



NUJ parliamentary submission on the investigatory powers bill to the public bill committee, April 2016

Introduction:

The National Union of Journalists is the representative voice for journalists and media workers across the UK and Ireland. The union was founded in 1907 and has 30,000 members. We represents staff, students and freelances working at home and abroad in the broadcast media, newspapers, news agencies, magazines, books, public relations, communications, online media and as photographers.

The NUJ code of conduct was first established in 1936 and it is the only ethical code for journalists written by journalists. The code is part of the union rules; members support the code and strive to adhere to its professional principles.

The NUJ code of conduct includes the following clause:

"A journalist protects the identity of sources who supply information in confidence and material gathered in the course of her/his work."

Overview:

- Safeguards for journalists should apply across the different powers set out in the bill and not just apply to communications data.
- Protections for journalists should apply to communications, material and activity regardless of whether or not the authorities intend to identify a journalistic source.
- The new powers in the bill should involve an open and inter partes process. The media need to be able to challenge and appeal requests so that public interest and press freedom arguments are put forward and considered.
- The IPB should not enable the state to interfere in the legitimate and democratic activities of independent trade unions.

Protection of sources:

Michelle Stanistreet, NUJ general secretary, said: "We are defending the core principle enshrined in the NUJ's code of conduct - the protection of sources. It is a vital aspect of a free press - that whistleblowers and sources need to be able to come forward and share information they believe the public should know about in the certain knowledge that their identities will be protected.

"We are raising awareness of the growing threat to the ability of journalists to do their jobs safely, to guarantee their material and to protect their sources. Without that protection, we simply won't have a functioning free press.

"We cannot have a situation where journalists are seen as instruments of the state - their work should not be used by the authorities as a short cut in their investigations, and their sources shouldn't in any way be compromised or identified."

Criticisms of the current version of the bill:

The NUJ has welcomed the government's commitment to change the existing surveillance laws but the union remains extremely concerned by the current proposals contained within the investigatory powers bill and specifically in relation to journalistic sources, communications, material and activity.

Criticism of the bill spans across the media industry as a whole and the latest version of the bill has failed to adhere to key rulings and recommendations including:

- The bill does not adhere to the standards or existing protections for journalism enshrined in legal precedent (*Goodwin v UK* 1996).
- The joint committee on the draft investigatory powers bill recommended that protections for journalistic privilege should be fully addressed by way of substantive provisions on the face of the bill and these provisions should be at least equivalent to the protection presently applicable under the Police and Criminal Evidence Act 1984 (PACE) and the Terrorism Act 2000. The current version of the bill does not include sufficient safeguards on the face of the bill and it does not meet the standard level of safeguards for journalists when compared to PACE.
- The parliamentary intelligence and security committee report said that protections for sensitive professions are mentioned sporadically throughout the bill and do not appear to be applied consistently. For example, clause 61 (now changed to clause 68) sets out authorisation approvals for communications data for the purpose of identifying a source. The committee said: "safeguards must be applied consistently, no matter which investigatory power is used to obtain the information. The new legislation should be amended to rectify this inconsistency." Unfortunately the legislation has not been amended in line with these recommendations.
- David Anderson QC's investigatory powers review in June 2015 emphasised the importance of privacy in relation to the ability of a whistleblower to reveal state misconduct and of a journalist to report it, highlighting that the ability to do so requires an assurance that the journalist's sources will not be made known to the authorities. Yet the investigatory powers bill enables the authorities to target journalistic sources.
- The Investigatory Powers Tribunal (IPT) ruled that the journalists' Article 10 rights to freedom of expression were violated in the case of the surveillance of the call records of Tom Newton Dunn, Craig Woodhouse, Anthony France and the newsdesk phone because the law failed to take into account the protection of sources. The IPT ruled the grab of phone records and GPRS data involving Woodhouse was unlawful because it was unnecessary - partly because the police already had the information they were seeking by other means.

Safeguarding thresholds:

There is no fundamental difference between the authorities asking for a journalists' physical contacts book or footage and their telephone and communications records. The effect on journalists and sources is exactly the same and the same legal safeguards must cover both.

Source protection does not just apply to the identity of the source but also to all matters relating to and communications between the journalist and the source. This includes the person's name; personal data, voice and image. It also includes the unpublished content of information and the circumstances of acquiring the information.

In the case of Tom Newton Dunn, the police used the Regulation of Investigatory Powers Act 2000 (RIPA) to access his phone records in secret; they did not notify him that they had accessed his material or sources. The Met obtained the phone records without notification or consent and in other RIPA cases, no journalist was informed in advance.

The Interception of Communications Commissioner's Office (IOCCO) report in February 2015 highlighting 19 police forces had accessed the communications data of 82 journalists using RIPA.

In November 2015 the IOCCO watchdog revealed that Police Scotland had recklessly breached the interim codes of practice on five occasions. The breaches occurred after a newspaper investigation into the unsolved murder of prostitute Emma Caldwell. Police Scotland suspected that two serving and two retired officers were involved in supplying information to the newspaper. The four individuals targeted are now believed to be taking their case to the IPT. Holyrood's justice committee launched an inquiry, but were unable to call any of the officers who were involved in the RIPA applications.

The IPT has also heard that the Metropolitan Police press office provided the mobile telephone numbers of Sun journalists who had called in to check stories and ask for comments. The numbers were passed on to investigating officers and then the phone records and telephone location data were accessed by the police in secret.

The Court of Appeal has ruled that the Metropolitan Police breached European law when the partner of a Guardian journalist was detained for nine hours under the Terrorism Act. David Miranda was held at Heathrow Airport in August 2013 and his electronic equipment, which included a hard drive carrying thousands of encrypted documents leaked by Edward Snowden, was confiscated. Lord Dyson said the stop power conferred by Article 7 of the Terrorism Act "is incompatible with article 10 of the Convention in relation to journalistic material in that it is not subject to adequate safeguards". He also said: "It will be for Parliament to provide such protection. 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." Lord Justice Richards and Lord Justice Floyd agreed with the judgment. Dyson also said in his judgment: "If journalists and their sources can have no expectation of confidentiality, they may decide against providing information on sensitive matters of public interest. That is why the confidentiality of such information is so important."

Under PACE journalists are notified when the authorities want to access their material and sources, and journalists have the ability to defend their sources in an open court with the chance to challenge and appeal the application and related decisions. Unlike PACE, both

RIPA and the IPB do not apply the same protections and safeguards.

The interim RIPA codes of practice published in March 2015 stated that the authorities "must use the procedures of PACE to apply to a court for a production order to obtain this data". When compared to the IPB, the draft bill fails to meet the existing standards set out in PACE.

Clause 68:

At the moment clause 68 is the sole reference to journalists on the face of the bill, it only applies to communications data when the purpose is to identify a source (the clause does not apply to bulk data, interception warrants or equipment interference) and the clause does not offer adequate protections for a wider range of journalistic activity or when compared to PACE.

Equipment interference:

The NUJ is also concerned by the powers on "equipment interference" that enable the authorities to access computers or other devices. This means the authorities would have control over targeted devices and access to any information stored. This information could include documents, emails, diaries, contacts, photographs, internet messaging chat logs, and the location records on mobile equipment. It would also mean having powers to access anything typed into a device, including login details/passwords, internet browsing histories, other materials and communications. Draft documents and deleted files could also be accessed. In addition, the microphone, webcam and GPS-based locator technology could be turned on and items stored could be altered or deleted.

Trade union surveillance:

The joint committee on the draft IPB also recommended that the bill should be amended to include definitions of national security and economic well-being and provide clarity to the circumstances in which different types of state surveillance will be permitted. The parliamentary intelligence and security committee also recommended that economic well-being should be subsumed within a national security definition as it was "unnecessarily confusing and complicated".

The IPB still contains surveillance powers that are justified on the basis of economic well-being and financial stability. The trade union movement as a whole remains extremely concerned that these specific clauses provide a legal framework for the authorities to spy on trade unions and their members.

The NUJ strongly believes that the state has no right to interfere in the legitimate and democratic activities of independent trade unions.

TUC Congress 2015 noted that Mark Jenner was a police officer serving in the Special Demonstration Squad (SDS) and he infiltrated construction union UCATT and spied on its members. Former police officer Peter Francis has admitted that during his time in the SDS he spied on trade unionists in the construction industry and activists in the NUT, CWU, FBU and the National Union of Students.

Furthermore, information held by companies about blacklisted workers could have been provided by the police or the security services and attempts to find out further information about the involvement of police officers in infiltrating trade unions has been blocked by the Metropolitan Police on the grounds of national security.

Six NUJ members have discovered that their lawful journalistic and trade union activities have been monitored and recorded by the Metropolitan Police. They are now taking legal action against the Police Commissioner and the Home Secretary. All six NUJ members have worked on media reports exposing corporate and state misconduct or had cause to pursue litigation or make complaints arising from police misconduct.

The clauses in the bill relating to economic well-being and financial stability are unnecessarily vague and left dangerously undefined.

Trade unions are united in calling for the removal of "the economic well-being of the UK " as grounds for the authorisation of surveillance in the IPB.

Themes for media amendments:

The key measures need to be incorporated into the protections included on the face of the bill:

- An automatic and mandatory prior notification process applied to journalistic communications, material, sources and electronic equipment.
- An open, independent and judicial process that includes inter partes hearings so media experts can participate in the application process and advocate on behalf of journalists and media organisations.
- Mechanisms to challenge an application with the right of appeal.

Specific amendment proposals:

The NUJ, Guardian News and Media, and Independent Television News (ITN) have worked collaboratively with Gavin Millar QC to draft the following amendments as proposed changes the bill:

Protection for journalistic sources, materials and activities

1A Disapplication of Parts 2 – 7

(1) Save in the exceptional circumstances identified in subsection (2), the regimes provided for by Parts 2 – 7 may not be used to access, obtain, record, hold, consider, analyse, disclose or otherwise deal with information, material or data:

(a) of, or concerning the activities of, journalists; or

(b) if the purpose of so doing is to obtain information identifying a journalistic source.

(2) The exceptional circumstances referred to in subsection (1) are:

- (a) the case is one of great emergency, and
- (b) immediate action is necessary, and
- (c) the relevant investigatory powers under the regimes provided by Parts 2-7 can be used lawfully having regard to the provisions thereof.

1B Special judicial procedure

- (1) In any case where the regimes provided for by Parts 2 – 7 are disapplied by section 1A any person who could otherwise have sought to use one of the investigatory powers specified therein may apply to a judge for an order allowing that person to access, obtain, record, hold, consider, analyse, disclose or otherwise deal with such information, material or data in a way provided for by Parts 2 – 7.
- (2) An application for an order under subsection (1) shall be made on notice to the journalist or journalists affected unless the judge determines that an application without such notice is required in order to avoid prejudice to the investigation.
- (3) Paragraphs 7 – 9 of Schedule 1 to the Police and Criminal Evidence Act 1984 shall apply in relation to the service of a notice of application for an order under subsection (1) as if the application were for an order under Schedule 1 Police and Criminal Evidence Act 1984.
- (4) Criminal Procedure Rules may make provision about proceedings under this section where the judge determines that an application without such notice is required.
- (5) A judge may only make an order under subsection (1) if the person making the application has convincingly established that:
 - (a) the order is directed to one or more of the legitimate aims specified in Article 10.2 of the Convention, and
 - (b) there is an overriding public interest necessitating the order, and
 - (c) reasonable alternative measures to the order do not exist or have been exhausted, and
 - (d) the order is proportionate to the legitimate aim or aims being pursued.
- (6) The costs of any application under this Schedule and of anything done or to be done in pursuance of an order made under it shall be in the discretion of the judge.

1C Interpretation

(1) In this Part:

- (a) "journalist" includes any natural or legal person who is regularly or professionally engaged in the collection and dissemination of information to the public via any means of mass communication;
- (b) "source" means any person who provides information to a journalist;
- (c) "information identifying a source" includes:
 - (i) the name and personal data as well as voice and image of a source;
 - (ii) the factual circumstances of acquiring information from a source by a journalist;
 - (iii) the unpublished content of the information provided by a source to a journalist;
 - (iv) personal data of journalists and their employers related to their professional work;
in so far as far as this is likely to lead to the identification of a source;
- (d) "the Convention" means the European Convention for the Protection of Human Rights and Fundamental Freedoms;
- (e) "judge" means a circuit judge or judge of the High Court.