

# Report of Various Size

## Monthly data collection on the current reform of intelligence legislation

### Submission template

**Country: United Kingdom**

**Contractor's name: Human Rights Law Centre, University of  
Nottingham**

**Author(s) name: An Cuypers**

**Reviewed by: Professor David Harris**

**Period covered: January – April 2017**

DISCLAIMER: This document was commissioned under a specific contract as background material for the project on [National intelligence authorities and surveillance in the EU: Fundamental rights safeguards and remedies](#). The information and views contained in the document do not necessarily reflect the views or the official position of the EU Agency for Fundamental Rights. The document is made publicly available for transparency and information purposes only and does not constitute legal advice or legal opinion.

## 1. Legislative reform(s)

*(Please, highlight the key aspect(s) of the reform, summarise any key report published in the context of the reform procedure)*

The Investigatory Powers Act (IPA) came into force on 30 December 2016.<sup>1</sup> The Explanatory Notes attached to it provide an overview to the Act:

*“1. The Investigatory Powers Act 2016 provides an updated framework for the use (by the security and intelligence agencies, law enforcement and other public authorities) of investigatory powers to obtain communications and communications data. These powers cover the interception of communications, the retention and acquisition of communications data, and equipment interference for obtaining communications and other data. It is not lawful to exercise such powers other than as provided for by the Act. The Act also makes provision relating to the security and intelligence agencies’ retention and examination of bulk personal datasets.*

*2. The Act governs the powers available to the state to obtain communications and communications data. It provides consistent statutory safeguards and clarifies which powers different public authorities can use and for what purposes. It sets out the statutory tests that must be met before a power may be used and the authorisation regime for each investigative tool, including a new requirement for Judicial Commissioners to approve the issuing of warrants for the most sensitive and intrusive powers. The Act also creates a new IPC to oversee the use of these powers. Finally, the Act provides a new power for the Secretary of State to require, by notice, communications services providers to retain internet connection records”.*<sup>2</sup>

The IPA largely replicates and expands the Regulation of Investigatory Powers Act 2000 (RIPA). It sets out a new oversight regime, the Investigatory Powers Commissioner,<sup>3</sup> which will replace and abolish the existing regime, namely the Interception of Communications Commissioner, the Intelligence Services Commissioner and the Surveillance Commissioners.<sup>4</sup> The Commissioner will be supported by a number of Judicial Commissioners undertaking either authorisation or oversight and inspection functions.<sup>5</sup> The Commissioner will also be in charge of informing individuals about errors and their right to apply to the Investigatory Powers Tribunal.<sup>6</sup>

---

<sup>1</sup> United Kingdom, *Investigatory Powers Act 2016*, 29 November 2016, available at:

[www.legislation.gov.uk/ukpga/2016/25](http://www.legislation.gov.uk/ukpga/2016/25).

<sup>2</sup> United Kingdom, ‘Investigatory Powers Act 2016 – Explanatory Notes’, available at:

[www.legislation.gov.uk/ukpga/2016/25/notes/division/2](http://www.legislation.gov.uk/ukpga/2016/25/notes/division/2). See also further information at Home Office (2016), ‘Investigatory Powers Act’, 1 December 2016, available at: [www.gov.uk/government/collections/investigatory-powers-bill](http://www.gov.uk/government/collections/investigatory-powers-bill)

<sup>3</sup> Section 227 IPA.

<sup>4</sup> Section 240 IPA.

<sup>5</sup> Sections 227-229 IPA.

<sup>6</sup> Section 231 IPA.

The most contested powers included in the IPA are the broad “bulk” powers to intercept<sup>7</sup> and obtain<sup>8</sup> any communications data, retain bulk datasets<sup>9</sup> and to interfere with any equipment<sup>10</sup>.

On 23 February 2017, five draft codes of practice have been published for public consultation in accordance with Schedule 7 of the IPA.<sup>11</sup> The draft codes are on: 1) Interception of communications; 2) Equipment interference; 3) Bulk communications data acquisition; 4) Bulk personal datasets; and 5) National Security Notices.<sup>12</sup> The consultation will close on 6 April 2017.<sup>13</sup> The draft codes set out the processes and safeguards governing the use of investigatory powers and give detail on how the relevant powers should be used. Their purpose is to provide additional clarity and to ensure the highest standards of professionalism and compliance with the IPA.<sup>14</sup>

The most important fundamental rights safeguards set out in the codes include the following:

- Necessity: disclosure, copying and retention of intercepted content and secondary data is limited to the minimum necessary for the authorised purposes.<sup>15</sup>
- Non-disclosure: exclusion of intercept from legal proceedings and duty not to make unauthorised disclosures.<sup>16</sup>
- Review: warrants should be reviewed on a regular basis to assess the necessity and proportionality of the conduct.<sup>17</sup>
- Storage: all data must be handled and stored securely.<sup>18</sup>
- Deletion: all data must be scheduled for deletion and securely destroyed as soon as possible once it is no longer needed for any of the authorised purposes.<sup>19</sup>
- Confidential information and legally privileged information<sup>20</sup>
- Record keeping and error reporting: errors need to be reported to the Investigatory Powers Commissioner within ten days.<sup>21</sup>

---

<sup>7</sup> Sections 136-142 IPA.

<sup>8</sup> Sections 158-161 IPA.

<sup>9</sup> Sections 199-203 IPA.

<sup>10</sup> Sections 176-183 IPA.

<sup>11</sup> Home Office (2017), ‘Investigatory powers codes of practice consultation launched’, 23 February 2017, available at: <http://bit.ly/2me2s8z>.

<sup>12</sup> Home Office (2017), *Investigatory Powers Act 2016 Consultation: Codes of Practice*, February 2017, available at: <http://bit.ly/2lhFb1I>.

<sup>13</sup> Home Office (2017), ‘Open consultation: Investigatory Powers Act 2016: codes of practice’, 23 February 2017, available at: <http://bit.ly/2mbfHYP>.

<sup>14</sup> Home Office (2017), *Investigatory Powers Act 2016 Consultation: Codes of Practice*, February 2017, p. 2, available at: <http://bit.ly/2lhFb1I>

<sup>15</sup> Home Office (2017), *Interception of communications: draft code of practice*, February 2017, p. 82, available at: <http://bit.ly/2nrKoJe>.

<sup>16</sup> Home Office (2017), *Interception of communications: draft code of practice*, February 2017, pp. 83-84, available at: <http://bit.ly/2nrKoJe>.

<sup>17</sup> Home Office (2017), *Interception of communications: draft code of practice*, February 2017, p. 84, available at: <http://bit.ly/2nrKoJe>.

<sup>18</sup> Home Office (2017), *Interception of communications: draft code of practice*, February 2017, p. 86, available at: <http://bit.ly/2nrKoJe>.

<sup>19</sup> Home Office (2017), *Interception of communications: draft code of practice*, February 2017, pp. 86-87, available at: <http://bit.ly/2nrKoJe>

<sup>20</sup> Home Office (2017), *Interception of communications: draft code of practice*, February 2017, pp. 90-101, available at: <http://bit.ly/2nrKoJe>.

- Oversight: The Investigatory Powers Commissioner will have oversight ensure compliance with the law by inspecting public authorities and investigating any issue which they believe warrants further independent scrutiny.<sup>22</sup>
- Complaints: The Investigatory Powers Tribunal has jurisdiction to consider and determine any complaint regarding public authority use of certain investigatory powers.<sup>23</sup>

## 1. Reports and inquiries by oversight bodies

By virtue of Section 272 (3) IPA, Sections 227 and 228 (appointment of the Investigatory Powers Commissioner) came into force on 29 January 2017 (two months after the date of Royal Assent).

On 20 February 2017, the Home Secretary has appointed Max Hill QC as the new Independent Reviewer of Terrorism Legislation.<sup>24</sup>

On 3 March 2017, the Investigatory Powers Commissioner, Rt Hon Sir Adrian Fulford, was appointed by the Prime Minister for a three-year-period.<sup>25</sup> The press release states that Sir Adrian will begin work on establishing his office and will take on the statutory functions in due course.<sup>26</sup>

The appointment procedure is set out in Sections 227 (Investigatory Powers Commissioner and other Judicial Commissioners) and 228 (Terms and conditions of appointment) of the IPA.<sup>27</sup> Section 227 provides that: the Commissioner will be appointed by the Prime Minister after being jointly recommended by the Lord Chancellor, the Lord Chief Justice of England and Wales, the Lord President of the Court of Session, and the Lord Chief Justice of Northern Ireland. Furthermore, the Prime Minister must consult the Scottish Ministers before appointing the Commissioner.

On 2 March 2017, the Information Commissioner's Office (ICO) published draft guidance for UK organisations on consent under the General Data Protection Regulation (GDPR).<sup>28</sup> The

---

<sup>21</sup> Home Office (2017), *Interception of communications: draft code of practice*, February 2017, pp. 102-109, available at: <http://bit.ly/2nrKoJe>.

<sup>22</sup> Home Office (2017), *Interception of communications: draft code of practice*, February 2017, pp. 118-119, available at: <http://bit.ly/2nrKoJe>.

<sup>23</sup> Home Office (2017), *Interception of communications: draft code of practice*, February 2017, p. 120, available at: <http://bit.ly/2nrKoJe>.

<sup>24</sup> Home Office (2017), 'New Independent Reviewer of Terrorism Legislation appointed', 20 February 2017, available at: <http://bit.ly/2lmgAue>.

<sup>25</sup> Home Office (2017), 'Investigatory Powers Commissioner appointed: Lord Justice Fulford', 3 March 2017, available at <http://bit.ly/2masiZj>.

<sup>26</sup> Home Office (2017), 'Investigatory Powers Commissioner appointed: Lord Justice Fulford', 3 March 2017, available at <http://bit.ly/2masiZj>.

<sup>27</sup> Sections 227 and 228 IPA, available at: [www.legislation.gov.uk/ukpga/2016/25/part/8/chapter/1/enacted](http://www.legislation.gov.uk/ukpga/2016/25/part/8/chapter/1/enacted).

<sup>28</sup> Information Commissioner's Office (ICO) (2017), *Consultation: GDPR consent guidance*, 2 March 2017, available at: <https://ico.org.uk/about-the-ico/consultations/gdpr-consent-guidance/>.

guidance sets out how the ICO interprets the GDPR and the ICO's general recommended approach to compliance and good practice. The consultation closed on 31 March 2017.

On 20 March, the ICO published the results of its survey on local government information governance practices which received 173 responses.<sup>29</sup> Findings include the following:

- A quarter of councils reported they did not have a data protection officer;
- More than 15% of councils do not have data protection training for employees processing personal data;
- A third of councils do not do privacy impact assessments.

Therefore, the overall conclusion was that, although there already is good practice in place, with the GDPR coming in May 2018, many councils have work to do. The article further gives practical advice to councils on how to improve.<sup>30</sup>

## 2. Work of specific ad hoc parliamentary or non-parliamentary Commissions

There has been no further work since the delivery of the Fundamental Rights Report.

The Law Commission has been requested by the Government to review the four Official Secrets Acts.<sup>31</sup> The Commission has currently published a consultation paper suggesting ways to improve the law, which will be open until 3 April.<sup>32</sup> The Commissions suggestions include:

- increasing maximum sentences for whistleblowers;<sup>33</sup>
- expanding the definition of espionage to include obtaining sensitive information.<sup>34</sup>

The deadline for responding to the consultation has been extended to 3 May.<sup>35</sup>

The request for a review and the proposed changes have been heavily criticised as a “full-frontal attack” on whistle-blowers and media and civil society organisations have pointed out that these changes would effectively curb investigative journalism.<sup>36</sup> Liberty has also pointed out that,

---

<sup>29</sup> Clarke, A. (2017), ‘Information Governance Survey: What councils need to do now’, 20 March 2017, available at: <https://iconewsblog.wordpress.com/2017/03/20/information-governance-survey/>.

<sup>30</sup> Clarke, A. (2017), ‘Information Governance Survey: What councils need to do now’, 20 March 2017, available at: <https://iconewsblog.wordpress.com/2017/03/20/information-governance-survey/>.

<sup>31</sup> Law Commission (2017), ‘Official Secrets Acts reviewed to meet the challenges of the 21st Century’, 2 February 2017, available at: <http://bit.ly/2mSsW0b>. See: UK (1911), *Official Secrets Act 1911*, 22 August 1911, available at: [www.legislation.gov.uk/ukpga/Geo5/1-2/28/contents](http://www.legislation.gov.uk/ukpga/Geo5/1-2/28/contents); UK (1920), *Official Secrets Act 1920*, 23 December 1920, available at: [www.legislation.gov.uk/ukpga/Geo5/10-11/75/contents](http://www.legislation.gov.uk/ukpga/Geo5/10-11/75/contents); ; UK (1939), *Official Secrets Act 1939*, 23 November 1939, available at: [www.legislation.gov.uk/ukpga/Geo6/2-3/121/contents](http://www.legislation.gov.uk/ukpga/Geo6/2-3/121/contents); UK (1989), *Official Secrets Act 1989*, 11 May 1989, available at: [www.legislation.gov.uk/ukpga/1989/6/contents](http://www.legislation.gov.uk/ukpga/1989/6/contents).

<sup>32</sup> Law Commission (2017), ‘Protection of Official Data’, 2 February 2017, available at: <http://bit.ly/2mCfHyf>.

<sup>33</sup> Law Commission (2017), *Protection of Official Data: Summary*, 2 February 2017, para. 3.31, available at: <http://bit.ly/2mSq0Av>. See more detail at Law Commission (2017), *Protection of Official Data: A Consultation Paper*, 2 February 2017, available at: <http://bit.ly/2IH63Ni>.

<sup>34</sup> Law Commission (2017), *Protection of Official Data: Summary*, 2 February 2017, para. 3.45, available at: <http://bit.ly/2mSq0Av>.

<sup>35</sup> Law Commission (2017), ‘Protection of Official Data consultation deadline extended’, 7 March 2017, available at: [www.lawcom.gov.uk/protection-of-official-data-consultation-deadline-extended](http://www.lawcom.gov.uk/protection-of-official-data-consultation-deadline-extended).

<sup>36</sup> Evans, R., Cobain, I. and Slawson, N. (2017), ‘Government advisers accused of ‘full-frontal attack’ on whistleblowers’, *The Guardian*, 12 February 2017, available at: <http://bit.ly/2kzS3R2>; Chakrabarti, S. (2017), ‘Whistleblowers keep us safe. We can’t allow them to be silenced’, *The Guardian*, 13 February 2017, available at:

while the Law Commission claims to have consulted with them,<sup>37</sup> the consultation consisted of merely one meeting.<sup>38</sup>

### 3. Work of non-governmental organisations and academia

On 10 January Liberty launched a legal challenge to the IPA.<sup>39</sup> Through crowdfunding, they are hoping to be able to seek a High Court judicial review of the core bulk powers in the IPA.<sup>40</sup>

More specifically, Liberty seeks to challenge the core bulk powers in the IPA, namely:

- bulk hacking;
- bulk interception;
- bulk acquisition; and
- bulk personal datasets.

The IPA lets police and agencies access, control and electronic devices, lets them intercept messages and calls and acquire and retain communications data and internet history without requiring suspicion of criminal activity. Liberty argues that the government failed to provide any evidence that these indiscriminate powers are lawful or necessary to detect crime (e.g. Article 8 of the Human Rights Act<sup>41</sup>).

On 2 February, in an update, Liberty stated that they have instructed specialist solicitors from Bhatt Murphy who have agreed to act on a conditional fee agreement.<sup>42</sup> On 10 March, Liberty announced that they have now applied to the High Court for permission to proceed.<sup>43</sup>

Liberty also published a guide to protect online communications from surveillance.<sup>44</sup>

---

<http://bit.ly/2l0Zvpl>; Liberty (2017), 'Planned Espionage Act would "silence whistle-blowers and gag our press"', 13 February 2017, available at: <http://bit.ly/2nfGhjR>.

<sup>37</sup> Law Commission (2017), *Protection of Official Data: A Consultation Paper*, 2 February 2017, p. 286, available at: <http://bit.ly/2lH63Ni>.

<sup>38</sup> Liberty (2017), 'Planned Espionage Act would "silence whistle-blowers and gag our press"', 13 February 2017, available at: <http://bit.ly/2nfGhjR>.

<sup>39</sup> Liberty (2017), 'The People vs the Snoopers' Charter: Liberty launches crowdfunded legal challenge to indiscriminate state spying powers in Investigatory Powers Act', 10 January 2017, available at: <http://tinyurl.com/glc8nw7>.

<sup>40</sup> See their crowdfunding page: CrowdJustice, 'The People vs the Snoopers' Charter', [www.crowdjustice.org/case/snoopers-charter](http://www.crowdjustice.org/case/snoopers-charter).

<sup>41</sup> United Kingdom, *Human Rights Act 1998*, 9 November 1998, available at: [www.legislation.gov.uk/ukpga/1998/42](http://www.legislation.gov.uk/ukpga/1998/42).

<sup>42</sup> CrowdJustice, 'The People vs the Snoopers' Charter – The Government doesn't want you to care', 2 February 2017, available at: [www.crowdjustice.org/case/snoopers-charter](http://www.crowdjustice.org/case/snoopers-charter).

<sup>43</sup> CrowdJustice, 'The People vs the Snoopers' Charter – Legal proceedings have begun!', 10 March 2017, available at: [www.crowdjustice.org/case/snoopers-charter](http://www.crowdjustice.org/case/snoopers-charter).

<sup>44</sup> Liberty, 'Liberty's Guide to Protecting Your Rights Online', available at: <http://tinyurl.com/hlvxdqb>.

## ANNEX – Court decisions

<b>Thematic area</b>	Please provide the most relevant high court decision relating to the use of surveillance measure.
<b>Decision date</b>	2 February 2017
<b>Reference details</b>	Divisional Court, <i>R. (on the application of Privacy International) v Investigatory Powers Tribunal</i> , 2 February 2017, [2017] EWHC 114 (Admin), available at: <a href="http://www.bailii.org/ew/cases/EWHC/Admin/2017/114.html">www.bailii.org/ew/cases/EWHC/Admin/2017/114.html</a>
<b>Key facts of the case</b> (max. 500 chars)	The claimant, Privacy International, was seeking judicial review of a decision of the Investigatory Powers Tribunal (IPT). However, the IPT held that this was not possible because of Section 67 (8) of the Regulation of Investigatory Powers Act (RIPA). This section provided the following: “Except to such extent as the Secretary of State may by order otherwise provide, determinations, awards, orders and other decisions of the Tribunal (including decisions as to whether they have jurisdiction) shall not be subject to appeal or be liable to be questioned in any court”. In the instant case, the court was required to determine, as a preliminary issue, whether Section 67 (8) RIPA prevented judicial review of a decision of the IPT and whether the wording of the provision was sufficiently clear to prevent any judicial review of a decision of the IPT, even where there had been an error of law.
<b>Main reasoning/argumentation</b> (max. 500 chars)	The court stated that it is not in issue that Parliament is able to oust the jurisdiction of the court when it does so in clear terms. Furthermore the court held that the subject matter before the IPT involves highly sensitive material and activities which need to be kept secret in the public interest. Such cases are not suitable for determination through the normal court process and a carefully crafted regime has been created by Parliament to deal with them. The court explained that there is a material difference between a tribunal which is adjudicating on claims brought to enforce individual rights and the IPT which is exercising a supervisory jurisdiction over the actions of public authorities. In the former case there are compelling reasons for insisting that a decision of the tribunal is not immune from challenge and that, if the tribunal follows an unfair process or decides the case on a wrong legal basis, the decision may be subject to judicial review by the High Court. The need and the justification for such judicial review is far less clear in the case of the IPT, which is itself exercising powers of judicial review comparable to those of the High Court. Furthermore, the court stated that Parliament had made provision in Section 67 of RIPA for challenging decisions of the IPT by way of an appeal in specified cases. Parliament therefore clearly intended to restrict the means by which decisions of the IPT may be challenged in the courts to the ones provided in RIPA. When the Investigatory Powers Act 2016 brings Section 67A RIPA into force (which will provide for appeals of the IPT’s judgements), the position will be different.

<b>Key issues (concepts, interpretations) clarified by the case</b> (max. 500 chars)	The decision interprets Section 67 (8) of RIPA and whether judicial review of decisions of the IPT is possible.
<b>Results (sanctions) and key consequences or implications of the case</b> (max. 500 chars)	The case was decided in favour of the defendant. No judicial review was possible in this case.
<b>Key quotation in original language and translated into English with reference details</b> (max. 500 chars)	<p>“It is not in issue that Parliament is able to oust the jurisdiction of the court provided it does so in appropriately clear terms. Furthermore, the courts will presume against the conferment of such a power save in the clearest cases specifically because of the risk of unchallengeable decisions on the breadth of the jurisdiction conferred or unreviewable errors of law. Thus, it is not surprising that in <i>R (Simms) v Secretary of State for the Home Department</i> [2000] 2 AC 115, Lord Hoffmann made it clear:</p> <p style="padding-left: 40px;">"The principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words." [Para. 36]</p> <p>“In exercising its powers to hear proceedings under section 65(2)(a) and to consider complaints under section 65(2)(b) of RIPA, the IPT is performing a similar oversight function in relation to activities of the intelligence services to that ordinarily performed in relation to the actions of public bodies by the High Court when it deals with claims for judicial review. This is reflected in subsections 67(2) and (3)(c) of RIPA, which require the IPT, in determining such proceedings and complaints, to apply the same principles "as would be applied by a court on an application for judicial review." The reason for allocating this judicial review jurisdiction to a specially constituted tribunal is the nature of its subject matter, involving as it does highly sensitive material and activities which need to be kept secret in the public interest. Such cases are not suitable for determination through the normal court process and a carefully crafted regime has been created by Parliament to deal with them. In the words of Laws LJ in <i>A v B</i> quoted at [26] above, the solution adopted has been to "confide the jurisdiction to a judicial body of like standing and authority to that of the High Court, but which operates subject to special procedures apt for the subject matter in hand." [Para. 41]</p> <p>“There is a material difference between a tribunal – such as the Foreign Compensation Commission whose</p>



"determination" was in issue in *Anisminic*, SIAC, or the Upper Tribunal (when dealing with appeals from the First-tier Tribunal) – which is adjudicating on claims brought to enforce individual rights and the IPT which is exercising a supervisory jurisdiction over the actions of public authorities. In the former case there are compelling reasons for insisting that a decision of the tribunal is not immune from challenge and that, if the tribunal follows an unfair process or decides the case on a wrong legal basis, the decision may be subject to judicial review by the High Court. The need, and indeed the justification, for such judicial review is far less clear where the tribunal (here the IPT) is itself exercising powers of judicial review comparable to those of the High Court. Indeed, in *R (Cart) v Upper Tribunal* [2011] QB 120 at [94], in considering the role of the Upper Tribunal, Laws LJ thought it "obvious" that judicial review decisions of that tribunal could not themselves be the subject of judicial review by the High Court". [Para. 42]

"A further feature of the regime under RIPA which differs from that considered in *Anisminic* is that Parliament has made provision in section 67 of RIPA for challenging decisions of the IPT by way of an appeal in specified cases. In so far as there is a presumption, therefore, that Parliament could not have intended to make a statutory tribunal wholly immune from judicial oversight, it is not engaged in this case". [Para. 43]

"I recognise that the Supreme Court in *A v B* did not deal with s.67(8) of RIPA as part of the *ratio* of its decision but, for my part, I agree with the view there expressed. In my judgment, the provision achieves the aim that Parliament clearly intended of restricting the means by which decisions of the IPT may be challenged in the courts to the system of appeals for which the Act itself provides. Were it otherwise, as I have explained, there would have been no point in including authority within s.67(8) for the Secretary of State by order to provide for a right of appeal, a duty under s.67(9) to do so in relation to a person who claims under s.65(2)(c) and (d) of RIPA and the power to create mechanisms in order to do so: see s.67(10)." [Para 44]

"I have had the advantage of reading the judgment of Leggatt J and fully recognise the force of the reasoning and reservations which he articulates. In my judgment, however, the legislation having provided for the Secretary of State to authorise an appeal (albeit that this step has not been taken), in the particular circumstances of this case, and this decision of the IPT, judicial review does not lie. For the future, when s. 67A is brought into force, the position will be different". [Para. 45]

"For these reasons, which I have stated at some length, I was inclined to the view that section 67(8) does not exclude the possibility of judicial review. Having read the judgment of the President, however, I see the cogency of the contrary opinion. In circumstances where this court at least is not the final arbiter of the law that it applies, nothing would be served by causing the issue to be re-argued before a different constitution. In the circumstances I have concluded that the right course is to concur in the result, while recording my reservations". [Para. 62,

	concurring opinion of Judge Leggatt J]
--	--