

# BIG BROTHER WATCH

## Enhancing surveillance transparency: A UK policy framework

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## **Comments on this paper:**

### **Former Home Secretary David Blunkett MP:**

*"This paper highlights some very positive steps that will better inform the public and the debate which is rightly taking place about how we learn lessons from the immediate past and move forward to the future. We should learn from the US that it is possible to give the public more information about how surveillance powers are used without jeopardising security. I know that the Intelligence and Security Committee will not only be taking on board a whole range of submissions following their call for evidence, but also drawing down on the wider debate publicly and in Parliament. Both are important."*

### **Sir David Omand, former Director of GCHQ:**

*"I welcome this initiative by Big Brother Watch. Not all the ideas in this paper may prove practicable, but it is important to keep seeking safe ways of informing the public about the true purpose, value and extent of interception of communications about which misunderstandings abound. US practice may not always be the best guide due to the scale of their effort and since their legal structure is different. Nevertheless, I hope ways will be found to make more information available for the UK so as to enhance public trust in the intelligence work of the police and security authorities."*

# Introduction

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*The public should be able to know who has used what powers, how often, and why. They should also be informed about the effectiveness of surveillance and whether data is being collected in bulk.*

## **Headline issues:**

- UK does not publish a breakdown by agency, law enforcement or other body – for the use of surveillance powers
- There is no proactive requirement on different organisations able to use these powers to collect or publish statistics on how they use access data, or how effective powers are
- Data can be accessed in various ways, not just through RIPA, while we do not know if the UK is engaged in the same bulk data collection as undertaken in the US

*Already far more detailed data is available in the US about how surveillance powers are used and there has not been a discernible reduction in law enforcement effectiveness.*

## **UK Polling (BBW/ComRes, October 2013):**

- 70% of British adults say British companies should publish reports on how often they receive requests for customer data from the police and security services.
- 66% of British adults say that the Government should publish more data about how surveillance powers are used

# Specific detail

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Where data is not currently available, there should be a proactive duty on the individual agencies or organisations to record the information required.

- Data should be published on an annual basis and broken down by:
  - The individual organisations
  - What legal authority is being used
  - What purpose the surveillance was undertaken or data accessed
- Where CHIS, directed, intrusive or intercept powers were used, for what offence and whether the investigation resulted in a prosecution or conviction. This should follow the model already in place for wiretap statistics by the US Department of Justice. (See below)
- Where certificates are signed, how much data was collected under them and how many citizens were affected
- The US Government has committed to publishing the number of individuals affected by these requests and we believe the UK Government should also do so
- The US Government has committed to allow companies to report on the data requests they receive – and how many are contested – and the UK should do the same

- The total financial amounts paid under cost recovery mechanisms (as an annual, aggregate figure) broken down by capital expenditure, staffing costs and data access requests.
- The issue of non-RIPA avenues being used to acquire data should be included until they are repealed by Parliament

### **Who should publish the data**

The Interception of Communications Commissioner is a regulator, not a statistical reporting body. It is important that the IoCC report does not become a statistical bulletin and so we believe the obligation should fall on individual organisations (or an umbrella Government department) to publish these figures. The IoCC should be able to comment on their robustness.

Similar obligations are already placed upon law enforcement and intelligence agencies as well as companies abroad, for example the German Telecommunications Act 1996, s 88(5) and 18 U.S.C. § 2516.

Transparency data should allow the public to understand which bodies are using what legal powers, for what purpose and to what extent they lead to successful prosecutions. This should also include provisions around the overall financial cost of surveillance, the number of people targeted by the surveillance and the scale of data collected. There is no reason why individual organisations cannot publish their own transparency reports, whether a local police force or MI5.

Companies play a key role in this area and while it may take some time to build up a fully accurate picture, delaying because of administrative concerns only raises questions that there is something amiss. Gagging orders on companies should be lifted where there is no threat to a specific operation. British companies will bolster their international reputation by being transparent about their co-operation with Governments.

Equally, of particular importance is companies reporting on the requests they refuse and why.

## Transparency in the US

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*From the Department of Justice: Each Wiretap Report uses tables, text, and charts to report information provided by federal and state officials on orders authorizing or approving interceptions of wire, oral, or electronic communications for the calendar year ending December 31.*

- The reports present data on types of offenses under investigation, nature and locations of intercept devices, costs and durations of intercepts, and intercept extensions granted.
- They do not include names, addresses, or phone numbers of subjects under surveillance.

***President Obama: The US "can and must be more transparent" about its use of phone and internet data.***

The Director of National Intelligence – directed by President Obama – confirmed on August 31 the US Government would be expanding its own transparency efforts to disclose more information about how powers are used. For example, the US already breaks down the use of powers by intelligence agencies. This followed confirmation the US would begin publishing statistics about the use of FISA orders, encompassing the government’s “total number of orders issued during the prior 12-month period, and the number of targets affected by these orders.”

The Government has also declassified the legal rationale for the government's phone-data collection and associated opinions.

## USA – Proposed reforms:

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### **USA Freedom Act**

Under the plan, the companies would be able to say how often that customer data has been handed over to U.S. intelligence agencies. It also would let businesses say the number of government requests they agreed to, and the number of users or accounts impacted by the requests.

### **Surveillance Transparency Act**

It would require officials to disclose how many people are targets of government surveillance programs, an estimate how many of them are Americans, and how many people’s communications the government actually collects under the Federal Intelligence Surveillance Act (FISA).

And it would lift a gag order preventing communication or technology companies from discussing the amount of information they give the government under FISA. Companies are currently unable to acknowledge what’s been, by now, widely reported, that the government has asked them to provide information from their users under federal intelligence laws. (A Google lawyer, under direct questioning Wednesday, said he was barred from providing a number.)

### **What the major companies want (as per their joint letter):**

First, the US government should ensure that those companies who are entrusted with the privacy and security of their users’ data are allowed to regularly report statistics reflecting:

- The number of government requests for information about their users made under specific legal authorities such as Section 215 of the USA PATRIOT Act, Section 702 of the FISA Amendments Act, the various National Security Letter (NSL) statute s, and others;
- The number of individuals, accounts, or devices for which information was requested under each authority; and
- The number of requests under each authority that sought communications content, basic subscriber information , and/or other information