

Big Brother Watch briefing on the Report of the Bulk Powers Review by David Anderson QC

Background to the Report

David Anderson's report into the four bulk powers contained in the Investigatory Powers Bill was commissioned by the Government in response to calls from the Labour Party.

The terms of reference were for Mr Anderson to "*examine the operational case*" for the bulk powers in Parts 6 and 7 of the Investigatory Powers Bill.

Mr Anderson was not required, in his words, to "*opine*" on what safeguards would be appropriate or if the proposed safeguards in the Bill are proportionate.

Mr Anderson was supported in his work by three team members. Dr Bob Mowill a former Director of Technology and Engineering at GCHQ but now an independent security consultant, Gordon Meldrum former Director of Intelligence at the National Crime Agency (NCA) and Cathryn McGahey QC, barrister and QC in criminal and civil cases.

The Report also presented 69 case studies where powers have been used or, in the case of bulk equipment interference, examples of how the power would be used.

The report was published on the 10th August 2016.

Recommendation

- **The creation of a Technical Advisory Panel** was the Report's sole recommendation. Its role would be to advise the Investigatory Powers Commission and the Secretary of State on the "*impact of changing technology*" to ensure the "*availability and development of techniques....whilst minimising interference with privacy*".

Other points for consideration

- Aside from the one formal recommendation, Mr Anderson expressed a "**theoretical**" **view on the impact of changing technology**, he posed a number of serious questions and raised concerns which deserve further debate and consideration before the Bill is passed. Notably he questioned the possible impact technological change may have on bulk powers, in particular with bulk equipment interference, he said:
"New techniques for bulk EI will be developed, some of which may disappoint, or show themselves capable of causing unintended damage to devices."
He went on to say that the "*additional promise*" of new techniques for making use of bulk data holdings may bring with it "*additional threats to the privacy of those whose data is held.*" And finally says that sharing databases could also have "*perhaps far-reaching, consequences for the exercise of investigatory powers*".

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- A “*frame of reference*” for the “*purposes of evaluating the utility or otherwise of the powers under review*” is needed. Anderson notes that nothing along these lines currently exists. The Operational Case published alongside the Bill he says lacks “*coherence and consistency*”.

Noteworthy elements of the report:

Bulk Interception

- Is solely exercised by GCHQ but the product of the interception is used by MI5 and MI6.
- It is a capability used on a “*large scale*” by GCHQ and appears to be taken for granted by them. Anderson notes that the intelligence agencies “*make little attempt precisely to assess the extent to which the use of bulk interception achieves or fails to achieve the desired goal*”.

Bulk Acquisition

- Large amounts of communications data most of it relating to people who are unlikely to be of intelligence interest is already obtained by the intelligence agencies.
- The Government’s Bulk Communications Data factsheet says communications data doesn’t include internet connection records, but it is not ruled out as a future capability.

Bulk Equipment Interference

- Bulk EI is not currently used as a capability, its inclusion in the Bill is a future proofing measure.
- Bulk EI will be used less for content, more for establishing devices where more intrusive techniques could be deployed.
- It will be used as a method of “*addressing difficulties*” regarding the “*ever increasing use of encryption*”.
- Targeted EI warrants can currently be used thematically, meaning the power “*can take place at “scale”*”.
- The dividing line between large scale operations and bulk EI is described as “*not an exact one*”.
- Mr Anderson stresses that it will be particularly important that targeted thematic EI not be used as “*a means of avoiding or circumventing the restrictions that have quite properly been placed on the authorisation of bulk warrants*”.

Bulk Personal Datasets (BPDs)

- It is revealed that BPDs are not just used by the intelligence agencies but by the National Crime Agency, the police and “*other bodies*” – detail of which is not provided.
- The process of searching a BPD is described as being “*analogous to commercial techniques*”.

Request Filter

- No Request Filter will be fully operational in the short term.
- The Home Office are still developing and defining the filtering arrangements.

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Big Brother Watch's view

The level of scrutiny given to the IP Bill has been necessary for Parliament to properly debate these complex issues. Whilst we welcome the further detail outlining how the powers are currently used, we are sorry Mr Anderson was not given the opportunity to pose questions of the proportionality surrounding the use of these powers.

The proportionality argument is critical and ought to be given full and proper consideration, to ensure that in the efforts of maintaining the security of the country, we do not forget about the necessity of protecting law abiding citizens from intrusion into their lives.

In light of this, there are a number of points relating to this Report which should be discussed in the remaining stages of the Committee of the Whole House.

1. The revelation that **Bulk Personal Datasets** are used by other agencies beyond the intelligence agencies must be urgently addressed. Detail of exactly which “*other bodies*” are accessing this data, when and why, as well as what the retention process is, must be provided.
2. In light of the detail in the report about how **Bulk Personal Datasets** are used it could be inferred that a searchable citizen database of all UK citizens is in use. We reiterate our concerns that the acquisition, retention and use of BPD’s fundamentally alter the nature of the relationship between citizen and state.
Law abiding citizens deserve better protection than the Bill currently permits. People picked out from a search, and who are subsequently found to be of no investigatory interest, should be notified a search has been conducted when enough time has elapsed to ensure this cannot prejudice an ongoing investigation. We ask that Peers support the calls for notification which are tabled by Lord Paddick and Baroness Hamwee.
3. Paragraph 8.37 of the report notes that MI5 is developing “*machine learning and predictive analytics*” which offers “*additional promise in this field [BPDs]*”. It would be naïve of both Houses not to ensure that proper legal protections are enforced to guarantee that this method does not become a tool for bulk profiling and categorising of all UK citizens irrespective of their guilt or innocence. As Mr Anderson points out “*The fact that an intrusive power can be successfully used to avert threats and reduce crime does not of course mean that it should automatically be passed into law: that way lies a police state.*” Of all the bulk powers in the Bill, Bulk Personal Datasets are to our mind the closest step to creating such a state.
4. **Bulk Equipment Interference (EI)** we are told is not currently used. Its appearance in the IP Bill is indicated to be one of future proofing against encryption. Peers and Members alike must now take the time to properly address the concerns Mr Anderson raises in his report (outlined above under other considerations) about technological advancements leading to unintended consequences.

The report emphasises that concern still exists over the detail in the Operational Case for Bulk Powers which states 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.*”

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Mr Anderson made clear that current use of EI has been targeted and adhered to the golden rule of necessity and proportionality.

Whilst we accept that there is a requirement for the Bill to have longevity, the process of making lawful extremely intrusive capabilities such as bulk EI to future proof constantly evolving technology is profoundly troubling.

Because the technological landscape is constantly changing there will inevitably be an impact on technical capabilities, as Mr Anderson points out, this could have *“far reaching consequences for investigatory powers”*. Add to that the problem of authorising intrusion which breaks the golden rule of proving the necessity and proportionality and there is clearly a very unstable legislative foundation for bulk EI. Put simply, these fundamental concerns leave no option other than the removal of Bulk EI from the Bill.

4. The **Technical Advisory Panel** is a welcome recommendation, but it must not overshadow the calls from the Interception of Communications Commissioner’s Office and others for attention and resources to be given to the hiring of technically skilled staff to support the Commissioners who will make up the new Investigatory Powers Commission.
5. A regular review of technical changes is vital and the Technical Advisory Panel will be welcome but to support this work an annual review of the Bill should be conducted by both Houses of Parliament. We again recommended that the Bill be amended to ensure this happens.
6. The report reveals the **Request Filter** is not fully developed or designed. It appears to be a vague desire rather than a coherent and clearly needed capability. Without any clarity on what the filter would be, why it would be necessary or how it would be proportionate it should be removed from the Bill.
7. Clarity is required to establish what the intention is with regard to the **Bulk Acquisition of Internet Connection Records** further down the line. Specifics should be made clear on the face of the Bill and in accompanying documents including the code of practice. We do not support the introduction of Internet Connection Records and see bulk acquisition of such data as being excessive surveillance of UK citizens most of which will be of no intelligence interest whatsoever.
8. We support Mr Anderson’s call for a *“frame of reference”* for the *“purposes of evaluating the utility or otherwise of the powers under review”*. This should be presented and debated before the Bill is sent back to the House of Commons.