1) special consideration is given to the possible consequences for the exercise of rights and freedoms, (2) appropriate arrangements are in place for the use of the data, and (3) the application is flagged for the attention of ISIC inspectors.
>
> 68. If communications data is sought for the purposes of determining matters that are privileged or confidential such as (e.g.) (1) the identity or a witness or prospective witness being contacted by a lawyer or (2) the identity of or a journalist's confidential source, the DP should be obliged either to refuse the request or to refer the matter to ISIC for a Judicial Commissioner to decide whether to authorise the request.
>
> 69. A Code of Practice, and/or ISIC guidance, should specify (1) the rare circumstances in which it may be acceptable to seek communications data for such a purpose, and (2) the circumstances in which such requests should be referred to ISIC.

Draft legislation was promised in the autumn which would build on – but would not necessarily accept – the recommendations of the Anderson Review.[45]

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41 *Data Retention and Investigatory Powers Act 2014* s7(2) [emphasis added]

42 David Anderson, *A question of trust: report of the Investigatory Powers Review*, June 2015

43 The Interception of Communications Commissioner's Office, the Office of Surveillance Commissioners and the Intelligence Services Commissioner

44 The "designated person" of the requisite rank or position within the requesting public authority or another public authority

45 See Commons Library Briefing Paper 6373, *Communications data: the 2012 draft Bill and recent developments*

# 9. The *Investigatory Powers Bill*

## 9.1 In draft

A *Draft Investigatory Powers Bill* was duly published by the Home Office on 4 November 2015. It sought to update and consolidate all the existing legislation governing the use of investigatory powers, including the *Regulation of Investigatory Powers Act 2000*.[46] The following provisions were relevant to journalists' sources:

- Clause 61 provided that a public authority must obtain the approval of a "Judicial Commissioner" (see below) before obtaining communications data which would identify a journalist's source, unless there is an imminent threat to life. There is no requirement to notify the source or their legal representative of the application.

- Clauses 167-187 made provision for a new oversight body – the Investigatory Powers Commission (IPC). The IPC will be headed by the Investigatory Powers Commissioner and supported by "Judicial Commissioners", who must have held high judicial office. The Judicial Commissioners are to be appointed by the Prime Minister.

- Clause 179 provided for the Secretary of State to issue Codes of Practice governing the use of powers contained in the Bill, as set out in Schedule 6. These must include provision for the protection of journalistic sources and legally privileged material.

The Draft Bill was considered by a Joint Committee of both Houses. Evidence sessions yielded insight into how these provisions were viewed by parliamentarians, the press and broadcasters: for example, on 14 December 2015, representatives of the Society of Editors and the National Union of Journalists appeared before the Committee. They said that, while the existing protections under PACE were "not ideal", the principle of prior notification was "essential", to ensure that journalists are treated "not as a first resort but as a last resort". The provision for Judicial Commissioners did not go "far enough", in their view.[47]

In its report the Joint Committee recommended that the Home Office reconsider the level of protection which the Bill afforded to journalistic material and sources. This should be at least equivalent to the protection presently applicable under PACE and the *Terrorism Act 2000*.[48] The Government responded that it was

> satisfied that the additional protections set out in the new draft Codes of Practice which have been published alongside the revised Bill are appropriate in relation to journalistic material. This reflects the fact that it is much harder to define in law what

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46 See Commons Library Briefing Paper 7371, *The Draft Investigatory Powers Bill*

47 Joint Committee on the Draft Investigatory Powers Bill, Oral evidence: *Draft Investigatory Powers Bill*, HC 651, 14 December 2015, Qq142-144

48 Joint Committee on the Draft Investigatory Powers Bill, *Report*, HL 93/HC 651, 11 February 2016, Recommendation 48

> constitutes a journalist (as opposed to legally privileged material)…[49]

## 9.2 The final Bill

The *Investigatory Powers Bill* was introduced into the Commons on 1 March 2016 and passed its second reading stage on 15 March.[50]

**Clause 68** provides that a public authority would have to obtain the approval of a Judicial Commissioner before obtaining communications data for the purpose of identifying a journalist's source, unless there is an imminent threat to life. There is no requirement to notify the journalist or their legal representative of the application. The clause has been amended from its draft form so as to remove the exemption for the security and intelligence agencies from obtaining approval from a Judicial Commissioner prior to acquiring communications data for the purposes of identifying a journalistic source.

**Clause 207** provides for the Secretary of State to issue Codes of Practice governing the use of powers contained in the Bill, as set out in Schedule 7. These must include provision for the protection of journalistic sources and legally privileged or confidential material.[51]

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49 Investigatory Powers Bill: Government Response to Pre-Legislative Scrutiny, Cm 9219, March 2016, p64

50 See Commons Library Briefing Paper 7518, *Investigatory Powers Bill*

51 On the latest draft code, see above section 6.3.

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