

# BIG BROTHER WATCH

## DEFENDING CIVIL LIBERTIES, PROTECTING PRIVACY

### ***Introduction***

- 1 Big Brother Watch support the introduction of a Bill to bring greater transparency and safeguards to surveillance powers for the Intelligence Agencies and law enforcement. However we feel the Investigatory Powers Bill in its current form requires a great deal of work before it is fit to do its job.
- 2 We do not support the use of many of the bulk powers in the Bill and believe there is opportunity to look again at these powers; particularly the use of bulk equipment interference and bulk personal datasets. We address one of those issues in this submission.
- 3 Far greater clarity is required in the Bill and in the draft Codes of Practice. Currently the Codes of Practice are riddled with poor drafting, incoherence and lack of clarity. Indeed, clarity is a concern throughout the Bill, in particular the definitions of communications data which are incomprehensible. We note the drafting has been done to achieve longevity of the Bill, but as the world becomes more connected it will cause confusion and misunderstanding in the long term. This needs to be addressed as a matter of urgency.
- 4 Due to the word limit on submissions we have chosen to restrict ours to a selection of amendments which we believe will start the process of ensuring that privacy is made the backbone of the Bill; a recommendation made by the Intelligence and Security Committee. We hope that this Committee take that recommendation seriously and ensure the safeguards within the Bill are strengthened.
- 5 **This submission calls for:**
  - Removal of review and approval by a Judicial Commissioner to be replaced with authorisation by a Judicial Commissioner and the Secretary of State.
  - Removal of class bulk personal datasets, amendments to state no medical or health record will be used as a bulk personal dataset.
  - Judicial authorisation to be given to all warrants and notices which involve a Secretary of State.
  - Changes to Section 198 error reporting
  - Amendments to targeted equipment interference warrants, creation of thematic equipment interference warrants and the removal of bulk equipment interference warrants.

### ***Judicial authorisation***

- 6 We do not agree that the “double lock” defined in the Bill as a process of “review” and “approval”, provides a world leading method of authorisation.
- 7 The process of judicial authorisation should be strengthened to allow for a Judicial Commissioner, as well as the Secretary of State, to independently assess, analyse and authorise a warrant application, rather than the proposed process of review and approval of a warrant already authorised by the Secretary of State.
- 8 These changes will strengthen oversight and transparency. They will ensure that rather than rubber stamping a pre-authorised warrant, a true, double lock of authorisation will be given.

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- 9 We propose that **Section 21, Section 97, Section 123, Section 139 and Section 157** are amended in the following way:

*In deciding whether to [insert “authorise”] ~~approve a person’s decision to issue~~ a warrant under this Chapter, a Judicial Commissioner must [insert “assess”] ~~review the person’s conclusions as to the~~ following matters—*

- (a) whether the warrant is necessary on relevant grounds (see subsection (3), and*
- (b) whether the conduct that would be authorised by the warrant is proportionate to what is sought to be achieved by that conduct.*

*In doing so, the Judicial Commissioner must apply the same principles as would be applied by a court ~~on an application for judicial review.~~*

*Where a Judicial Commissioner refuses to [insert “authorise”] ~~approve a person’s decision to issue~~ a warrant under this Chapter, the Judicial Commissioner must give ~~the person~~ written reasons for the refusal.*

*Where a Judicial Commissioner, other than the Investigatory Powers Commissioner, refuses to [insert “authorise”] ~~approve a person’s decision to issue~~ a warrant under this Chapter, the ~~person may ask~~ the Investigatory Powers Commissioner [insert “may be asked to assess the application”]*

### ***Judicial authorisation and class bulk personal datasets***

- 10 In the case of **Section 179** we propose the same amendments which addresses judicial authorisation noted in paragraph 9 above, but we also propose striking out and removal of class bulk personal datasets. This recommendation was made by both the Intelligence and Security Committee and the Joint Committee on the draft Investigatory Powers Bill.
- 11 Bulk personal datasets are intrusive as a whole, but the nature of a class bulk personal dataset will we are led to believe, enable the health, travel, hobbies and other day to day personal time activities of people to be acquired, retained and analysed. If the definition of class bulk personal datasets is as inferred, questions exist as to whether they may breach Article 8 of the ECHR.
- 12 The Bill should also be amended with a clause which states clearly that any medical or health dataset will not be requested, obtained, retained or analysed.

### ***Judicial authorisation to be inserted into warrants***

- 13 If the Bill is going to provide clarity and transparency the Judicial Commissioner should be involved in all warrants, modified warrants and notices which require authorisation by a Secretary of State.
- 14 We acknowledge and support the comments made by the Joint Committee on the draft Investigatory Powers Bill who reported that with regard to major modifications “*The warrant could ...be changed in a substantial way without any judicial oversight.*”
- 15 **Section 30, Section 31, Section 104, and Section 105** should be amended to include a clause giving “authorisation” of warrants to Judicial Commissioners and the Secretary of State, in line with the proposed amendments to judicial authorisation outlined earlier in this submission at paragraph 9.

## ***Judicial authorisation to be inserted into notices***

- 16 Notices given by the Secretary of State in relation to National Security and technical capability, namely **Sections 216 and 217**, should be subject to authorisation by either a Judicial Commissioner or if preferred, by the Investigatory Powers Commissioner as well as the Secretary of State.

## ***Error reporting - Section 198***

- 17 **Section 198** is a critical part of the Bill for transparency and ensuring this Bill has world leading safeguards, it is critical to making privacy of the non-suspected individual the “backbone” of this Bill.
- 18 Although the authorities and agencies who will lawfully use the powers outlined in the Bill will attempt to minimise the intrusion into people’s personal information, data, communications or devices, errors may occur.
- 19 It is worth noting that errors are reported in the annual reports of both the Intelligence Services Commissioner and the Interception of Communications Commissioner. Since 2011 there have been 82 errors by MI5, 26 errors by MI6 and 8 errors by GCHQ. The Ministry of Defence committed 2 errors and the Home Office 6 errors. Over the same period a total of 28 people were wrongfully visited, detained or accused off the back of interception methods.
- 20 It is often suggested that error reporting is a complex problem because an individual who is determined to be innocent in relation to one investigation may become a person of interest in the future.
- 21 Whilst these instances may occasionally happen they should not be used as a way of restricting the truly innocent people of the opportunity for notification and redress.
- 22 Unfortunately Section 198 imposes restrictions which have the potential to restrict the Investigatory Powers Commissioner from informing a wrongfully surveilled individual of the error conducted against them.
- 23 Based on the Section as written, the threshold in which an individual can be informed falls on the side of protection of the relevant agency or department and not on the side of the individual.
- 24 Section 198 requires the Investigatory Powers Commission to only inform an individual if the error is a “serious error” or if it is in the “public interest.” Serious error is a broad term which lacks clear definition and is highly subjective. Public interest has the potential to be determined by what the agencies or government determine as public interest rather than what is in the interest of the individual. Section 198(4)(iv) the continued discharge of the functions of any of the intelligence services only emphasises further that the balance lies with the agency not with the wronged individual.
- 25 It is clear from Section 198(6) (b) that a decision can be made to inform an individual of an error with only the detail which the Commissioner “*considers to be necessary*”. The Bill therefore should restrict what information and detail the Investigatory Powers Commissioner can include in the notification, rather than restricting the notification full stop.

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- 26 Detail about what the error was or how it occurred would not be necessary for the Investigatory Powers Commission to discharge their duty, with proper consideration they should be capable of informing an individual of an error without impacting the work of the agencies or issues of national security.
- 27 This method of notification is possible. A number of countries around the world; three of which are members of the Five Eyes community, allow notification to take place for innocent individuals who have been the target of surveillance or interception.
- 28 Countries that permit notification of surveillance include America, Canada, New Zealand, Germany, Belgium, the Netherlands, Austria, Ireland, Switzerland, Slovenia, Montenegro and Hungary.
- 29 Whilst each country offers different thresholds, a number are clear that as long as a case is closed and notification won't jeopardise other proceedings, it is acceptable for an individual to be informed that surveillance or interception was undertaken against them.
- 30 This approach seems sensible. We propose in our amendment to the Section that a case must be closed for 6 months and there should be no ongoing legal proceedings before an error can be reported. This will ensure that the individual has been thoroughly determined as a person of no interest and notification will not influence, jeopardise or impact in anyway an investigation or legal proceedings.
- 31 Whilst 6 months is our preferred time frame, we acknowledge that it differs from country to country, the Netherlands refer to 5 years, the USA and Canada insist on informing a person within 90 days.
- 32 We believe these amendments will encourage better transparency, provide opportunity for redress as well as ensuring human rights, access to justice and the rule of law are considered properly in the Bill.
- 33 For further views on the importance of error reporting and notification we would recommend the committee take note of the Joint Committee on the draft Investigatory Powers Bill report Sections 613 to 620 inclusive.
- 34 Our proposed amendments are as follows:

### **Section 198 (1)**

*"The Investigatory Powers Commissioner must inform a person of any relevant error relating to that person of which the Commissioner is aware if the Commissioner considers that –*

*~~(a) the error is a serious error, and~~*

*~~(b) It is in the public interest for the person to be informed of the error~~*

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## Replace with

- (a) the person has been wrongfully surveilled in the course of an investigation,
- (b) the error has caused significant consequences to the person's Convention rights (within the meaning of the Human Rights Act 1998)
- (c) the investigation and any subsequent legal proceedings will have concluded 6 months prior
- (d) the person has never been considered of interest or a specific target to an investigation.

## Section 198 (3)

~~"Accordingly, the fact that there has been a breach of a person's Convention rights (within the meaning of the Human Rights Act 1998) is not sufficient by itself for an error to be a serious error."~~

## Section 198 (4)

~~"In making a decision under subsection (1)(b), the Investigatory Powers Commissioner must, in particular, consider—~~

- ~~(a) the seriousness of the error and its effect on the person concerned, and~~
- ~~(b) the extent to which disclosing the error would be contrary to the public interest or prejudicial to—~~
  - ~~(i) national security,~~
  - ~~(ii) the prevention or detection of serious crime,~~
  - ~~(iii) the economic well-being of the United Kingdom, or~~
  - ~~(iv) the continued discharge of the functions of any of the intelligence services."~~

## Section 198 (5)

~~"Before making a decision under subsection (1)(a) or (b), [replace with "(1)(a),(b),(c) or (d)"] the Investigatory Powers Commissioner must ask the public authority which has made the error to make submissions to the Commissioner about the matters concerned.~~

## Section 198 (6)

~~"When informing a person under subsection (1) of an error, the Investigatory Powers Commissioner must—~~

- ~~(a) inform the person of any rights that the person may have to apply to the Investigatory Powers Tribunal, and~~
- ~~(b) provide such details of the error as the Commissioner considers to be necessary for the exercise of those rights. having regard in particular to the extent to which disclosing the details would be contrary to the public interest or prejudicial to anything falling within subsection (4)(b)(i) to (iv)."~~

## ***Targeted equipment interference warrants***

- 35 **Part 5** of the Bill details targeted equipment interference warrants. The following amendment proposal will impact the Part as a whole, but we will concentrate solely on **Section 90**.
- 36 As currently drafted the Section appears to permit a targeted warrant to be used in a thematic way, enabling “more than one person or organisation” and “more than one location” to be subject to the interference.
- 37 This is not targeted. Targeted equipment interference should be defined on the face of the Bill stating clearly that targeted means, one person and/or one organisation and/or one place.
- 38 If more than one person, one organisation, one place is to be subject to the power it should be defined as a separate standalone Section of the Bill defined as a thematic equipment interference warrant. Thematic in this way appears in the Operational Case for Bulk Powers but not on the face of the Bill. This is not acceptable.
- 39 Creating thematic equipment interference warrants as a standalone Section of the Bill would remove the need for bulk equipment interference. As the Operational Case states:
- 40 *“Both bulk EI and targeted ‘thematic’ EI operations can take place at scale, if the relevant criteria are met. It is entirely possible for a targeted ‘thematic’ EI warrant to cover a large geographic area or involve the collection of a large volume of data.”*
- 41 The removal of Bulk EI warrants is of critical importance when it is noted in the Operational Case that *“A bulk EI warrant is likely required in circumstances where the Secretary of State or Judicial Commissioner is not be (SIC) able to assess the necessity and proportionality to a sufficient degree at the time of issuing the warrant.”*
- 42 This process falls foul of the guiding principles and rules created and promoted by the Government, the Agencies and the Police that powers are only used when “necessary and proportionate.” “To a sufficient degree” is not acceptable.
- 43 We propose the following amendments to targeted warrants and targeted examination warrants to ensure they are limited to just one person, one place and/or one organisation.
- 44 The clauses struck through should then be considered for a new Section specifically outlining thematic equipment Interference warrants and thematic examination warrants.
- (1) A targeted equipment interference warrant may relate to any one or more of the following matters—
- (a) equipment belonging to, used by or in the possession of a particular person or organisation;
  - (b) equipment belonging to, used by or in the possession of a ~~group of~~ persons who ~~share a common purpose or who carry on, or may carry on,~~ a particular activity;
  - ~~(c) equipment belonging to, used by or in the possession of more than one person or organisation, where the interference is for the purpose of a single investigation or operation;~~
  - (d) equipment in a particular location;

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~~(e) equipment in more than one location, where the interference is for the purpose of the same investigation or operation;~~

(f) equipment which is being, or may be used, for the purposes of a particular activity or activities of a particular description;

(g) equipment which is being, or may be used, to test, maintain or develop capabilities relating to interference with equipment for the purpose of obtaining communications, equipment data or other information;

(h) equipment which is being, or may be used, for the training of persons who carry out, or are likely to carry out, such interference with equipment.

(2) A targeted examination warrant may relate to any one or more of the following matters—

(a) a particular person or organisation;

~~(b) a group of persons who share a common purpose or who carry on, or may carry on, a particular activity;~~

~~(c) more than one person or organisation, where the conduct authorised by the warrant is for the purpose of a single investigation or operation;~~

(d) the testing, maintenance or development of capabilities relating to the selection of protected material for examination;

(e) the training of persons who carry out, or are likely to carry out, the selection of such material for examination.



## **About Big Brother Watch**

Big Brother Watch is a civil liberties and privacy campaign group founded in 2009. We have been active in campaigning on the issues of civil liberties, surveillance and privacy, whilst promoting information to help people make informed decisions about their privacy and security.

With regard to the Investigatory Powers Bill we gave written and oral evidence to the Joint Committee on the Draft Investigatory Powers Bill. Additionally we gave written evidence to the Science and Technology Committee's inquiry into the technical aspects of the draft Bill.