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British Police State: Routine State Surveillance of Journalists' Communications Breaches International Law

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The Bureau of Investigative Journalism's application to the Strasbourg Court challenges the government's use of covert surveillance powers to access and analyse journalistic information. We say it is clearly contrary to fundamental human rights law.

The background to BIJ's challenge is well known. Edward Snowden finally told us the facts.

The government uses the Regulation of Investigatory Powers Act 2000 (RIPA) to harvest huge quantities of our data. This includes the content of our digital material and communications. It also includes our communication data (or metadata) – the surrounding information about who we communicate with, how, when, from where and so on.

There is no targeting of subjects for these investigations by GCHQ (such as particular individuals or premises). Instead there is blanket collection of data in pursuit of broadly identified aims – such as the protection of national security and prevention of crime. Authorisations under RIPA are signed off routinely and on a rolling basis.

This data is then analysed using hugely sophisticated and intrusive programs to find out whatever it is the security state considers it needs to know.

RIPA was drafted before we all began to use digital communications and information storage in any meaningful way. It is not designed to protect our rights to privacy and freedom of expression – under Articles 8 and 10 of the European Convention on Human Rights respectively – in the digital age.

Everyone knows now that RIPA is therefore no longer "fit for purpose".

The practical and legal consequences for journalists of this data harvesting are, however, less well known. BIJ's case is concerned with these.

Related article: Bureau files ECHR case challenging UK government over surveillance of journalists' communications

In the midst of the vast quantities of data being indiscriminately collected and analysed are large quantities of journalistic information. After all, journalism is a huge digital information industry in the UK. The days when journalists met their confidential sources in the snug bar and jotted down handwritten notes, or pocketed photocopied documents, are long gone. The

tools of the trade are now computers and mobile devices. The leaks can come in gargantuan numbers of bytes.

No one knows anything about what GCHQ does with the journalistic information it pulls in. This is because, startlingly, neither the legislation nor government guidance about its use says anything at all about this.

But it is inevitable that some of GCHQ's minute analysis of the data will be giving it selective access to confidential journalistic material and identifying sources. There is already much evidence that law enforcement agencies increasingly seek to access such information for their own purposes. It is an easy way of advancing their investigations. It can help to identify and deal with embarrassing whistleblowers and can forewarn of awkward stories in the offing. The same is true for the security and intelligence agencies.

Article 10 of the Convention, as interpreted by the Strasbourg Court, gives strong legal protections to those engaging in public interest journalism. It is these rights that BIJ argues are being flouted by this process.

In particular, such journalists are entitled to protect information which may identify a confidential source. Such sources are recognised as the lifeblood of investigative journalism. State enforced disclosure of this type of information deters future whistleblowers from approaching journalists. Journalistic activity is "chilled". The journalists are less able to pass on important information and ideas to the public. In this process our Article 10 rights to receive the product of this journalism are interfered with by the state as well.

So Strasbourg has long made clear that this Article 10 right can only be overridden by an order of a judge. And the journalist must first have the opportunity to argue before the court that there is no competing public interest which makes such an order necessary. The law under the Convention is quite clear. Covert state surveillance and accessing of journalistic information cannot be used to circumvent these important rights.

Other journalistic information and activity can only be the subject of such covert surveillance in certain circumstances. Most importantly it must be carried out under laws which are clear, accessible and foreseeable in their effects. These laws must give journalists an adequate indication of how these discretionary surveillance powers might be used against them. They also have to provide protection against arbitrary or disproportionate surveillance measures.

The Court of Human Rights recently spelt this out in a case brought by two Dutch investigative journalists subjected to covert surveillance. In finding their Article 10 rights had been violated the Court said:

> "…where, as here, a power of the executive is exercised in secret, the risks of arbitrariness are evident. Since the implementation in practice of measures of secret surveillance is not open to scrutiny by the individuals concerned or the public at large, it would be contrary to the rule of law for the legal discretion granted to the executive to be expressed in terms of an unfettered power. Consequently, the law must indicate the scope of any such discretion conferred on the competent authorities and the manner of its exercise with sufficient clarity, having regard to the legitimate aim of the measure in question, to give the individual adequate protection against arbitrary interference."

This is exactly what UK law and practice under RIPA fails to do. In fact there is no clarity at all – let alone insufficient clarity.

The way in which our state security apparatus is using the journalistic material it collects is in flagrant breach of these basic human rights norms. No one can seriously argue that collection of this material is not arbitrary and disproportionate. Indeed this is the whole point of the exercise.

So BIJ has decided to challenge the government. Of course we must have state surveillance laws to protect us against serious harm. But they must meet international standards and should only be used against journalists where strictly necessary in a democracy. This is what the Convention says and it is time the UK started to listen.
