



## Draft Communications Data Bill

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This note provides background information on the proposed draft Communications Data Bill which has yet to be published. It mentions reports that consideration is being given to a centralised database and some of the concerns these have given rise to. A government consultation on implementing, via secondary legislation, an EC Directive on data retention closed on 31 October 2008.

On 12 August 2008, the Home Office published a consultation paper<sup>1</sup> on the final phase of the transposition of Directive 2006/24/EC on retaining data generated through electronic communications or public communications networks. As the Home Office website notes:

The aim of this directive is to ensure that certain data is retained so that public authorities can investigate, detect and prosecute crime.

This consultation is necessary to ensure the law includes internet access, internet telephone service, and internet mail.

While consideration had been given to completing the transposition of the data retention directive using a *Communications Data Bill*,<sup>2</sup> the decision to use secondary legislation is consistent with the approach which led to the *Data Retention (EC Directive) Regulations SI 2007/2199* discussed in more detail below. The *Communications Data Bill* is likely to be used to further “future-proof” the retention of communications data, a term which excludes the content of the data (such as conversations).

In May 2008, the Government published its draft legislative programme for 2008/09, *Preparing Britain for the future*. This included the following information on the *Communications Data Bill*:

**The purpose of the Bill is to:** allow communications data capabilities for the prevention and detection of crime and protection of national security to keep up with changing technology through providing for the collection and retention of such data, including data not required for the business purposes of communications service

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<sup>1</sup> <http://www.homeoffice.gov.uk/documents/cons-2008-transposition>

<sup>2</sup> Home Office official, 12 Sep. 08

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providers; and to ensure strict safeguards continue to strike the proper balance between privacy and protecting the public.

**The main elements of the Bill are:**

- Modify the procedures for acquiring communications data and allow this data to be retained;
- Transpose EU Directive 2006/24/EC on the retention of communications data into UK law.

**The main benefits of the Bill are:**

- Communications data plays a key role in counter-terrorism investigations, the prevention and detection of crime and protecting the public. The Bill would bring the legislative framework on access to communications data up to date with changes taking place in the telecommunications industry and the move to using Internet Protocol (IP) core networks;
- Unless the legislation is updated to reflect these changes, the ability of authorities to carry out their counter-terror, crime prevention and public safety duties and to counter these threats will be undermined.

**Consultation**

The Government plans to publish this Bill in draft for pre-legislative scrutiny later this year. The draft Bill will then be made available on [www.homeoffice.gov.uk](http://www.homeoffice.gov.uk). In the meantime, any comments or questions about these proposals should be directed to [CommsData@homeoffice.gsi.gov.uk](mailto:CommsData@homeoffice.gsi.gov.uk).

**Territorial extent**

The Bill would extend to the whole of the United Kingdom. The Government will work closely with the devolved administrations in relation to their responsibilities in this area.<sup>3</sup>

Home Office Minister Tony McNulty referred to the draft Bill in response to a written question in June:

Dr. Julian Lewis: To ask the Secretary of State for the Home Department whether she plans to put in place measures for the comprehensive storage of national telephone and e-mail communications data.

Mr. McNulty: We are considering how we ensure that we can continue to have access to communications data in the light of changing technology, and are developing proposals for the Communications Data Bill announced in the Government's draft legislative programme.

These proposals relate to communications data—not the content of communications.<sup>4</sup>

A voluntary Code of Practice on the Retention of Communications Data has existed since 2003. Under the *Anti-Terrorism, Crime and Security Act 2001* (ATCSA) telecommunications operators were asked to retain information on a voluntary basis with the understanding that they would be reimbursed for retaining and handing over data beyond their normal

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<sup>3</sup> *Preparing Britain for the future*, Cm 7372, May 2008

<sup>4</sup> HC Deb 9 June 2008 c68W

operations. A code of practice setting out the voluntary agreement was created through the *Retention of Communications Data (Code of Practice) Order 2003*.

Directive 2006/24/EC has been implemented in the UK by the *Data Retention (EC Directive) Regulations SI 2007/2199*. The retention of data is now mandatory while the reimbursement of costs remains as under the voluntary system. The explanatory note to the 2007 regulations explains the limitations in their current scope:

These Regulations implement Directive 2006/24/EC (“the Directive”) of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC.

The United Kingdom made a declaration pursuant to Article 15.3 of the Directive that it will postpone application of that Directive to the retention of communications data relating to Internet Access, Internet telephony and Internet e-mail. These Regulations therefore do not implement the Directive with respect to those forms of data.

The Regulations impose a requirement on the providers of public electronic communications services or networks (“providers”), as defined in regulation 2, to retain the categories of data specified in regulation 5. The Regulations apply to those providers as provided for in regulation 3. Regulation 4 makes provision regarding the obligation to retain the data specified in regulation 5.

Such data must be retained for a period of 12 months, in accordance with regulation 4(2). The data must be stored in accordance with the requirements in regulation 7.

Data security is provided for in regulation 6.

Regulation 8 provides that the Information Commissioner as the supervisory authority is responsible for monitoring the application of these Regulations with respect to the security of stored data.

There is a requirement on providers to provide statistics to the Secretary of State in regulation 9.

Regulation 10 provides that the Secretary of State may make arrangements for reimbursing any expenses incurred by providers in complying with the Regulations.

In July 2008 a number of questions on internet privacy were raised in the House of Lords, from which the following of relevance to the *Communications Data Bill* is extracted:

Baroness Miller of Chilthorne Damer asked Her Majesty’s Government:

What guidance they have issued to internet service providers on when and how they can intercept their customers’ website use; and what information they have made available to the public about the privacy issues involved.

The Parliamentary Under-Secretary of State, Home Office (Lord West of Spithead): My Lords, the Home Office provides guidance about lawful interception conducted under warrant for law-enforcement purposes. This is separate from advice provided by the Department for Business, Enterprise and Regulatory Reform on the relevant business facing legislation. ISPs may, with the consent of the consumer, use information about consumers’ internet use for the provision of value-added services. The Information Commissioner provides information to the public on privacy issues.

[...]

Viscount Bridgeman: My Lords, in view of the concern expressed by the noble Baroness about privacy, will the Government withdraw their plans for a communications data Bill to set up a database logging every private phone call and e-mail? There has been enormous opposition to the idea, including that from the Information Commissioner.

Lord West of Spithead: My Lords, the noble Viscount is referring to the IMP [interception modernisation programme]. It is very early days as to where we go on this and it relates to entirely new methods of how telecommunications firms will transmit and move data. It is also early days to see how this will impact on any aspects of intercept. We have come to no decisions on any of that. It is still being looked at. It is too early to make any statement.

The outline proposals have attracted some adverse criticism; for example a report on the ZDNet.co.uk website begins:

Privacy and IT security experts have reacted with horror to reported government plans that would see UK citizens' internet and telephony usage details stored in a massive centralised database.

As details begin to emerge about the [Communications Data Bill](#), included in very detail-light form in last week's draft Queen's Speech, the Home Office on Tuesday declined to deny reports suggesting it wanted such a database. Initial interpretations of the draft bill had internet service providers (ISPs), rather than the government, holding such data, but it now appears that Home Office officials may want their own database.

To come into line with the requirements of the European Data Retention Directive, introduced in 2006, UK communications providers have, for some time, had to retain telephony data — who the subscriber is; who he or she was calling or texting; when the communication took place, and so on — for a minimum period of one year. The government held off on applying the same requirements to internet-usage data, and it is that data that is particularly affected by the new Communications Data Bill, set to come into force by the end of March 2009.<sup>5</sup>

In the absence of a published Bill, criticism of its measures must necessarily be either limited to broad principles or engage in speculation. In the former category come concerns over proportionality and privacy, not to mention data security. In a debate on data protection that took place in the House of Lords in June 2008, the shadow Lord Chancellor, Lord Kingsland said:

Finally, I turn to the Government's draft legislative programme outlined in May in which, among many other things, is proposed a communications data Bill. It appears that Home Office officials are considering a database that would record all e-mail and telephone communications in the United Kingdom. Can that really be true? If it is, it is a matter of deep concern to the Opposition and, I suspect, to those on the Liberal Democrat Benches. How can such a proposal have emerged, even if, on due reflection, the Government think again?

Why do the Government have so much difficulty with this area of individual rights, personal data rights? Is it because as a party for so long their focus has been not on the individual but on the collective—and they find it exceedingly difficult to adjust to the idea of privacy and the protection of personal data? The Government have lost an

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<sup>5</sup> "Gov't planning centralised communications database", 20 May 2008  
<http://news.zdnet.co.uk/communications/0,1000000085,39420722,00.htm>

enormous amount of ground in this area and, in a very traditional Victorian image, they need to pull their socks up.<sup>6</sup>

On 20 October 2008 the Information Commissioner's Office issued the following statement:

This summer the Information Commissioner called for a public debate on government proposals for the state to retain citizens' internet and phone records. The Commissioner warned that it is likely that such a scheme would be a step too far for the British way of life. Creating huge databases containing personal information is never a risk-free option as it is not possible to fully eliminate the danger that the data will fall into the wrong hands. It is therefore of paramount importance that proposals threatening such intrusion into our lives are fully debated. We welcome the fact that the government intends to fully consult the public on any scheme it brings forward. Precise details of the plans are unclear at this stage; the ICO will be studying the proposals once published and responding to the Government's consultation in due course.<sup>7</sup>

A relevant consultation is to be launched in January 2009:

**Patrick Mercer:** To ask the Secretary of State for the Home Department if she will place in the Library copies of the information which was presented to internet service providers on 3 November 2008 by her Department on the issues and technology surrounding the Government's Interception Modernisation Programme. [235526]

**Mr. Coaker:** We have been considering how we can continue to protect the public by utilising communications data in the light of changing technology and have created the cross-Government Interception Modernisation Programme (IMP) to analyse the available options. Since 2006 there has been ongoing work with intelligence agencies, SOCA, police, HMRC and the telecommunications industry to analyse the size of the problem and to investigate possible solutions to help maintain this essential capability, including relevant safeguards.

I recognise there is a difficult balance between public safety and public rights to privacy so I recently announced my intention to launch a public consultation on the Interception Modernisation Programme. As part of the ongoing engagements with communications service providers, and to raise awareness of the forthcoming consultation, the Interception Modernisation Programme recently presented at the Internet Services Providers' Association conference, outlining the importance of communications data to public safety and the problems that the move to internet technologies will cause. The consultation document also will set out the range of background issues including the vital requirement of communications data in protecting the UK from serious crime and terrorism, the need for a solution to maintain our capability and the need to provide adequate safeguards as part of any solution.

This will be published in January 2009 and as a matter of course be placed in the Library. The results of the public consultation will be used to inform any decisions on the programme's preferred solution and safeguards and to determine whether future legislation is needed.<sup>8</sup>

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<sup>6</sup> HC Deb 12 June 2008 c741

<sup>7</sup> Information Commissioner's Office, *ICO Statement on the Communications Data Bill*, 20 October 2008 [http://www.ico.gov.uk/upload/documents/pressreleases/2008/ico\\_statement\\_comms\\_data\\_bill.pdf](http://www.ico.gov.uk/upload/documents/pressreleases/2008/ico_statement_comms_data_bill.pdf)

<sup>8</sup> HC Deb 24 November 2008 c830W