

11 March 2016

**Investigatory Powers Bill – NUJ 2<sup>nd</sup> reading briefing**

**Key NUJ concerns about the Investigatory Powers Bill (IPB):**

The NUJ regrets that the Bill as presented does not reflect recommendations of the Joint Committee regarding protecting journalists' confidential sources (p135) namely that:

**553. The Committee considers that protection for journalistic privilege should be fully addressed by way of substantive provisions on the face of the Bill.**

**554. The Committee recommends that the Home Office should reconsider the level of protection which the Bill affords to journalistic material and sources. This should be at least equivalent to the protection presently applicable under PACE and the Terrorism Act 2000. (Recommendation 48)**

At the moment **Clause 68** is the sole reference on the face of the Bill to safeguarding sources, it only applies to communications data (not the interception warrants or equipment interference) and the Clause does not offer adequate protections for the media.

The NUJ campaign against Regulation of Investigatory Powers Act 2000 (RIPA) was always about its misuse by the authorities to spy on journalists. In response we demanded urgent action to prevent RIPA being used to secretly obtain the phone records of journalists. We have been campaigning to change the law so that the authorities should be required to make a public request to a journalist or news organisation to access communications data that could identify their sources. The IPB does not provide the safeguards we had hoped for.

Despite the legal advice the Government claims to have received, we do not believe the IPB will be compliant with article 10 of the European Convention on Human Rights on the protection of freedom of expression.

These are our thematic concerns about the Bill:

- The bill does not adhere to the standards or existing protections for journalism enshrined in legal precedent (Goodwin v UK 1996), the Police and Criminal Evidence Act (PACE) and the Terrorism Act.
- The bill contains no requirement to notify a journalist, media organisation or their legal representatives when the authorities intend to access journalists' communications or hack electronic equipment. The bill includes proposals to allow the state to intercept and examine both the content and meta-data of journalists' communications and electronic devices.
- The bill does not contain the right to challenge or appeal a decision to access journalists' communications, material and sources. The application will proceed in secret - if this law

is introduced then journalists may never know if their communications or equipment were accessed by the state.

- There is no open, independent judicial authorisation enshrined in the bill. The IPB proposes judicial commissioners to oversee the arrangements and the commissioners will be appointed by the Prime Minister rather than the Lord Chief Justice.

**The key measures** we wish to see 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. Currently the IPB clearly states there are no provisions for prior notification.
- An open, independent and judicial process. The oversight measures in the bill do not involve any inter-partes hearings and there is no opportunity for media experts to participate in the application process in order to advocate on behalf of journalists and media organisations.
- Mechanisms to challenge an application with the right of appeal. The Bill includes no provisions for journalists or media organisations to challenge or appeal decisions.

## **Background**

For a good overview of the recent history over the controversy around the protection of journalists' sources we would recommend the [House of Commons Library Briefing \(07440\) \(extract from page 9\)](#):

### **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. 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.

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.

### **How do the new proposals differ from existing standards and protections PACE?**

PACE offers better protections when compared to the latest version of the IPB. Currently under the Police and Criminal Evidence Act (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, neither RIPA nor the draft IPB apply the same protection and safeguards.

In the draft IPB it states that "in making an application for data to identify a journalistic source, the applicant is not required to notify either the person to whom the applications relates i.e. the journalistic source, nor that person's legal representative".

Without prior notification a journalist and/or media organisation will not have an opportunity to challenge this behind-the-scenes request. This means that the public interest and press freedom arguments for maintaining source protection are never put forward.

Clause 68 of the IPB refers to the approval of a "judicial commissioner" before accessing journalists' communications data yet there is no provision for a journalist or media organisation to be able to contest an application before a judge (or appeal) in advance of the investigatory power being granted. The draft IPB appears to propose to review a decision that has already been taken and merely check if the correct procedure has been followed. This is not the same as a judge hearing the arguments for and against.

In the draft IPB this oversight will only apply for the purpose of an application that attempts to identify a journalistic source and the judicial authorisation set out in the draft IPB will only cover the police and not the intelligence services. There is no prior notification for journalists or media organisations where their material is either deliberately, incidentally, collaterally or accidentally sought or obtained, whether by the police or by intelligence agencies and the proposed measures can be bypassed by using the urgent procedures.

The NUJ believes the production order procedures set out in PACE - in which a judge makes the decision and has the benefit of evidence and argument from the journalist as well as the state - offers better safeguards and protections when compared to the current proposals in the IPB. This is because PACE includes the right to notification, challenge and appeal. Unlike PACE, the draft IPB contains no reference to source protection that can only be displaced by an overriding public interest. There are also no measures proposed in the draft IPB that would compel the police to exhaust other lines of inquiry in the first instance and in advance of an application that attempts to identify a journalistic source.

Gavin Millar QC has said: "There must be an overriding requirement in the public interest - in order to remove the source protection. This is a very high hurdle and is not specified in the bill... Under the bill the journalists' data can be obtained in any criminal investigation, however minor.

"The intelligence services are excluded from the requirement to obtain even this (flawed) form of judicial approval. Yet the convention law applies to them just as much as to the police who obtain source-identifying information.

"Both under the Police and Criminal Evidence Act 1984 and the Terrorism Act 2000 when the police apply for orders for material in the possession of the journalist to be handed over

(known as production orders) there must be a hearing before a judge at which the journalist is entitled to be heard. The worry is that the police will now start using these powers routinely to identify sources instead of making PACE/TA applications for the journalist's material."

The draft IPB provides an easier route for the authorities to identify a journalists' source when it is compared to the tried and tested legislative framework that already exists under PACE. The NUJ is extremely worried that the authorities will avoid the higher threshold in PACE and use the new powers contained in the IPB.

### **Journalists' equipment**

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.

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. These powers accompanied by the proposals to retain 12 months' of website data of all UK citizens have severe and detrimental implications for journalism and the public's right to be informed.

### **Why is this important to journalists and the media?**

As Chris Frost, the chair of the NUJ ethics council, has said: "It is difficult to measure the extent of stories from whistleblowers because they are anonymous but in my experience virtually every serious investigation is launched on the back of a source or whistleblower who needs to be kept anonymous for their protection."

The right to protect journalistic sources is recognised by international law. It has been recognised by the United Nations, the Council of Europe, the Organisation of American States and the Organisation for Security and Cooperation in Europe. The European Court of Human Rights said in several of its decisions that it's a key element of freedom of expression. In addition, the NUJ has historically secured legal precedent on the protection of sources in the Goodwin v UK 1996 case.

The Goodwin judgement stated: "Protection of journalistic sources is one of the basic conditions for press freedom"

In order to be able to play the role of watchdogs, as qualified by the European Court of Human Rights, journalists need to rely on sources of information. Some of these sources are official and known, but more often, they're confidential and secret. Without protection, some informers will refuse to speak out, for fear of being exposed.

One of the most serious consequences of the lack of protection is the impact on the physical integrity of journalists. This applies to journalists who work in dangerous environments such as war zones and/or those who investigate organised crime.

If journalists are perceived as informers to the authorities, or as future witnesses in a trial, they can become a target.

Dominic Ponsford, editor of Press Gazette, has also emphasised the risks involved: "If law enforcement are able to secretly grab the phone records of journalists and news organisations then no confidential source is safe and pretty much all investigative journalism is in peril."

Roy Mincoff, NUJ legal and industrial officer, said: "To continue to allow the authorities to access journalists' data and therefore sources will have a serious chilling effect on those who would otherwise reveal corruption, crime, abuse and wrongdoing by public and private bodies. Journalists are the public watchdog, with a duty to inform the public. The public has a right to be informed."

The union has routinely tackled and challenged cases where the police have served production orders on journalists - we've funded and supported journalists through lengthy and stressful legal processes in which they have successfully stood up for their sources, and stood by the NUJ's ethical code of conduct. But if journalists don't know their sources are being compromised then it is not possible to uphold the long-held principles they stand for.

## Examples of bad practice

In the case of Tom Newton Dunn, The Sun's Political Editor, as part of the 'Plebgate' investigation, the police used RIPA to access his phone records in secret. They did not notify him that they had accessed his material or sources. The police obtained the phone records without notification or consent and in other RIPA cases, when the police have been spying on journalists no journalist was informed in advance. If this example was tested against the new proposals contained within the IPB then nothing has changed.

The NUJ has worked with Press Gazette on the 'Save our Sources' campaign supported by all UK national newspaper editors. The campaign launched a petition that received wide-spread support from our industry and enshrines the principles we wish to see added to the legislation. The petition stated:

A free and open democratic society relies on whistleblowers to expose scandals and corruption in our public institutions. The secret monitoring of journalists' telephone records by public authorities risks turning Britain into a more secret state. The Operation Alice closing report by the Met Police revealed the force used RIPA to secretly obtain the phone records of Sun political editor Tom Newton Dunn and details of calls made to The Sun newsdesk. This information was used to track down and then sack three police officers accused of leaking information about the 'Plebgate' affair (even though the Crown Prosecution Service said they had no case to answer). Urgent action is needed to find out how many times public authorities have used RIPA to obtain the phone records of journalists and to ensure new guidelines are in place to prevent this happening in future. It is a well-established legal principle that there is a huge public interest in the protection of confidential journalistic sources under Article 10 of the European Convention on Human Rights (freedom of expression). If law enforcement authorities require access to confidential journalistic material (such as phone records) they should make a public request to the journalist or news organisation involved. And if necessary they should argue the case before a judge in the procedure set out in the Police and Criminal Evidence Act.

It has also been reported that surveillance included the call records of Tom Newton Dunn, Craig Woodhouse, Anthony France and the newsdesk phone. The Investigatory Powers Tribunal (IPT) ruled that the journalists' Article 10 rights to freedom of expression were violated 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.

The Investigatory Powers Tribunal 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 secretly accessed by police.

In 2015 a report from the Interception of Communications Commissioner revealed that police had secretly obtained the phone records of 82 journalists in the previous three years in order to find their confidential sources.

From March 2015, police forces in Scotland have been required to get judicial approval before using the Regulation of Investigatory Powers Act (RIPA) to identify reporters' sources. In November 2015, the IOCCO watchdog revealed that Police Scotland had recklessly breached the new rules 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 Investigatory Powers Tribunal. Holyrood's Justice Committee launched an inquiry, but were unable to call any of the officers who were involved in the RIPA applications.

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."

David Cameron, in a written statement to parliament on Thursday 16 July 2015, said: "The Commissioner finds that two police forces have acquired communications data to identify the interactions between journalists and their sources in two investigations without obtaining judicial approval, in breach of the code of practice introduced in March this year. This was a serious error." The Interception of Communications Commissioner's report was published alongside the Prime Minister's statement. Sir Anthony May, wrote: "...two police forces have acquired communications data to identify the interactions between journalists and their sources in two investigations without obtaining judicial approval."

## **Summary**

The IPB in its current form risks undermining press freedom in the UK. The IPB needs better safeguards across the entire draft bill - not just in the section relating to the interception of communications data. For example, the protections specified for journalists should also apply to related powers of collection, retention and examination. The revelations that the police had been

routinely using - or rather misusing - the RIPA codes to secretly access information on journalists and their sources sent genuine shock waves throughout our industry. It has also united organisations and individuals that often do not rub shoulders together - just within journalism alone.

We are now starting to see the same alliance speak out to raise genuine concerns about the lack of safeguards proposed in the draft IPB. We hope politicians will be persuaded by our specific concerns and our alternative proposals suggested:

- An automatic and mandatory prior notification process applied to journalistic communications, material, sources and electronic equipment. Currently the IPB clearly states there are no provisions for prior notification.
- An open, independent and judicial process. The oversight measures in the bill do not involve any inter-partes hearings and there is no opportunity for media experts to participate in the application process in order to advocate on behalf of journalists and media organisations.
- Mechanisms to challenge an application with the right of appeal. The Bill includes no provisions for journalists or media organisations to challenge or appeal decisions.