NUJ response to the Home Office consultation on the Investigatory Powers Act 2016 draft codes of practice

April 2017

Introduction

1. This is the National Union of Journalists' ("NUJ" or "the union") response to the consultation on the draft codes of practice issued under schedule 7 of the Investigatory Powers Act 2016 ("the IPA or the Act"), initiated by the Home Office on 23 February 2017.

2. The NUJ welcomes the opportunity to comment on the draft codes. This response covers four of the five draft codes of practice published in February 2017:

    a. Interception of communications
    b. Equipment interference
    c. Bulk acquisition of communications data
    d. Bulk personal datasets

3. We are concerned that this consultation process has been initiated without a draft code of practice on parts 3 and 4 of the chapter 2 of the Act. The draft codes of practice ("the codes") have to be considered in the round in order to ensure the consistency of safeguards across/between the codes. It is, in our view, regrettable that this consultation process has been initiated without all of the codes being available for consultation.

4. While we share the concerns of many other organisations in respect of the broader privacy implications of the Act and the inadequacy of the safeguards contained in the codes, this response is largely focused on the impact of the codes on journalists and journalism.

The NUJ

5. The NUJ 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.

6. The union is not affiliated to any political party and has a cross-party parliamentary group.

7. 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 code 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."*

Background

8. The NUJ has made submissions on the IPA during its passage through parliament. We outlined our serious concerns about the impact of the Act on journalists and public interest journalist. While not wishing to repeat these points in this response, the union reiterates its fear that the Act will seriously compromise journalistic confidentiality and the protection of sources leading to significant damage to journalism and to the public's right to receive information imparted by journalists. We do not accept that the codes come close to addressing these concerns because they provide insufficient safeguards. While we accept that the codes cannot amend the Act, it is our belief that there is scope for including far more robust safeguards in the codes. We hope that the government will take on-board the recommendations made in this response (and those of others) with a view to ensuring (to the greatest extent possible) that the powers in the Act cannot be used in a way that is harmful to the rights of journalists and the public interest in a free press.

The need to protect journalistic sources and confidential journalistic information

9. The NUJ wishes to reiterate the reasons for which the protection of journalistic material and sources is of fundamental importance in a democratic society. In *R (Miranda) v Secretary of State for the Home Department* [2016] EWCA Civ 6 the Court of Appeal stated that:

> *"The central concern is that disclosure of journalistic material (whether or not it involves the identification of a journalist's source) undermines the confidentiality that is inherent in such material and which is necessary to avoid the chilling effect of disclosure and to protect article 10 rights. 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 [...] In my view, the possibility of [legal proceedings after the event] provides little protection against the damage that is done if journalistic material is disclosed and used in circumstances where this should not happen."*[1]

[1] *Miranda* [113].

10. The Grand Chamber of the European Court of Human Rights has underscored the importance of the protection of information concerning journalistic sources not only for the press but for society more generally:

> "*The right of journalists to protect their sources is part of the freedom to 'receive and impart information and ideas without interference by public authorities' protected by article 10 of the convention and serves as one of its important safeguards. It is a cornerstone of freedom of the press, without which sources may be deterred from assisting the press in informing the public on matters of public interest. As a result the vital public-watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information to the public may be adversely affected.*"[2]

11. The union considers that these principles need to be more clearly acknowledged in the codes.

12. Recent revelations have demonstrated the concerns of the NUJ regarding the (ab)use of covert investigative techniques to acquire information about journalistic sources are entirely justified. Notably, there have been three recent cases in which the Investigatory Powers Tribunal has held that police forces have exercised their communications data powers unlawfully against journalists.[3]

13. In our view, the consultation on the codes and the safeguards they should include must be approached with these events in mind. This is particularly true of powers which enable state agencies to obtain systems or communications data.

Themes within the codes of practice

14. Comments in this section address concerns that we consider to be common to two or more of the codes on which we are responding.

15. The NUJ welcomes the inclusion of examples in the codes on Equipment Interference and the Interception of Communications. We urge the government to make further use of examples throughout the codes as they are beneficial for enabling users and the public to better understand the provisions, as well as for explaining how the government interprets provisions of the Act. We recommend that all codes include examples that are specific to the complex issues which may arise in relation to confidential journalistic information and journalistic sources.

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[2] *Sanoma Uitgevers BV v the Netherlands* (2010) [GC] no. 38224/03 [50].

[3] *Dias & Matthews v Chief Constable of Cleveland Police* [2017] UKIPTrib15_586-CH; *Moran & Ors v Police Scotland* [2016] UKIPTrib15_602-CH; *NGN & Ors v Commissioner of Police for the Metropolis* [2016] UKIPTrib14_176-H.

Using investigatory powers to access journalistic information and sources

16. The NUJ reiterates its longstanding position that the state should not (save in highly exceptional circumstances) be permitted to access confidential journalistic information and information concerning the identification of journalists' sources without an on-notice hearing before a judge at which the journalist and media organisations concerned can make representations. We regret that the government has (i) refused to accept this argument and (ii) has declined to include safeguards which could in some way compensate for the absence of such processes, including the use of special advocates to represent the interests of persons who are to be targeted.

17. It is beyond dispute that the European Convention on Human Rights ("the convention") requires that the exercise of any power by the state for the purposes of identifying a journalist's source requires *ex ante* judicial authorisation. The Court of Appeal has recently considered the Strasbourg authorities on this subject and observed that:

> *"It is clear enough that the Strasbourg jurisprudence requires prior, or (in an urgent case) immediate post factum, judicial oversight of interferences with article 10 rights where journalists are required to reveal their sources. In such cases, lack of such oversight means that there are no safeguards sufficient to make the interference with the right "prescribed by law". This is not surprising in view of the importance to press freedom of the protection of journalistic sources…."*[4]

18. Further as the Court of Appeal held in *Miranda* accessing journalistic material (regardless of whether it reveals a source) also requires judicial authorisation.[5] This point has been ignored in the codes and we urge the government to reconsider the implications of this legal requirement when finalising the codes.

19. The government is reminded that in its report on the Investigatory Powers Bill, the Joint Committee on Human Rights stated that:

> *"[W]e are concerned that the safeguards for journalists' sources are inferior to similar safeguards in other contexts. We recommend that the Bill should provide the same level of protection for journalists' sources as currently exists in relation to search and seizure under the Police and Criminal Evidence Act 1984, including an on notice hearing before a Judicial Commissioner, unless that would prejudice the investigation."*[6]

[4] *R (Miranda) v Secretary of State for the Home Department* [2016] EWCA Civ 6 at [101]. See also *Sanoma Uitgevers BV v the Netherlands* (2010) [GC] no. 38224/03 [90] – [93].

[5] *Miranda* [107]; *Sanoma Uitgevers BV v the Netherlands* (2010) [GC] no. 38224/03 [66].

[6] Joint Committee on Human Rights, *Legislative Scrutiny: Investigatory Powers Bill*, p4.

> *"The Joint Committee was particularly concerned about the possibility that the relevant provision in the draft Bill provided less protection for journalists' sources than the current law in the Police and Criminal Evidence Act 1984 ("PACE") and the Terrorism Act 2000, which require applications to be made to a court for a production order, on notice to the relevant journalist or media organisation which therefore has an opportunity to appear at the hearing before the judge to make arguments about the need to protect the confidentiality of communications with their source…. the level of protection which the Bill affords to journalistic material and sources, which should be at least equivalent to the protection which already exists under the Police and Criminal Evidence Act 1984 and the Terrorism Act 2000. It recommended that the Bill should make it clear that nothing in the Bill enables the investigatory authorities to circumvent the protections for journalists' sources contained in PACE and the Terrorism Act…"*[7]

20. For the reasons developed below, these legal requirements, concerns and recommendations have not been fully addressed in the Act. We urge the government to revise the codes having regard to these principles.

Extending Judicial Commissioner approval

21. The NUJ opposes in the strongest terms any power permitting an authority to use the provisions of the Act to identify or confirm a journalist's source and/or to obtain confidential journalistic material without obtaining the approval of a Judicial Commissioner. It is of serious concern that the codes do not ensure that such approval is required in all cases in which an IPA power may be exercised for such purposes (see further our comments on individual codes below). Instead, the Act and the codes adopt an inconsistent approach to the requirement for Judicial Commissioner approval – this creates an obvious incentive for relevant agencies to follow the route of least accountability.

22. The approval of bulk warrants by Judicial Commissioners under sections 159, 179, 208 cover the initial decision to collect data in bulk which may subsequently be interrogated for the purposes of identifying/confirming a journalist's source and/or examining journalistic material. By definition, the approval of the initial bulk warrant does not amount to the judicial authorisation of the subsequent decision to examine bulk data for these purposes.

23. The convention requires judicial authorisation for this second decision. This requirement is implicitly recognised in part 2 of the Act because section 23 requires judicial approval for targeted examination warrants permitting the selection for examination of content gathered under section 136 bulk interception warrants, which themselves require the approval of a Judicial Commissioner (per section 140 of the Act). There is no basis upon which the selection

[7] Joint Committee on Human Rights, *Legislative Scrutiny: Investigatory Powers Bill*, 7.5 – 7.6.

for examination of content should attract additional protection to that provided to the selection of data for examination in order to identify/confirm journalistic sources and/or access confidential journalistic information.[8] This proposition appears to be accepted in the Act because part 3 (authorisations for obtaining communications data) requires the approval of a Judicial Commissioner where communications data is sought from a CSP for the purpose of identifying or confirming a journalistic source.

24. Decisions as to whether it is necessary and proportionate to obtain/access confidential journalistic material and/or to identify and journalist's source require an assessment of complex legal and factual considerations which cannot reasonably (and impartially) be undertaken by intelligence and security officials, including but not limited to:

    a. Whether a person is to be regarded as a journalist (see further below).
    b. Whether material is created or acquired with the intention of furthering a criminal purpose so as to prevent journalistic protections from applying.
    c. Whether there is an overriding requirement in the public interest for a journalistic source to be identified.

25. While the union does not accept that 'approval' by Judicial Commissioners (in accordance with the principles of judicial review) of decisions taken by others is necessarily sufficient to satisfy the convention requirement for judicial authorisation, this safeguard is clearly preferable to there being no form of judicial involvement. With these considerations in mind, we implore the government to amend the codes so as to ensure that the approval of Judicial Commissioner whenever IPA powers may be exercised for the purposes of obtaining confidential journalistic material/data and or identifying/confirming a journalistic source, *or* where there are reasonable grounds to believe that the exercise of the power may lead to obtaining/identifying such information.

Guidance on and definitions of journalists and journalism

26. The union is gravely concerned that a number of the codes place law enforcement, intelligence and security officials in the invidious position of having to determine whether or not someone is to be regarded as a journalist.[9] It is not for state agencies to decide what constitutes journalism and who is a journalist. These are questions for a Judicial Commissioner or the courts in appropriate cases. We urge the government to amend the codes to ensure that officers are not required to make such decisions.

[8] See by analogy the remarks of the Court of Justice of the European Union in C-203/15 and C-698/15 *Tele2Sverige & Watson* at [99].

[9] Draft Code of Practice on Security and Intelligence Agencies' Retention and Use of Bulk Personal Datasets, § 7.42; Draft Code of Practice on Bulk Acquisition of Communications Data § 6.27; Draft Code of Practice on Equipment Interference, § 9.71; Draft Code of Practice on the Interception of Communications, § 9.75.

27. Although "journalistic material" is defined in section 264(1) of the Act, there is no definition of journalism in the Act. Journalism has been defined broadly by the European and UK courts in the following terms:

> Activities whose "*object is the disclosure to the public of information, opinions or ideas, irrespective of the medium which is used to transmit them*."[10]
>
> The "*communication of information or ideas to the public at large*."[11]

28. Instead of accepting these well-established legal definitions of journalism, the codes[12] attempt to introduce a number of criteria (whose origin and rationale for inclusion are not explained) for determining whether someone is a journalist, including:

    a. the frequency of the individual's relevant activities,
    b. the level of personal rigour they seek to apply to their work,
    c. the type of information that they collect, and
    d. the means by which they disseminate that information and whether they receive remuneration for their work.

29. These considerations are not appropriate measures for determining whether someone is a journalist (and should therefore benefit from enhanced protections). The union makes the following comments regarding these criteria.

    a. Reference to "relevant activities" is meaningless without further explanation as to what is meant.
    b. The frequency of a person's journalism cannot sensibly be said to be relevant to the question of whether or not s/he is a journalist and/or engaged in journalism.
    c. Reference to "the level of personal rigour they seek to apply to their work" is highly problematic. First, it is unclear what is meant by "rigour." Second, this is an inherently subjective concept about which reasonable people may disagree (and its assessment is likely to differ between persons charged with selecting data for examination). Third, the level of rigour in any journalistic activities will vary

[10] C-73/07 *Tietosuojavaltuutettu v Satakunnan Markkinapörssi Oy & Satamedia Oy*, EU:C:2008:727, [61]. The ECHR cited this definition in its judgment arising from the same dispute: *Satakunnan Markkinapörssi Oy and Satamedia Oy v Finland* (2015) no. 931/13, [69]. This case has been referred to the Grand Chamber of the ECHR.

[11] *Law Society v Kordowski* [2011] EWHC 3185 (QB) at [99].

[12] Draft code of practice on Security and Intelligence Agencies' Retention and Use of Bulk Personal Datasets, § 7.42; Draft Code of Practice on Bulk Acquisition of Communications Data § 6.27; Draft Code of Practice on Equipment Interference, § 9.71; Draft Code of Practice on the Interception of Communications, § 9.75.

depending on the nature of the journalism and the subject matter. Whether or not a journalist is entitled to protect his/her sources or information should in no way be contingent upon this. Fourth, it is wholly unclear as to how this consideration could be assessed, not least because this consideration would appear to require an authorised person to assess the state of mind of someone involved in journalism in order to evaluate whether s/he seeks to apply sufficient rigour to his/her work.

d. Whether or not a person is a journalist can in no way depend on whether or not s/he is remunerated.

30. We urge the government to abandon or amend these considerations and to ensure that the definitions of journalism recognised in the convention and UK case law (set out above) are referred to in the codes to ensure that users have a proper understanding of what is meant by journalism.

31. Further, we recommend that the codes include a specific provision requiring officers/authorised persons to seek legal advice and, if necessary, the view of a Judicial Commissioner when making a decision as to whether a person is to be regarded as a journalist.

Incorrect test regarding identification of journalistic sources

32. It is well established that that an interference with the confidentiality of journalistic sources can only be justified by "an overriding requirement in the public interest."[13] This is a demanding test to meet. As David Anderson QC noted in *A Question of Trust*, this means that "the threshold that must be passed is significantly higher than the ordinary necessity and proportionality test."[14] The union is concerned that the codes do not properly reflect these requirements.

    a. While the overriding public interest requirement contained in the draft code on Bulk Acquisition, it is absent from the other codes. There is need for a clear reference to this test in the relevant parts of all of the other codes.
    b. None of the codes make it plain that the threshold that must be passed is significantly higher than the ordinary necessity and proportionality test. The union considers it imperative that such wording is included to make it clear to users of the codes that more stringent requirements must be met when they are taking decisions that touch upon on journalistic sources. This is especially important given that the codes do not require (contrary to our recommendation in this submission) that legal advice be sought in all such cases.

[13] *Goodwin v United Kingdom* (1996) [GC] application no. 17488, at [39]; Recommendation No. R (2000) 7 of the Committee of Ministers to member states on the right of journalists not to disclose their sources of information (Adopted by the Committee of Ministers on 8 March 2000 at the 701st meeting of the Ministers' Deputies), principle 3a.

[14] David Anderson QC, *A Question of Trust: Report of the Investigatory Powers Review*, (June 2016), 5.49.

Threshold for engaging additional safeguards

33. Several of the codes introduce additional safeguards where an authorised person/officer selects data for examination with the *intention* of obtaining confidential journalistic information and/or identifying/confirming a journalistic source. A requirement for such an intention to exist before certain safeguards apply sets too high a threshold. The union asks that this threshold be amended to ensure that the relevant enhanced safeguards apply whenever an authorised person/officer has reasonable grounds/reason to believe that the selection or other use of data may reveal confidential journalistic information and/or identify/confirm a journalistic source.

Training requirements

34. The union recommends the inclusion of the following provision (or similar), taken from draft code of practice on Security and Intelligence Agencies' Retention and Use of Bulk Personal Datasets, in the safeguards section of all of the codes:

> *"Users should receive mandatory training regarding their professional and legal responsibilities, including the application of the provisions of the Act and this code of practice. Refresher training and/or updated guidance should be provided when systems or policies are updated."*[15]

35. We consider that this provision could made be more specific to include reference to training on the human rights considerations including, but not limited to: the practical meaning of necessity and proportionality and how to apply these concepts to decisions to taken under the codes, the privacy and freedom-of-expression implications of different powers and decisions taken under the codes; and the rights of journalists. Without proper training, platitudinal references to these concepts are insufficient to ensure that the codes provide protections to the convention rights of people affected by the exercise of powers under the Act.

36. In our view the need for more robust training requirements (including an explicit focus on question of freedom of expression and the rights of journalists) is underlined by IOCCO's findings in its inquiry into police forces' use of communications data powers (under the Regulation of Investigatory Powers Act 2000) to identify journalistic sources. The Commissioner stated that:

> *"We are not satisfied that generally speaking the applicants or designated persons in fact gave the question of necessity, proportionality and collateral intrusion sufficient consideration in the applications that we examined as part of this inquiry. The*

[15] Draft Code of Practice on Security and Intelligence Agencies' Retention and Use of Bulk Personal Datasets, § 7.5.

applications focused on privacy considerations relevant to Article 8 of the Convention and did not give due consideration to Article 10 of the Convention."[16]

Relation between the Act and other statutory powers relating to journalistic material

37. Wherever the codes address powers exercisable by law enforcement agencies in relation to confidential journalistic material and the identification of journalistic sources, there is a need for guidance to be included as to:

    a. The circumstances in which it would (and would not) be appropriate to have recourse to these powers rather than those available under, *inter alia,* the Police and Criminal Evidence Act 1984 and the Terrorism Act 2000.
    b. The factors that are relevant in making such assessments.
    c. Who should make any decision as to whether the powers under the Act should be used rather other statutory powers.
    d. The internal auditing and external oversight of such decisions.

Legal advice and consultation with the Investigatory Powers Commissioner (IPC)

38. Across the codes, we urge the introduction of a requirement that relevant decision makers consult the IPC wherever a decision is made to obtain / select for examination material which is likely to be confidential journalistic material and/or information which is likely to lead to the identification/confirmation of journalistic sources. This is important because it would ensure external, expert input in relation to the use of the powers that have serious consequences for the freedom of the press. This requirement would obviously not apply to situations in which approval by a Judicial Commissioner is required in respect of the decision in question.

39. We also recommend that the codes give the Secretaries of State and the Judicial Commissioners the option of consulting appropriate media (law) experts wherever they are called upon to take decisions relating to confidential journalistic material and/or the identification/confirmation of journalistic sources.

40. The NUJ recommends that all codes include a requirement that wherever data is selected for examination with the intention of obtaining privileged or confidential information and/or identifying/confirming a journalist's source legal advice should be sought. There is reference at several junctures to a requirement to consult, wherever possible, a legal adviser on the lawfulness of various actions.[17] This clause should be included in all sections of codes dealing with these matters. Requiring that an authorised person/office (who is unlikely to be legally

[16] IOCCO inquiry into the use of Chapter 2 of Part 1of the Regulation of Investigatory Powers Act (RIPA) to identify journalistic sources, Report issued 4th February 2015, 8.6.

[17] Draft Code of Practice on Security and Intelligence Agencies' Retention and Use of Bulk Personal Datasets, § 7.33.

qualified) considers the necessity and proportionality of his/her proposed actions is an insufficient safeguard to the ensure compliance with UK and convention case law in these highly sensitive contexts.

Requirements concerning the presentation of applications

41. The draft code of practice on security and intelligence agencies' retention and use of bulk personal datasets includes the following provision, which the union commends:

> "*When completing a warrant application, the agency must ensure that the case for the warrant is presented in the application in a fair and balanced way. In particular all reasonable efforts should be made to take account of information which supports or weakens the case for the warrant*."[18]

42. We consider that this requirement be included across of the codes of practice and be extended not only to warrant applications but also to situations in which the approval of a director or senior officer is required in order to exercise a particular power or measure.

Records keeping

43. The records-keeping sections of all of the codes should require that relevant authorities keep records evidencing the decision-making processes, and taking into account of the considerations set out in the codes concerning confidential information relating to members of sensitive professions (including but not limited to journalistic material and journalistic sources) the right to freedom of expression and the right to privacy. This is important not only in reference to applications for warrants made to an external body (such as a Secretary of State) but also in the context of 'internal' decisions and approvals.

44. We consider that a requirement to record the reasoning and the taking into account of provisions set out in the codes is a precondition to effective oversight by the IPC. Requirements to, for example, consider the public interest in the freedom of expression when making a given decision are of limited value without the possibility of an overseer evaluating such processes.

Safeguards applicable to the dissemination of data/material to foreign bodies

45. Where the codes make reference to the possibility of the sharing/dissemination of data and information with authorities of a country outside the UK, the NUJ recommends that explicit reference be made to the need to consider:

    a. The freedom of expression and the public interest in the protection of journalistic information and journalistic sources.

[18] Draft Code of Practice on Security and Intelligence Agencies' Retention and Use of Bulk Personal Datasets, § 4.5.

b. Whether the data/information shared may be used by the recipient to take steps to interfere with the freedom of expression and, in particular, the activities of journalists.
c. Any potential risks to journalists in the UK or overseas which may arise from the sharing of the data/information.
d. Examples of situations in which risks to journalists and their sources abroad would make it improper for dissemination to take place.

46. This is essential in order to focus the minds of relevant decision makers on these considerations. General references to section 2 of the Act and to necessity and proportionality are insufficient to ensure that specific consideration is given to these matters.

47. The union considers it essential that all of the codes include a requirement that legal advice be sought wherever it is proposed that confidential journalistic information and/or information capable of identifying/confirming journalistic sources is disseminated outside the relevant agency. Such a requirement should not be limited to situations in which an officer/authorised person in uncertain as to the legality of disseminating such information. This requirement should apply to both dissemination of information to other authorities within the UK and to foreign bodies.

Protections for trade unions

48. The codes provide insufficient guidance as to sensitivities associated with using the Act's powers against trade unions and trade unionists. We do not accept that the codes' single clauses on trade unions are within the spirit of the concessions made in parliament by relevant ministers in the context of the passing of the Act. Notably:

a. Earl Howe, the Minister of State, Ministry of Defence, Deputy Leader of the House of Lords stated:

> "*The Government therefore agreed an opposition amendment on Report in the Commons to what is now Clause 20 of the Bill, making explicit that legitimate trade union activity would never be sufficient grounds of itself for an interception warrant application to be considered necessary*."[19]

b. John Hayes, the Minister of State (Home Office) for Security stated:

> *"The existing law is clear that none of these powers can be used in the interest of a political party or in a particular political interest, but it may be that we can do more to offer reassurance… The Security Service Act 1989 and the Intelligence Services Act 1994 provide some protection, because they*

[19] Investigatory Powers Bill – Committee (1st Day) – in the House of Lords at 8:36 pm on 11th July 2016.

deal particularly with the issue of the interests of any political party being served by the powers."[20]

"*It would neither be proportionate nor lawful for the security or intelligence agencies to investigate legitimate trade union activity*."[21]

49. It is trite and obvious to state that the activity of a trade union in the UK should not of itself be sufficient to establish that a warrant is necessary – this is tantamount to stating that the fact that a person is going about their lawful day-to-day activities is not of itself sufficient to establish that a warrant to surveil is necessary. The codes fail to make the key point with sufficient force: legitimate trade union activity would never be a sufficient basis to exercise any of the powers under the Act and that do so would be unlawful.

50. There is a clear need for more thought to be given to this issue and for users of the codes to be made aware of the potential concerns surrounding state agencies gathering information on trade unions, trade unionists and their activities. Reasons for which this is important, to which reference should be made when explaining these sensitivities to users of the codes, include:

    a. The right to freedom of association.
    b. Union-related rights contained within employment legislation.
    c. The relationship between unions and political parties/activity and the obligations of security and intelligence agencies (and law enforcement agencies) concerning political neutrality, as referred to by John Hayes MP above.
    d. The history of state agencies engaging in espionage and infiltration targeting unions.

Miscellaneous remarks

51. The sections of the codes dealing with errors and serious errors should include examples of errors concerning the obtaining or selecting for examination material concerning confidential journalistic information, journalistic sources and information relating to the other sensitive professions.

52. Wherever it is envisaged that the modification of a warrant will impact upon the sensitive professions/their confidential material, all codes should require that the applicant highlight this in the modification request.

[20] Investigatory Powers Bill – Public Bill Committee at 4:00 pm on 12th April 2016.
[21] Investigatory Powers Bill – Report Stage, 6 June 2016.

Comments on each Code of Practice

53. In this section we raise concerns and make recommendations which are specific to the four codes upon which the NUJ is commenting. All references to paragraph numbers refer to the numbering in the relevant code of practice under discussion.

Interception of Communications

54. The code's overarching references to necessity and proportionality should refer to the right to freedom of expression (including the freedom of the press) wherever privacy is mentioned, e.g., paragraphs 4.14 and 4.15. It may be necessary to explain in this subsection why the (possibility of or potential) interception of communications engages these rights. This addition is important for ensuring that users of the code approach their functions not only with privacy in mind but also with regard to the impact that their decisions may have upon the freedom of expression.

55. Paragraph 4.16 requires further explanation. We recommend the inclusion of an example to illustrate what is or is not permissible in relation to warrants concerning trade unions, their staff and members. See also our general comment on this provision, which appears in all of the codes, at paragraphs 48-50 above.

56. Regarding the format of warrant applications, there is a need to supplement paragraphs 5.30p and 5.33q to require that an applicant sets out why it is said to be necessary and proportionate (to the extent that there is an overriding requirement in the public interest), to seek a warrant which is intended to intercept/select such material for examination. Where the applicant is a law enforcement agency, it should also be required to include a justification as to why the powers under section 9 and schedule 1 to the Police and Criminal Evidence Act ("PACE") 1984 (or any other relevant statutory powers) are considered to be inappropriate for obtaining the journalistic material and/or identifying/confirming a journalist's source. It is essential that these considerations are also reflected in paragraph 5.41 concerning the authorisation of targeted warrants.

57. The NUJ is concerned that paragraph 5.45 focusses too narrowly on collateral intrusion as it applies to privacy. Consideration must also be given to the way that any interference may impact on the right to freedom of expression (and specifically to the rights of journalists).

58. In the section dealing with Judicial Commissioner approval of targeted warrants, we recommend stating that a Judicial Commissioner may seek the views of appropriate media (law) experts concerning the potential impacts on journalists and/or press freedom of the warrant submitted for approval.

59. Paragraph 6.72 should be developed to make it clear that the mandatory training a person must have received before performing these functions should include training on special considerations/sensitivities and the tests which apply to obtaining confidential journalistic material and to the identification/confirmation of journalistic sources (see paragraphs 34-36 above).

60. The cross references to sections of the Act are inaccurate throughout part 9 of the code. It is therefore difficult to evaluate and comment fully on this part. Accordingly, we suggest that there is need to extend the period of consultation on this code.

61. Paragraph 9.31 should make it explicit that where such content is selected for examination in circumstances in which there are reasonable grounds to believe that it contains confidential journalistic material and/or identify/confirm a source of journalistic material, the approval of a Judicial Commissioner must be sought.

62. The union welcomes the reference (at paragraph 9.37) to authorised persons receiving appropriate training on the safeguards regarding confidential or privileged information. To the extent that it is not already included in the other codes of practice, we recommend that it be inserted (see further paragraphs 48-50 above).

63. We suggest that paragraph 9.68 should be expanded to explain the public interest in more detail. The above-cited passages from the Court of Appeal's decision in the David Miranda case and the European Court of Human Rights' decision in the case of *Sanoma Uitgevers BV v The Netherlands* provide reasoning which could be incorporated into this paragraph.

64. Further examples should be given in paragraph 9.71 of situations in which confidentiality continues to attach to journalistic material when it is sent to or held by a person who is neither the journalist nor the source.

65. We are concerned that paragraph 9.74 again seeks to downplay the significance of communications data in identifying a journalist's source. It is trite to say that it may not alone identify a source. Equally, it may be sufficient to identify a source and users of the code need to be made aware of this possibility and its consequences. Additionally, identifying communications addresses may in some circumstances be sufficient to give rise to inferences about the nature of a relationship between a journalist and another person. The code should not seek to downplay this possibility.

66. As to paragraph 9.75, we have serious concerns about this attempt to lay down criteria for defining journalists and journalism and we refer to our comments at paragraphs 26-31 above.

67. Paragraph 9.76 requires amendment to make it clear that the examination of communications for the purpose of identifying/confirming a journalist's source must satisfy the more stringent "overriding requirement in the public interest" test discussed at paragraph 32 above.

68. It needs to be made clear at paragraph 9.77 that the fact that journalistic material may no longer be confidential does not mean that the source of that information is not highly confidential.

69. The final sentence of paragraph 9.77 is nonsensical and unhelpful: it should be deleted. It axiomatic that not every user of social media is a journalist and that not every user of social media will hold confidential journalistic material. However, a person may fall within the definition of a journalist (see our comments at paragraphs 26-31) on the basis of activities conducted entirely through social media.

70. Concerning paragraphs 9.79 – 9.81, we refer to our comments at paragraphs 94-96 (below) in the section on Equipment Interference. These concerns and recommendations apply equally in this context.

71. The meaning of an "outside body," referred to at paragraph 9.82, is not defined. We do not consider that paragraph 9.82 provides sufficient safeguards. While cross-referring to the comments made at paragraphs 45-47, we also recommend that this paragraph be amended to provide:

    a. That the legal advice requirement should apply in all such cases and not only where there is any doubt about lawfulness. Authorised persons may not be well placed to assess whether any such doubts exist and the potential consequences of dissemination may be profound; and
    b. An explicit requirement that consideration be given to the safety of any journalists and their sources who may be affected by the dissemination of the information, whether in the UK or abroad.

72. The part of section 9 of the code dealing with applications to intercept communications relating to confidential journalistic material and journalists sources should include the safeguard at paragraph 9.51 (in the context of legally privileged material) that the case for a warrant must be presented in a fair and balanced way, including information which weakens the case for the warrant. This is a safeguard that should be included across all of the codes and for the purposes of all applications to Secretaries of State and for approval to senior officers/directors.

73. Section 10 of the code should be expanded to include requirements to keep records on:

a. The number of targeted warrant applications relating to confidential journalistic material and journalists sources.
b. The reasoning forming part of the assessments of necessity and proportionality in respect of all warrant applications relating to confidential journalistic material and journalists sources.
c. The notification and approval processes under paragraphs 9.79 and 9.81.
d. The assessments/reasoning referred to at paragraphs 9.75, 9.76 and 9.82.

74. The final bullet point of paragraph 10.16 should mention journalistic sources.

Equipment Interference

75. We suggest that paragraph 3.5 should be expanded to make explicit references to the right to freedom of expression. Reference should also be made to the reasoning set out by the Court of Appeal and the European Court of Human Rights in the passages cited above concerning the importance of journalistic confidentiality and the protection of sources – these are not matters that will be readily apparent to all users of the code.

76. The NUJ has long expressed its concern that there already exist powers for law enforcement agencies to access journalistic material by obtaining a court order under other statutory provisions including the PACE 1984. These processes are attended by safeguards designed to ensure compliance with article 10, including the use of on-notice *inter partes* hearings at which the legal representatives of a journalist have the opportunity to make submissions as to why material should not be disclosed. With this in mind, we make a number of recommendations concerning paragraph 3.27:

a. This paragraph should highlight the specific sections and powers referred to in the generic references to these statutes.
b. As currently drafted, this paragraph does not make it clear whether law enforcement agencies would be precluded from having recourse to targeted equipment interference powers if the information sought could be obtained by using the powers under these statutes.
c. It should be made clear here and/or at paragraphs 4.17 – 4.18 that recourse by law enforcement agencies to targeted equipment interference powers is unlikely to be proportionate if the information sought could be obtained under one of the other statutory powers referred to. This is inherent in the requirements of section 2(2) (a) of the Act.
d. Guidance should be provided here, or elsewhere in the code, making it clear when it would be appropriate for law enforcement agencies to use equipment interference powers, as compared to the powers under PACE or other statutory provisions set out in this paragraph of the code.

77. Paragraphs 4.9 and 4.14 fail to capture the potential level of interference with convention rights which may arise from equipment interference.[22] We consider it important that the code makes this more explicit. Further, paragraph 4.9 should make direct references to the rights that are likely to be engaged through the use of equipment interference.

78. Regarding paragraph 4.19, we refer to our comments on this issue at paragraphs 48-50 above.

79. We are concerned that paragraphs 5.31 (setting out the required contents of an application for a targeted equipment interference warrant) and 5.32 (setting out the required contents of an application for a targeted examination warrant) contain insufficient safeguards concerning journalists and journalistic material. In particular:

    a. There must be a requirement that the applicant explains whether there are grounds to believe that anyone (i) targeted by the warrant or (ii) who may be collaterally affected by the proposed measures, is a member of a protected profession.
    b. Sub-paragraph 5.31p should be amended to state "for the purpose of obtaining communications or other items of information which the applicant believes *may (or is likely to)* contain confidential journalistic material…" Restricting the situations in which a statement is required to those in which the applicant believes the information will contain such material sets too high a threshold. 'Will' entails a level of certainty that is likely to present in relatively few applications. We consider a lower threshold to be necessary to protect journalists and journalistic material from collateral intrusion through equipment interference. Elsewhere in the codes there is reference to there being a 'likelihood' that particular information will be contained in a given place/source – consideration should be given to adopting this language here.
    c. Sub-paragraphs 5.31p and 5.32k should be amended to require that the statement referred to includes (having regard to the high level of protection that article 10 of the convention confers upon the protection of journalistic material and journalistic sources):

        i. An explanation of why the applicant considers it to be necessary and proportionate (to the extent that there is an overriding requirement in the public interest) to seek a warrant which is intended to generate such material.

[22] See the discussion in: David Anderson QC, *Bulk Powers Review Report* (August 2016), 7.1-7.38.

ii. Consideration (if any) given to the use of other powers contained with the Act and other statutes and why such powers are considered to be inappropriate.
iii. In regard to 5.31p (targeted equipment interference warrants) when used by a law enforcement agency, why the powers under section 9 and schedule 1 to the PACE 1984 are considered to be inappropriate for obtaining journalistic material and/or identifying/confirming a journalist's source.

80. The union recommends that paragraphs 5.40 and 5.43 (concerning what is to be included in targeted equipment interference and targeted examination warrants) be amended to require that (where relevant) reference is made to there being reasonable grounds to believe that the particular person or organisation is linked to journalism or any of the other protected activities.

81. Further, we consider that the guidance contained at 5.36 – 5.43 should require the inclusion of any potential impacts that the applicant, authorising and/or approving body/bodies have identified in respect of the sensitive professions.

82. At paragraph 5.44, covering the tests the person responsible for issuing targeted equipment interference warrants must consider to be met, there is a need to include the wording of the legal test applicable to measures taken to identify or confirm a journalistic source. Specifically, it must be stated in terms that the issuing authority is satisfied that there is "an overriding requirement in the public interest" for the warrant to be issued (see paragraph 32 above). As stated elsewhere in this response, there is a need to explain to all users of the codes what in practice is meant by this threshold.

83. The union welcomes the consideration of collateral intrusion at paragraphs 5.50 – 5.52. The final sentence of paragraph 5.50 should be amended to make it clear that the assessment of the risk of collateral intrusion (and measures taken to limit it) are relevant not only to the person authorising the warrant but also to the Judicial Commissioner approving any such authorisation – this is consistent with what is stated at paragraph 5.51 of this code.

84. The union welcomes the requirement (at paragraph 6.72) for training on the Act (including the requirements of proportionality) before a person is permitted to select for examination material collected under a bulk equipment interference warrant. We recommend that the scope of the mandatory training be enlarged to include the special considerations and tests which apply to confidential journalistic material and the identification/confirmation of journalistic sources (see our comments at 34-36 above).

85. Regarding paragraph 9.23, we reiterate our recommendations (see paragraphs 45-47 above) concerning the need for enhanced safeguards on the dissemination/sharing of material with authorities from countries outside the UK.

86. Section 10 should include a requirement for records keeping in respect of the decisions taken (and the reasoning underlying these decisions) in regard to the dissemination of material to authorities of a country outside the UK under paragraph 9.23.

87. The NUJ considers that paragraph 9.31 should include an explanation as to why special consideration is necessary in respect of acquiring material or selecting material for examination in relation to these professions.

88. For the reasons set out above (paragraph 32 of this response) it is essential that paragraph 9.64 makes reference to the test of a requirement for an overriding requirement in the public interest in order for such information to acquired, as well as the distinction between this and the standard tests for necessity and proportionality.

89. Users of the code would, in our view, benefit from further examples (at paragraph 9.67) of when confidentiality attaches to journalistic material notwithstanding the fact that the person to whom it is sent or the person holding the material is neither the journalist nor the source.

90. The final sentence of paragraph 9.68 gives us cause for concern as it would appear to be an attempt to downplay the significance of certain communications data in revealing information about journalistic sources.

91. For paragraph 9.71, please refer to our concerns set out at paragraphs 26-31 concerning the determination of whether a person is a journalist, which are common to all codes.

92. Paragraph 9.72 needs to make it clear that the test for acquiring or selecting for examination data for the purposes of identifying or confirming journalistic sources is that of an overriding requirement in the public interest (see our comments at paragraph 32).

93. Paragraph 9.74 would benefit from further clarity as to whether the 'outside body' referred to includes authorities of countries outside the UK. While we welcome the inclusion of the requirements regarding the dissemination of confidential journalistic material and material identifying journalistic sources (at paragraph 9.74), we cross refer to our recommendations at paragraphs 45-47 and also suggest the inclusion of the following:

    a. The legal advice requirement should apply in all such cases and not only where there is any doubt about lawfulness. Authorised persons may not be well placed to assess

whether any such doubts exist and the potential consequences of dissemination may profound; and

b. The inclusion of an explicit requirement that consideration be given to the safety of any journalists and their sources who may be affected by the dissemination of the information, whether in the UK or abroad.

94. For the reasons given at paragraph 17, the NUJ takes the position that the convention requires that a Judicial Commissioner grant approval on a case-by-case basis before an equipment interference agency be permitted to select for examination material obtained under a bulk interference warrant for the purposes of identifying/confirming a journalist's source or obtaining confidential journalistic material. The union calls on the government to amend paragraphs 9.75-9.77 accordingly.

95. To the extent that this proposal is not accepted by the government, we recommend that these paragraphs be amended as follows

a. The circumstances in which the additional safeguards identified in paragraph 9.75 would apply is too narrow. These safeguards should apply not only where material is selected for examination "in order" to identify or confirm a source of journalistic information but also where there is no such intent but there are reasonable grounds to believe that a source may be identified through the selection of such material for examination.

b. The code should include a requirement that, when an equipment interference agency makes a proposal to a senior official, as envisaged at paragraphs 9.75 and 9.77, s/he be required to present the proposal in a fair and balanced way and to make all reasonable efforts to highlight any information or arguments that weaken the case for granting approval. This is essential in a context in which it is proposed that a journalist's sources may be determined without the journalist having any opportunity to make representations.

c. When making the decisions set out in this paragraph, authorised persons and senior officers should be given the option of seeking guidance from the Secretary of State and/or a Judicial Commissioner.

96. The code should require that the notification and approval processes under paragraphs 9.75 and 9.77 should be reported to the IPC.

97. Section 10 of the code should be expanded to include requirements to keep records on:

a. The number of Part 5 warrant applications made where any of the additional safeguard provisions from sections 111-114 of the Act are engaged.

b. The notification and approval processes under paragraphs 9.75 and 9.77.
c. The reasoning forming part of the assessments of necessity and proportionality in respect of the abovementioned processes.

98. The sections on errors and serious errors should include examples of errors concerning the obtaining or selecting for examination material concerning confidential journalistic information, journalistic sources and information relating to the other sensitive professions.

Bulk acquisition of communications data

99. The selection for examination of communications data gathered pursuant to a bulk acquisition warrant under chapter 2 of part 6 is analogous to the process of seeking 'targeted authorisations' for communications data pursuant to part 3 of the Act. Both mechanisms are capable of being used to advertently or inadvertently uncover journalistic sources. It is immaterial that in one case communications data identifying particular matters is sought directly from a CSP (and may be sought by law enforcement agencies) and in the other it is sought from data held in bulk (and not yet analysed) by the security and intelligence agencies.

100. The union considers that part 6 of the code should contain an overarching reference to the public interest in the freedom of expression and the protection of journalists and their sources. The draft code of practice on bulk personal datasets and the draft code of practice on equipment interference including the following wording: "[t]here is a strong public interest in protecting a free press and freedom of expression in a democratic society, including the willingness of sources to provide information to journalists anonymously."[23] There is no good reason that this should not also appear in this code.

101. It is our view that a subsection referring to the impact on journalism and the other professions referred to at paragraph 6.20 should be added to part 3 of the code. The NUJ is concerned that in emphasising the distinction between content and communications data, the IPA regime fails to recognise the significance and sensitivity of communications data in revealing journalistic sources. As we and others emphasised throughout the IP Bill process, communications data may be as revealing about journalistic sources as the content of journalists' communications. In some circumstances, communications data may reveal more about journalistic sources (e.g., revealing that a journalist has had regular correspondence with several individuals within a given organisation) than the content of a given communication. We recommend that section 3 would be an appropriate place in which to remind those involved in bulk acquisition regime of this fact.

[23] Draft Code of Practice on Security and Intelligence Agencies' Retention and Use of Bulk Personal Datasets, § 7.37; Draft Code of Practice on Equipment Interference, § 9.64.

102. Concerning paragraphs 6.19 to 6.31 generally, we strongly encourage the inclusion of a requirement that legal advice be taken whenever these provisions are engaged.

103. As to paragraph 6.19, we reiterate the abovementioned comment that the code's emphasis on the distinction between the facts of a communication having taken place and its content misunderstands the concerns surrounding the protection of journalists' sources. We strongly recommend that paragraph 6.19 be amended to make the point that notwithstanding this trite statement of fact, retaining and accessing communications data demonstrating that a conversation took place may be highly intrusive and is not of a lower level than information about the content of communications.

104. Paragraph 6.22 should make reference to the overriding requirement in the public interest threshold referred to at 6.25.

105. The union considers that paragraph 6.22 should include a requirement for legal advice to be taken in circumstances in which data is to be selected for examination which may include the communication data of a journalist (or any member of the other professions referred to in this subsection of the code). Obtaining legal advice on the implications for the right to freedom of expression (and privacy) of the proposed subjects necessarily forms part of the requirement for "particular care" to be taken in these cases.

106. Paragraph 6.23 deals with the selection for examination of data relating to 'certain professions' (including journalists). The union's concerns about this provision are two-fold:
    a. The phrase "consider any additional sensitivities" provides those concerned with the selection of data for examination with no meaningful guidance as to the nature of these "sensitivities" and what is meant by considering them. Further specificity is required here in order for this to provide a meaningful safeguard for journalists and members of other relevant professions.
    b. In our view, it is not sufficient for these sensitivities to be considered only when "it is intended or known that the data being selected for examination includes communications data of those known to be" e.g., a journalist. This requirement should apply equally to situations in which the authorised person has reasonable grounds to believe that the data being selected include a journalist's communications data.

107. Although we welcome the inclusion the overriding requirement in the public interest threshold, for the reasons set out above (at paragraph 32) it needs to be made explicit that this threshold is higher and more demanding to meet than the standard necessity and proportionality requirements.

108. The union is gravely concerned about the considerations identified at paragraph 6.27 for determining whether someone should be regarded as a journalist. We refer to the comments made above in respect of all of the codes.

109. We are strongly opposed to any decision to select for examination communications data in order to determine a journalist's source being approved by a body internal to a Security and Intelligence Agency (see paragraph 6.28). As noted above at paragraph 17, article 10 and its jurisprudence require that any such decision must be taken by a judicial authority. The Act recognises this by requiring that a Judicial Commissioner approve authorisations granted in relation to the obtaining of communications data for the purpose of identifying or confirming a source of journalistic information.[24] There is no principled basis for distinguishing between the nature of the authorisation required for examination of communications data obtained through a bulk acquisition warrant and targeted requests made to CSPs under part 3 of the Act. It is no answer to say that the initial bulk acquisition warrant will have been approved by a Judicial Commissioner because at that stage no consideration is given to the identification of journalists' sources. The *ex post facto* involvement of the IPC is an insufficient safeguard.

110. Without prejudice to these comments or those at paragraphs 21-25, the NUJ makes the following observations about paragraph 6.28:

    a. The circumstances in which the additional safeguards identified in paragraph 6.28 would apply are too narrow. These safeguards should apply not only where communications data are selected specifically to determine a journalist's source but also where there is no such intent but there are reasonable grounds to believe that a source may be identified through the selection of communications data for examination.
    b. The code should include a requirement that, when an officer makes a proposal to a person of the rank of director or above, as envisaged at paragraph 6.28, s/he be required to present the proposal in a fair and balanced way and to make all reasonable efforts to highlight any information or arguments that weaken the case for granting approval. This is essential in a context in which it is proposed that a journalist's sources may be determined without the journalist having any opportunity to make representations.
    c. When making the decisions set out in this paragraph, officers and directors should be given the option of seeking guidance from the Secretary of State and/or a Judicial Commissioner.

[24] Section 77 IPA 2016.

d. The final sentence should be supplemented with a requirement to notify the IPC of the reasons for which the officer making the request and the director granting the approval consider the requirements set out at paragraph 6.25 are met.

111. There are inconsistencies between this code and the draft code of practice on equipment interference[25] concerning the requirements surrounding the approval of decisions to select for examination material/data obtained under a bulk warrant for the purpose of identifying a source of journalistic information and/or obtaining confidential journalistic material. The latter contains better safeguards in respect of the person from whom approval is required: a senior official (as defined in section 198 of the Act) who is not a member of the agency concerned. To the extent that the government is unwilling to accept the NUJ's proposal that approval decisions under paragraph 6.28 be made by a Judicial Commissioner, we urge the government to amend paragraph 6.28 to mirror the safeguards contained in paragraphs 9.75 and 9.77 of the draft code of practice on equipment interference.

112. Paragraph 6.31's (on collateral intrusion into legitimate journalistic sources) reference to the need for officers to the give proper consideration "to the public interest" in such cases is too general to provide any meaningful safeguard. The NUJ recommends that the code make clear the various elements of the public interest in the protection of journalistic sources. In our view, this would provide more meaningful guidance as to the concerns to which an officer should have regard when making decisions on the selection of communications data for examination.

113. Paragraph 9.7 deals with the sharing of communications data obtained through bulk acquisition warrants with foreign entities. The sharing with foreign intelligence and security services of either selected or unselected communications data is of particular concern because this data may be 'mined' by a recipient to identify the sources of, for example, journalists who are regarded as being anti-government or who are exposing governmental wrongdoing. This is especially concerning for journalists whose work and sources are international and whose safety may be put at risk when communications data is shared with foreign intelligence and security services. We refer to the points made at paragraphs 45-47 above and emphasise that:

a. The code includes recognition of the risk to journalists and their sources which may arise through the sharing of communications data with foreign intelligence services.
b. Supplementary safeguards should be included at paragraph 9.7 to ensure that proper account is taken of these risks when any decision is made to disclose such data. We recommend that this should include an explicit requirement to have regard to any risk that sharing of communications data derived from a bulk acquisition warrant may (i) lead to the disclosure of journalistic sources, and (ii) put at risk

[25] Draft Code of Practice on Equipment Interference, § 9.75-9.77.

journalists and their sources who may be identified or identified from the information shared with authorities of a country outside the UK.

114. The record keeping requirements at paragraph 10.1 should be enlarged to require the retention of records evidencing an officer's decision making, including her/his taking into account of the relevant considerations, in relation to the matters set out at paragraphs: 6.23, 6.25, 6.27, 6.28 and 6.31. We regard the recording of these decision-making processes to be a necessary precondition of *ex post facto* oversight of decisions concerning journalistic material and journalistic sources by the IPC and, where relevant, the Intelligence and Security Committee.

Bulk personal datasets

115. Part 5 of the code deals with authorisations by a Secretary of State of bulk personal dataset ("BPD") warrants. The reference to necessity and proportionality as regards to article 8 of the convention should expand to include article 10 (the right to freedom of expression). For the reasons set out above, it is well established that the retention and examination of data engages article 10, which should equally be a focus of any necessity and proportionality analysis undertaken in the context of authorising the retention an examination of a BPD.

116. The same point applies to the guidance given on the assessment of proportionality at paragraph 5.21-5.22. This guidance should not be confined to the proportionality of interferences with the right to privacy.

117. There is a need for greater clarity at paragraph 7.11, which deals with the safeguards applicable to the examination of data held in BPDs for the purposes of identifying the sources of journalistic material. In particular:

    a. This passage would seem to elide two types of information which elsewhere in the codes and in the Act are dealt with as discrete types of information: confidential journalistic material/information and the identity of a journalist's source. There is a need for (i) both concepts to be referred to and (ii) an elaboration as to which safeguards are said to apply to the examination data BPD in each case.
    b. As set out above, the safeguards applicable to the identification of journalists' sources are inconsistent across the powers provided for under the Act. The union's position is that the correct reading of this passage is that a Security and Intelligence Agency would require the approval of a Judicial Commissioner before examining data in a BPD for the purposes of a identifying a journalist's source. If, however, this interpretation is incorrect, we repeat the points made in relation to the selection for examination of personal data from information gathered under a bulk acquisition warrant. There would be no principled basis for the code not to require the approval of a Judicial Commissioner before examining a BPD for the purposes for identifying

or confirming a journalistic source. For the purposes of article 10 of the convention, there is no difference identifying a source through this route as compared to doing so under chapter 3 of part 2 of the Act.

118. The reference at paragraph 7.13 to the need for an officer (selecting data for examination with the intention of obtaining privileged or otherwise confidential information) to give 'special consideration' to necessity and proportionality requires elaboration if it is to provide a meaningful safeguard. Further, as stated in reference to other codes, the union is concerned that enhanced safeguards should apply not only where there is an intention on the part of an authorised person to select for examination confidential journalistic material and information concerning journalistic sources. These safeguards should also apply where an authorised person has grounds to believe that the data selected may include such information.

119. For the reasons set out at paragraphs 26-31 above, we have serious concerns about paragraph 7.42 and urge the government to amend it. Further, the final sentence at paragraph 7.43, which seems introduce a requirement to consider the (non)use of a social media when undertaking an assessment as to whether someone is a journalist, is nonsensical and should be excised.

120. The NUJ welcomes the records keeping requirement at paragraph 7.44. This requirement should not, however, be limited to circumstances in which there is an *intention* to select such material for examination. It should apply equally to situations in which the decision maker has grounds to believe that the data selected for examination may include the types of data set out in this paragraph. We further recommend that this should be enlarged to include the documentation of all decision making and reasoning set out in paragraphs 7.42 to 7.47 of the code. Further, consideration should be given to reiterating this requirement in section 8 of the code.

121. The requirement to seek advice from a legal adviser (at paragraph 7.46) before disseminating confidential journalistic material should apply in all cases and not be limited to situations in which there is doubt as to the lawfulness of such action.

122. The union agrees with the inclusion of the requirement (at paragraph 7.47) to inform the IPC of decisions to record and retain confidential journalistic material. We consider that this requirement should be introduced in equivalent sections across the other codes.

123. The section of the code dealing with legal privilege includes a requirement (at paragraph 7.37) that disseminated material be accompanied by a clear warning that it is legal privileged. We recommend that a similar requirement be included in the section dealing with confidential journalistic material and information concerning journalistic sources.

124. We recommend expanding paragraph 8.10 to include recognition that errors may also have significant consequences for the freedom of the press.

125. To highlight the sensitivity surrounding confidential journalistic material and journalistic sources, paragraph 8.15 should include the example of selecting for examination confidential journalistic protected data or data intended to identify a source of journalistic information in circumstances where it is not strictly necessary and proportionate to do so.