

## The Regulation of Investigatory Powers Act (RIPA)

### BACKGROUND

The Regulation of Investigatory Powers Act 2000 (RIPA) governs the use of covert surveillance powers. In 2012 the Protection of Freedoms Act was introduced, partly to solve some of the issues created by the legislation, such as the use of intrusive surveillance for minor issues. Many problems still remain and the need to enact serious reform is now more pressing than ever.

### KEY POINTS

1. RIPA was drafted for a pre-social media age, it is now woefully outdated.
2. More transparency is needed around how RIPA powers are used, including the way that authorisations to use the powers are approved.
3. RIPA's oversight mechanisms are in need of reform.
4. Members of the public should be able to seek redress if they have been subject to surveillance.

### WHAT IS THE REGULATION OF INVESTIGATORY POWERS ACT?

The Regulation of Investigatory Powers Bill was introduced to the House of Commons on the 9<sup>th</sup> February 2000. The following powers are specified as being relevant:

1. The interception of communications.
2. Intrusive surveillance.
3. Directed surveillance.
4. The use of Covert Human Intelligence Sources (CHIS).
5. The acquisition of communications data.
6. Access to encrypted data.<sup>1</sup>

The Act was intended to outline a variety of important aspects of the powers, including:

1. Which authorities are permitted to use each power.
2. The purposes for which the powers may be used.
3. The authorising figures for each power.
4. The uses of the material that can be obtained.
5. The means of redress for individuals.
6. The role of the judiciary.<sup>2</sup>

The Bill's stated purpose was to "*ensure that the relevant investigatory powers are used in accordance with human rights.*"<sup>3</sup> Jack Straw MP, **the Home Secretary** at the time, who introduced

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<sup>1</sup> Regulation of Investigatory Powers Act 2000:  
[http://www.legislation.gov.uk/ukpga/2000/23/pdfs/ukpga\\_20000023\\_en.pdf](http://www.legislation.gov.uk/ukpga/2000/23/pdfs/ukpga_20000023_en.pdf)

<sup>2</sup> Ibid

# BIG BROTHER WATCH

## DEFENDING CIVIL LIBERTIES, PROTECTING PRIVACY

the legislation, stated that it was specifically aimed at making “*the intrusive powers of the state compatible with the Human Rights Act 1998.*”<sup>4</sup>

### DEFINITIONS

Precisely what RIPA gives authority to do is not clear. Some of the most common techniques are:

#### 1. Communications Data

Communications data, also known as metadata, is made up of every element of a communication except its content.

For example, access to the communications data of a phone call has the potential to show the following:

- Who made and received the communication.
- How long the call lasted for.
- The location of both parties.

As part of our evidence to the Joint Committee on the Draft Communications Data Bill, Big Brother Watch published figures highlighting that between 2009 and 2012 police forces made over **120,000 requests for communications data.**<sup>5</sup>

Aside from the police and the intelligence agencies; the Charities Commission, the Financial Services Authority and local councils can all request access to this data.

#### 2. Directed Surveillance

Directed Surveillance refers to surveillance that is deemed to be non-intrusive or occurring outside of a private home or vehicle. It can involve the monitoring of an individual’s movements, conversations and other activities. Big Brother Watch’s report, *Off the Record*, revealed that between 2010 and 2013 there had been at least **27,115 authorisations** for this kind of surveillance by the Police in England and Wales.<sup>6</sup>

Agencies permitted to use this kind of surveillance include the Intelligence Agencies, Royal Mail and the armed forces.

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<sup>3</sup> Regulation of Investigatory Powers Act 2000, Explanatory Notes:

<http://www.legislation.gov.uk/ukpga/2000/23/notes>

<sup>4</sup> J. Straw, Data Retention and Investigatory Powers Bill, 15<sup>th</sup> July 2014:

[http://www.publications.parliament.uk/pa/cm201415/cmhansrd/cm140715/debtext/140715-0004.htm#140715-0004.htm\\_snew52](http://www.publications.parliament.uk/pa/cm201415/cmhansrd/cm140715/debtext/140715-0004.htm#140715-0004.htm_snew52)

<sup>5</sup> Big Brother Watch, *RIPA and Communications Data - Police Use*, 12<sup>th</sup> October 2014:

<http://www.bigbrotherwatch.org.uk/wp-content/uploads/2014/10/Police-and-Comms-Data.pdf>

<sup>6</sup> Big Brother Watch, *Off the Record*, 23<sup>rd</sup> October 2014: <http://www.bigbrotherwatch.org.uk/wp-content/uploads/2014/10/Off-the-Record-BBW-Report1.pdf>

# BIG BROTHER WATCH

## DEFENDING CIVIL LIBERTIES, PROTECTING PRIVACY

### 3. Covert Human Intelligence Sources (CHIS)

CHIS is a form of surveillance that has received criticism from both politicians and the press. This tactic involves the deployment of officers to covertly monitor individuals, whilst assuming a false identity.

Aside from the intelligence agencies and the Police, organisations such as the Office for Fair Trading, Ofcom and the Gambling Commission can deploy CHIS.

### 4. Intrusive Surveillance

Intrusive surveillance methods can occur within private property or vehicles. The techniques can include actions such as eavesdropping on conversations that occur in an individual's home or vehicle.

The use of this kind of surveillance is strictly limited to law enforcement agencies, the intelligence agencies and organisations such as HMRC.

### EARLY CRITICISM

One of the major criticisms of RIPA is that it allows the use of various surveillance techniques in response to minor incidents.

One well publicised example involved officials from **Poole Council** conducting a surveillance operation which targeted 3 children and their parents to find out if they lived in a school's catchment area.<sup>7</sup>

Big Brother Watch's research has also highlighted how councils use the powers. The 2012 report ***The Grim RIPA*** highlighted that between 2010 and 2012 councils had authorised an average of 11 surveillance operations every day.<sup>8</sup> The report found examples of surveillance which included councils using RIPA powers to make a "test purchase" of a puppy and to identify a man who had trimmed a hedge.<sup>9 10</sup>

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<sup>7</sup> Big Brother Watch, *The Grim RIPA*, 28<sup>th</sup> May 2010, p. 5:  
<http://www.bigbrotherwatch.org.uk/TheGrimRIPA.pdf>

<sup>8</sup> Big Brother Watch, *The Grim RIPA*, 28<sup>th</sup> May 2010 p. 1:  
<http://www.bigbrotherwatch.org.uk/TheGrimRIPA.pdf>

<sup>9</sup> Ibid p. 6

<sup>10</sup> Ibid p. 5

# BIG BROTHER WATCH

## DEFENDING CIVIL LIBERTIES, PROTECTING PRIVACY

The over-zealous use and heavy handed application of RIPA by councils led the Conservative Party to add a pledge to their 2010 Manifesto, which promised to curtail “*the surveillance powers that allow some councils to use anti-terrorism laws to spy on people making trivial mistakes or minor breaches of the rules.*”<sup>11</sup> Similarly the Lib Dem manifesto included a commitment to “*stop councils spying on people.*”<sup>12</sup>

### THE PROTECTION OF FREEDOMS ACT

One of the key parts of the Coalition Agreement’s commitment to civil liberties was the implementation of a “*Freedom Bill*”, which later became the **Protection of Freedoms Act 2012**.

The Act contained a number of clauses that related to the use of RIPA.<sup>13</sup> Specifically it would “*provide for judicial approval in relation to certain authorisations and notices under the Regulation of Investigatory Powers Act 2000*”. The **Home Secretary**, Theresa May MP, later put it more succinctly, arguing that the Bill would “*restrict state powers of surveillance to serious offences.*”<sup>14 15</sup>

The ability of councils to carry out surveillance under the Act was curtailed; they are now required to seek a warrant from a magistrate before carrying out any surveillance. Additionally the use of directed surveillance by councils was made subject to further restrictions. Councils were limited to authorising operations that relate to crimes that carry a maximum 6 month custodial sentence or involve the underage sale of tobacco or alcohol.

### RECENT DEVELOPMENTS

In July 2014 emergency data retention legislation was passed in Parliament. **The Data Retention and Investigatory Powers Act (DRIPA)** was in response to a ruling by the European Court of Justice, which removed the obligation of Communications Service Providers to store communications data.

Alongside the emergency legislation, it was announced that there would be a full review of how RIPA functioned, which would be undertaken by David Anderson QC, **the Government’s Independent Reviewer of Terrorism Legislation**. At the press conference the **Deputy Prime Minister** argued that

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<sup>11</sup> *Conservative Party Manifesto 2010*, p. 79:

<https://www.conservatives.com/~media/Files/Activist%20Centre/Press%20and%20Policy/Manifestos/Manifesto2010>

<sup>12</sup> *Liberal Democrat Party Manifesto 2010*, p. 93: [http://www.astrid-online.com/Dossier--R3/Documenti/Elezioni-2/libdem\\_manifesto\\_2010.pdf](http://www.astrid-online.com/Dossier--R3/Documenti/Elezioni-2/libdem_manifesto_2010.pdf)

<sup>13</sup> *The Coalition: our program for government*, p. 11:

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/78977/coalition\\_programme\\_for\\_government.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/78977/coalition_programme_for_government.pdf)

<sup>14</sup> *Protection of Freedoms Bill Presentation*, 11<sup>th</sup> February 2011:

<http://www.publications.parliament.uk/pa/cm201011/cmhansrd/cm110211/debtext/110211-0001.htm#11021130000007>

<sup>15</sup> T. May, *Protection of Freedoms Bill; Second Reading*, 1<sup>st</sup> March 2011:

<http://www.publications.parliament.uk/pa/cm201011/cmhansrd/cm110301/debtext/110301-0002.htm#11030160000001>

# BIG BROTHER WATCH

## DEFENDING CIVIL LIBERTIES, PROTECTING PRIVACY

there were “*fundamental questions to be asked about the scope of existing powers*” and “*whether the Regulation of Investigatory Powers Act has kept pace with technology*”.<sup>16</sup>

This review will occur alongside a separate review into surveillance powers, to be carried out by the **Royal United Services Institute (RUSI)**. Both of these processes are due to report back their findings in 2015.

### THE UNRESOLVED PROBLEMS

#### ***Applicability***

One criticism of RIPA is that it was drafted in a pre-social media age. At the time MPs were debating its clauses neither Facebook (2004) nor Twitter (2006) had been launched. The fast progress of the Internet has created a revolution in the way we communicate with each other. But the legislation hasn't kept pace.

The gap between the technologies that RIPA was introduced to govern and the technology that is now available has produced a number of grey areas. One of the most worrying gaps was revealed during a case before the **Investigatory Powers Tribunal (IPT)**. In his evidence Charles Farr, **the Director of the Office for Security and Counter-Terrorism**, revealed that messages sent via social media can be classed as “*external communications*.”<sup>17</sup>

This means that there is no need to obtain a warrant before the collection of social media messages. The rationale for this being that most social media communications are routed through servers that are often in countries such as the US, before arriving with their intended recipient. The action of collecting communications without a warrant is judged to be legal even if all parties are UK citizens and are within the UK at the time.

The outdated nature of RIPA has been recognised by a variety of figures, such as the **Home Affairs Select Committee (HASC)**, which recommended a Joint Committee of both Houses of Parliament hold an inquiry on the matter “*with a view to updating*” the legislation.<sup>18</sup> As well as HASC, Yvette Cooper MP, **the Shadow Home Secretary**, has argued that “*significant questions remain about the way the legal framework operates and whether it is falling behind the pace of new technology*”. She continued by arguing that there should be a “*full review of RIPA*”.<sup>19</sup>

#### ***Authorisation***

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<sup>16</sup> No 10 Press Release, *PM and Deputy PM speech on emergency security legislation*, 11<sup>th</sup> July 2014:

<https://www.gov.uk/government/speeches/pm-and-deputy-pm-speech-on-emergency-security-legislation>

<sup>17</sup> *Witness Statement of Charles Blandford Farr on behalf of the Respondents*, Investigatory Powers Tribunal, paragraph 132, p. 40:

[https://www.privacyinternational.org/sites/privacyinternational.org/files/downloads/press-releases/witness\\_st\\_of\\_charles\\_blandford\\_farr.pdf](https://www.privacyinternational.org/sites/privacyinternational.org/files/downloads/press-releases/witness_st_of_charles_blandford_farr.pdf)

<sup>18</sup> Home Affairs Select Committee, *Counter Terrorism*, 30<sup>th</sup> April 2014, p. 70:

<http://www.publications.parliament.uk/pa/cm201314/cmselect/cmhaff/231/231.pdf>

<sup>19</sup> Y. Cooper, *The challenges of a Digital World to our Security and Liberty*, 3<sup>rd</sup> March 2014:

<http://press.labour.org.uk/post/78448368189/the-challenges-of-a-digital-world-to-our-security-and>

# BIG BROTHER WATCH

## DEFENDING CIVIL LIBERTIES, PROTECTING PRIVACY

Although the Protections of Freedoms Act ensured that council officials must now seek approval from a magistrate before conducting a surveillance operation the same cannot be said for the Police. *Off the Record*, a Big Brother Watch report published in 2014, showed that the process of authorisation within law enforcement is opaque at best.<sup>20</sup>

The report showed that between 2011 and 2013 there were over 27,000 authorisations for directed surveillance operations. However requests for information on the use of intrusive surveillance and CHIS were rejected. It is concerning that the Police continue to have their warrants signed off internally, without the need to first gain the approval of a magistrate.

A further issue that has been identified around authorisation is the number of organisations that can utilise surveillance techniques. A UN special report drew attention to this, commenting that over 200 “agencies, police forces and prison authorities can acquire data”. It warned that “as a result it is difficult for individuals to foresee which State agency they might be subjected to surveillance.”<sup>21</sup>

### Oversight

Chapter II Part IV of RIPA introduced a number of oversight bodies to ensure that the powers are used properly, the so called Commissioner system.

The current set up is best described by the Conservative MP **David Davis**, who commented that the Commissioners were “good people doing impossible jobs”.<sup>22</sup> As it stands each Commissioner is understaffed and underfunded.

Considering just one example, **the Intelligence Services Commissioner (InSC)**, this problem becomes clear. The role of the InSC is to “provide independent external oversight of the use of their intrusive powers by the UK intelligence services and parts of the MOD”. In order to carry this out he has a staff of just one person, who functions as his “PA”, in addition the Commissioner himself only works on a part time basis.<sup>23 24</sup> This clearly raises questions over how effective he can be in overseeing three intelligence agencies with a **combined staff of 13,293** and a **budget of approximately £2bn**.<sup>25 26</sup>

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<sup>20</sup> Big Brother Watch, *Off the Record*, 23<sup>rd</sup> October 2014:

<http://www.bigbrotherwatch.org.uk/home/2014/10/record-police-use-surveillance-powers.html>

<sup>21</sup> United Nations Human Rights Council, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue* (2013), p. 15:

[http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A.HRC.23.40\\_EN.pdf](http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A.HRC.23.40_EN.pdf)

<sup>21</sup> Ibid p. 21

<sup>22</sup> Home Affairs Select Committee, *Counter Terrorism*, 30<sup>th</sup> April 2014, p. 65:

<http://www.publications.parliament.uk/pa/cm201314/cmselect/cmhaff/231/231.pdf>

<sup>23</sup> Ibid, *Oral Evidence*, Tuesday 18<sup>th</sup> March, Ev 109

<sup>24</sup> Intelligence Services Commissioner, *Report of the Intelligence Services Commissioner for 2013*, 26<sup>th</sup> June 2014, p. 2:

[http://intelligencecommissioner.com/docs/40707\\_HC304IntelligenceServicesCommissioner\\_Accessible.pdf](http://intelligencecommissioner.com/docs/40707_HC304IntelligenceServicesCommissioner_Accessible.pdf)

<sup>25</sup> Intelligence and Security Committee, *Annual Report 2012-2013*, 10<sup>th</sup> July 2013, p. 40: [https://b1cba9b3-a-5e6631fd-s-sites.googlegroups.com/a/independent.gov.uk/isc/files/2012-2013\\_ISC\\_AR.pdf?attachauth=ANoY7cp0DSfSzveKcGzFiYFtdxnGD0IzbLyta6eqnchCNoKhdP3u-aEm3qRASc1-aySKDP3sENjPAGaybilJ94pIC5\\_JK\\_5XTb0zm-0UhgNhgqLuCkeqbuzZAmxCDDLwOeMMqw1Zzjk2g-](https://b1cba9b3-a-5e6631fd-s-sites.googlegroups.com/a/independent.gov.uk/isc/files/2012-2013_ISC_AR.pdf?attachauth=ANoY7cp0DSfSzveKcGzFiYFtdxnGD0IzbLyta6eqnchCNoKhdP3u-aEm3qRASc1-aySKDP3sENjPAGaybilJ94pIC5_JK_5XTb0zm-0UhgNhgqLuCkeqbuzZAmxCDDLwOeMMqw1Zzjk2g-)

# BIG BROTHER WATCH

## DEFENDING CIVIL LIBERTIES, PROTECTING PRIVACY

The level of scrutiny commissioners can offer is therefore low. At an appearance before **HASC** the **interim Interception of Communications Commissioner**, Sir Paul Kennedy, revealed that in 2013 **only 10% of the relevant warrants had been scrutinised**. For an effective system the figure should be at least 50%.<sup>27</sup>

Looking at all seven of the Commissioners, there are a worrying number of overlaps. Earlier this year the Information Commissioner's Office published the *Surveillance Road Map*, with the intention of clarifying the roles of each Commissioner and office. Unfortunately it misses the fact that nothing will be solved unless real reforms are made to properly restructure the system.<sup>28</sup>

### THE SOLUTIONS

The reviews being carried out by the Independent Reviewer of Terrorism Legislation and RUSI are welcome. They represent opportunities to update RIPA and bring it into line with current technology.

It is vital that the reviews include assessments of:

- The type of offences RIPA is being used for.
- The number of requests approved by law enforcement agencies.
- The requests that were subsequently rejected by service providers.

The current gaps in the legislation will become clear, as will the improvements which will need to be made. Any new legislation should take into account the changes that have occurred in communications since 2000.

There should be a greater level of transparency around the use of surveillance than there is currently. Publishing more information would not be difficult, nor would it overly impact on the effectiveness of the agencies using these powers.

In our paper, *Enhancing surveillance transparency: a UK policy framework*, we suggested several ways in which openness could be improved. These include publishing the following:

- The individual organisations that use surveillance powers.
- The legal authority they used each time an operation was initiated.

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<sup>26</sup> Ibid p. 34

<sup>27</sup> Home Affairs Select Committee, *Oral Evidence: Regulation of Investigatory Powers Act 2000*, 4<sup>th</sup> November 2014, p. 3: <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/home-affairs-committee/regulation-of-investigatory-powers-act-2000/oral/15164.pdf>

<sup>28</sup> Information Commissioner's Office, *Surveillance Road Map: A shared approach to the regulation of surveillance in the United Kingdom*, August 2014:

[http://ico.org.uk/~/media/documents/library/Corporate/Practical\\_application/surveillance-road-map.pdf](http://ico.org.uk/~/media/documents/library/Corporate/Practical_application/surveillance-road-map.pdf)

# BIG BROTHER WATCH

## DEFENDING CIVIL LIBERTIES, PROTECTING PRIVACY

- The purpose of the operation.<sup>29</sup>

Currently the US Justice Department releases annual reports on the use of wiretaps by both State and Federal authorities; they provide a good model for how UK authorities can improve transparency.

### CONCLUSION

RIPA has failed to keep up with advances in technology. Although the Protection of Freedoms Act made some important changes and allowed for added extra protection against over-zealous surveillance it still left many flaws in place. Alarmingly there is still urgent work that needs to be done to update the legislation and make it fit for purpose in the 21<sup>st</sup> Century.

It has also raised concerns about the ability of the Commissioners to properly oversee the powers being used. Clearly this system is in urgent need of reform, both to increase its funding and its staffing. Only through these steps can the system begin to offer a realistic chance of properly scrutinising the authorisation of surveillance warrants.

Important questions also remain about the level of secrecy around the powers. It is unacceptable that police forces can sign off warrants internally and release the bare minimum to show their use of these very intrusive techniques.

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<sup>29</sup> Big Brother Watch, *Enhancing surveillance transparency: a UK policy framework*: [http://www.bigbrotherwatch.org.uk/files/briefings/BBW\\_transparency\\_2014.pdf](http://www.bigbrotherwatch.org.uk/files/briefings/BBW_transparency_2014.pdf)