

Protections for Journalists in the Investigatory Powers Bill and accompanying Codes of Practice

Judicial Authorisation

The Joint Committee on Human Rights has said that the most significant safeguard required to protect the confidentiality of a journalist's source is that there be a '*review by a judge or other independent and impartial decision-making body*'. The Government agrees and the Bill introduces that safeguard across all warrants which grant access to the content of a journalist's communications. It also specifically provides for judicial approval of any authorisation to acquire communications data for the purpose of identifying or confirming a journalist's source.

Content of Communications - Interception and Equipment Interference

The Bill provides that a warrant to obtain the content of communications should be subject to the "double lock", which means a Secretary of State must first authorise the issuing of a warrant and a judicial commissioner must approve that decision before the warrant can be issued.

Statutory codes of practice accompanying the Bill make provision for additional safeguards designed to protect the public interest in the confidentiality of sources of journalistic information. They will also set out the details of the particular steps that must be taken when data which relates to a member of a profession which may hold confidential information, such as a journalist, is involved.

Communications Data

Communications data is information about communications: the 'who', 'where', 'when', 'how' and 'with whom' of a communication but not what was written or said.

Under the Bill, where a public authority wishes to obtain communications data in order to identify a journalist's source, a judicial commissioner must first agree that the authorisation is necessary and proportionate. In doing so, the commissioner (a serving or former High Court Judge) must comply with clause 2 of the Bill, which sets out duties in relation to privacy, and must have regard to whether less intrusive means could achieve the same result, and the public interest in the protection of privacy.

In addition, the Government has amended the Bill to make clear that the judicial commissioner must have regard to the public interest in protecting a source of journalistic information and be satisfied that there is another overriding public interest before approving the request.

What are journalists asking for?

Bodies representing journalists have asked:

- that journalists should always be told when a public authority wishes to use a covert power to obtain their communications or communications data;
- that they should be able to make representations to the judicial commissioner; and
- that all the powers under the Bill should be subject to a similar range of conditions as those listed in Schedule 1 of the Police And Criminal Evidence Act (1984) (PACE).

Protections in existing legislation

It is important to be clear about the protections provided by existing legislation, some of which have been misunderstood.

When law enforcement seek to obtain information directly from a journalist (for example, a notebook or video camera) they must seek judicial authorisation under PACE. In such cases, since the journalist is the holder of the material and the request is an overt request, the journalist will be informed of the application and will have the opportunity to contest it. The Bill does not affect this.

The Regulation of Investigatory Powers Act (2000) (RIPA) currently provides for the use of investigatory powers such as interception and communications data acquisition. Where RIPA is used to covertly obtain communications or communications data, the subject of the application is never informed.

In his 2015 report the Interception of Communications Commissioner recommended that judicial authorisation should be obtained in cases where communications data is sought to determine the source of journalistic information. The Government accepted the recommendation and amended the Acquisition and Disclosure of Communications Data Code of Practice to require that law enforcement agencies acquiring communications data under RIPA for the purpose of identifying a journalists' source must instead use the procedure under PACE.

Under this procedure it is the telecommunications operator who is the holder of the information and is notified of the request, not the journalist. For example, the material being requested might be a telephone record which the telecommunications operator holds for business purposes such as itemised billing and, in this case, the current legislation would provide that the telecommunications operator, as the holder of the material, should be notified.

Therefore, the Bill places on a clear statutory footing the important safeguard of judicial approval for applications to use investigatory powers to identify a journalists' source. But as under existing legislation, it does not provide for prior notification of anyone who is the subject of an investigation. To do so would seriously undermine the principle of the use of covert investigatory powers.

Why it is inappropriate for those who are under investigation to be informed

A number of bodies representing the journalist profession have argued that the only way to prevent the powers in the Bill from being misused is to allow a journalist to be involved in the judicial commissioner's decision. The Government does not agree.

It is of course the case that our security and intelligence and law enforcement agencies will, in very limited circumstances, have a legitimate need to investigate a journalist or their source. Where a journalist is suspected of a crime it is clearly not appropriate that they should be alerted to the investigation.

Instead, the Bill provides for a robust regime to govern the use of the powers, with a clear role for judicial commissioners in authorising and overseeing their use by public authorities. It also sets out the offences that apply in the event that any of the powers are misused.

The Bill provides that all warrants authorising access to the content of communications must be necessary in the interests of the prevention or detection of serious crime, in the interests

of national security, or to protect the economic well-being of the United Kingdom when it is also relevant to national security, and must be proportionate to what is sought to be achieved. All warrants must be approved by a judicial commissioner before they can be issued and can only be granted when another, less intrusive means is not available.

In addition, where a request for communications data is made for the purpose of identifying a journalist's source, the judicial commissioner, who must approve the request, must be satisfied that there is a public interest to be served by obtaining the data which overrides the established public interest in protecting a journalist's source.

There are real practical challenges to extending protections in the Bill to all journalistic material

Defining a journalist

The difficulty of defining a journalist in the digital age has been discussed by the Joint Committee who scrutinised the Bill before it was introduced, including with those representing the journalist lobby, and during Commons' consideration of the Bill.

The ability to publish material quickly, cheaply and anonymously online means that there are some who might consider themselves to be journalists but who most would agree should not receive additional protections. This Government has been clear that protections should be applied appropriately so as not to undermine the security and intelligence agencies' ability to do their job. The Da'esh media machine is a good example of those who could qualify for protection under an objective definition of a 'journalist' but who most people would agree should not be afforded special protection.

As raised on several occasions in the Commons, the approach set out in the Bill ensures that protections are applied where they are required and that those who commit a crime or pose a threat to national security can be investigated regardless of their chosen profession. These provisions form part of an investigatory powers regime which is subject to robust oversight within a clear statutory framework.

Why doesn't the Bill just protect everything a journalist does?

It is important that those who commit a crime or pose a threat to national security can be investigated regardless of their chosen profession. The Bill therefore seeks to apply protections as appropriate and not to professions as a whole.

A journalist's source is a clear and well understood example of where there is a public interest and where additional protections should apply. "Confidential journalistic material" – material which is held with a specific undertaking that it will be held in confidence – also falls into this category.

However there are practical implications to applying additional protections to all journalistic material. For instance, if additional protections were applied when journalistic material might be obtained through interception, every warrant application to intercept a broadband line would have to suggest that journalistic material read or broadcast over the internet might be obtained. These additional protections would become meaningless.

Debate in the House of Commons at Report stage was clear that protections should be applied to the activity, not the person. So, for example, protections should apply to a lawyer's legally privileged consultation with their client, not to any other aspect of a lawyer's life. Equally, journalists' interaction with their sources should be protected, but that does not mean a journalist should receive blanket protection from legitimate investigation simply because of their chosen profession.

The Bill takes a reasoned, balanced approach. It applies additional protections where appropriate; provides for judicial authorisation of the most intrusive powers and to the use of less intrusive powers in the most sensitive circumstances; and it provides a powerful and robust oversight regime to ensure powers cannot be misused.

The Provisions in the Bill respond to all relevant recommendations made previously

The Interception of Communications Commissioner published his report regarding the use of RIPA to acquire communications data to identify journalists' sources in February 2015. He recommended:

- a) *Judicial authorisation must be obtained in cases where communications data is sought to determine the source of journalistic information.*
- b) *Where communications data is sought that does not relate to an investigation to determine the source of journalistic information Chapter 2 of Part 1 of the Act [RIPA] may be used so long as the designated person gives adequate consideration to the necessity, proportionality, collateral intrusion, including the possible unintended consequence of the conduct.*

David Anderson QC, in his report 'A Question of Trust' in June 2015, recommended:

- a) *the new law should provide for the designated senior officer to ensure that:*
 - *special consideration is given to the possible consequences for the exercise of rights and freedoms;*
 - *appropriate arrangements are in place for the use of data; and*
 - *the application is flagged for the attention of Investigatory Powers Commissioner inspectors.*
- b) *If communications data is sought for the purposes of determining matters that are privileged or confidential such as ...the identity of a journalists' confidential source, the designated senior officer should be obliged either to refuse the request or to refer the matter to a Judicial Commissioner to decide whether to authorise the request.*
- c) *A code of practice should specify:*
 - *the rare circumstances in which it may be acceptable to seek communications data for such a purpose; and*
 - *the circumstances in which such request should be referred to the Investigatory Powers Commissioner.*