

Investigatory Powers Act 2016: Consultation on the Government's proposed response to the ruling of the Court of Justice of the European Union on 21 December 2016 regarding the retention of communications data

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Overview

1. This submission is made by Dr. Daragh Murray, Prof. Pete Fussey, and Prof. Maurice Sunkin members of the Human Rights, Big Data & Technology Project based at the University of Essex Human Rights Centre.¹ The authors appreciate this opportunity to engage with this consultation concerning the modification of the Investigatory Powers Act 2016, and express their willingness to engage further.²
2. This submission focuses on the Government's proposal to amend the statutory purposes for which communications data may be retained or acquired. Of particular concern are the proposed amendments to the definition of 'serious crimes'. These will reduce the threshold for which communications data may be retained or acquired from those crimes capable of giving rise to three years imprisonment, to crimes capable of giving rise to six months imprisonment, and further extend the scope of the powers to include: any offence involving violence; any offence which involves a large number of people acting in pursuit of a common purpose; any offence committed by a body corporate; any offence which involves the sending of a communication or a breach of privacy; or any offence involving a significant financial gain. These provisions would significantly increase the range of crimes included in the term 'serious crimes'. They would also add significant uncertainty to the law.
3. The use of bulk communications data powers has only been subject to public scrutiny relatively recently, with the consequence that neither the strict necessity nor the potential harm associated with the use of these powers is widely understood. State agencies have submitted that these powers are useful. At the same time, however, it is clear that these powers are exceptionally invasive, and facilitate near comprehensive analysis of significant portions of the population,

¹ These views are submitted in an individual capacity and do not necessarily represent the views of the University of Essex, the Human Rights Centre or the Human Rights, Big Data and Technology Project.

² This submission draws on research produced in a paper currently under review for publication; Daragh Murray & Pete Fussey, 'Surveillance in the digital age: Rethinking the human rights law approach to bulk monitoring of communications data'.

with potentially significant adverse consequences for the enjoyment of human rights and the effective functioning of a participatory democracy.³

4. The burden lies on the Government to demonstrate the strict necessity of bulk communications powers. This involves: clarifying why such powers are strictly necessary, and undertaking a proportionality assessment that demonstrates why existing techniques are inadequate. This will in turn require that the circumstances in which these powers may be used be strictly delimited. In this regard the focus should be on the exceptional need for the powers. Effective oversight measures must also be in place to assess the strict necessity of any such measures.⁴
5. The Government's current proposals have not been shown to be strictly necessary. They are almost certain to be held incompatible with the Government's legal obligations relating to strict necessity. In particular, current proposals are uncertain in their scope and may be applied broadly. As such, they are incapable of providing relevant authorities with appropriate guidance, do not provide the population with sufficient clarity, and present risk of abuse. It is essential that law be clear. The current proposals fall short in this regard.
6. The authors do not suggest that the retention and acquisition of communications data can never occur. It is conceivable that, in certain circumstances, these powers may satisfy the strict necessity test, and may be necessary to protect human rights. However, the burden lies with the Government to make the case for such powers and to clearly delimit the circumstances in which they should be employed. In doing so, the focus should be on identifying those exceptional circumstances, where alternative techniques are inadequate.
7. Oversight is a key issue in this area. As such, it is appropriate to commend the Government's proposal regarding the establishment of the Office for Communications Data Authorisations (OCDA). This is a significant and appropriate proposal, which has the potential to improve the authorisation process and to facilitate human rights compliance. Given the importance of the task, however, it is essential that OCDA be appropriately resourced, and allowed to operate independently.

How may human rights concerns be addressed?

³ See, for instance, Opinion of Advocate General Saugmandsgaard Oe, *Tele2 Sverige AB v. Post-och telestyrelsen and Secretary of State for the Home Department v. Tom Watson and others*, European Court of Justice, Case Nos. C-213/15 & C-698/15, 19 July 2016, para. 253.

⁴ With regard to oversight, it is noted that the establishment of the Investigatory Powers Commission is a welcome measure.

8. Both the European Court of Human Rights and the Court of Justice of the European Union have established that bulk surveillance practices should be evaluated on the basis of 'strict necessity'.⁵ Although neither the European Court of Human Rights nor the Court of Justice of the European Union have defined the specific circumstances in which bulk powers may be used concrete guidance is given. As stated by the European Court of Human Rights:

A measure of secret surveillance can be found as being in compliance with the Convention only if it is strictly necessary, as a general consideration, for the safeguarding the democratic institutions and, moreover, if it is strictly necessary, as a particular consideration, for the obtaining of vital intelligence in an individual operation.⁶

9. This test indicates that the use of bulk powers should be restricted to exceptional incidents, where the inadequacy of alternative techniques has been demonstrated.⁷ It is in accordance with this approach that extensions of the law to use bulk powers should only be made where they are shown to be strictly necessary.

Recommendation regarding the definition of serious crime for the purposes of the Investigatory Powers Act

10. The Government's proposal to remove three statutory purposes for which communications data may be retained or acquired is appropriate.⁸
11. However, the Government's proposal to extend the definition of 'serious crime' for the purposes of the Investigatory Powers Act, as detailed in paragraph 2 above, is problematic. This proposal represents a significant extension of the authority by which communications data may be retained or acquired, and is unlikely to satisfy the strict necessity test. Concerns already exist regarding the scope of the existing provisions. The current proposals will only add greater

⁵ With respect to the CJEU see, *Tele2 Sverige AB v Post-och telestyrelsen* and *Secretary of State for the Home Department v. Watson and others*, Judgment, Grand Chamber, European Court of Justice, Cases C-203/15, C-698/15, 21 December 2016, para. 116.

⁶ *Szabo and Vissy v. Hungary*, Judgment, European Court of Human Rights, Application No. 37138/14, 12 January 2016., para. 73. Although this decision was applied to content data, it is suggested that an equivalent approach would be adopted should a communications data case arise. As noted in the above footnote, the CJEU has adopted the strict necessity approach vis-à-vis communications data.

⁷ The inadequacy of alternative techniques is indicative of the 'vital' nature of the powers. In this regard the comments by David Anderson QC, the former Independent Reviewer of Terrorism Legislation, are pertinent: 'Cause and effect in this area are not always straightforward [...] [a] mosaic of different information sources is classically involved in identifying a target or threat.' See, David Anderson, Independent Reviewer of Terrorism Legislation, 'Report of the Bulk Powers Review', August 2016, para. 4.12.

⁸ The statutory purposes to be removed are: public health; collecting any tax, duty, levy or other imposition, contribution or charge payable to a government department; exercising functions relating to the regulation of financial services and markets, or financial stability.

uncertainty, and it is likely that they will be held inconsistent with the Government's legal obligations

12. It may be the case, as argued in the Government's consultation paper, that the retention and acquisition of communications data is necessary for certain offences falling outside the existing scope of the Investigatory Powers Act. As yet, however, this is insufficiently demonstrated. The Government's proposed approach is overly blunt and risks the unwarranted extension of powers, whereby communications data may be retained or acquired in circumstances where such powers are not strictly necessary.
13. Developments in this area should not be entered into hastily, and serious efforts must be made, for instance, to identify the specific circumstances in which communications data may be retained or acquired, to elaborate the characteristics of the relevant offences, or to define an appropriate threshold. Further research and analysis is required. It is essential that the Government provides clear justification for the for proposed extension of these powers. Such justification should demonstrate why the new provisions are necessary and why existing provisions are inadequate.