

## PROTECTING JOURNALISTS' SOURCES

A recent decision by the Investigatory Powers Tribunal (IPT) has highlighted the importance of protecting the confidentiality of journalistic sources, an issue that has been the subject of debate during the passage through Parliament of the Investigatory Powers Bill.

The case involved an ex-police officer turned journalist, Gerard Gallacher, and five other people – Mrs Gallacher, another former police officer and his wife, and two serving police officers. Mr Gallacher was the author of three articles published in the Scottish *Sunday Mail* on 5, 12 and 19 April 2015 which raised questions relating to the murder in 2005 of a 27-year-old Glasgow woman, Emma Caldwell, and the resulting inquiry mounted by the then Strathclyde Police. A review was conducted by the Interception of Communications Commissioner's Office (IOCCO) after fears were raised that police officers were illegally spying on journalists. IOCCO found that a covert investigation was launched on 7 April 2015 shortly after publication of Mr Gallacher's first article by the Counter Corruption Unit (CCU) of Police Scotland in attempt to identify serving police officers, police staff and ex-employees who may have made unauthorised disclosure of sensitive or restricted information revealed by the articles.

In November 2015 the Interception of Communications Commissioner determined that there had been contraventions of the Acquisition and Disclosure of Communications Data Code of Practice 2015, which relates to certain powers and duties conferred or imposed under the Regulation of Investigatory Powers Act 2000 (RIPA) and provides guidance on the procedures to be followed when acquisition of communications data takes place under the relevant provisions. The contraventions involved five applications for communications data submitted by Police Scotland. Judicial approval had not been obtained in order to acquire the data (in breach of para 3.78 of the Code); the content of the five applications failed to satisfy adequately the requirements of necessity or proportionality, or to give due consideration to Articles 8 or 10 of the European Convention on Human Rights (ECHR); and two of the applications had been approved by a designed person who was not independent of the investigation (in breach of para 3.12).

The IOCCO report found no evidence to suggest any employee of Police Scotland had intentionally avoided the requirements of RIPA or the Code, but determined that the failures were "reckless" within the provision of paragraph 8.3 of the Code.

Mr and Mrs Gallacher asked the IPT to award damages for Police Scotland's infringement of their rights to respect and privacy under Article 8 and Mr Gallacher's right to protect his sources under Article 10 ECHR, which guarantees the right of freedom of expression. On 8 August 2016 the IPT awarded Mr Gallacher £10,000 compensation to reflect the personal stress and strain he had suffered – including the loss of long-standing friendships – and a loss of earning capacity. For Mrs Gallacher an award of damages was not considered necessary to afford "just satisfaction" as this had been provided by the declaration that Police Scotland had infringed her rights. Police Scotland

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conceded in a letter to the IPT that the communications data had been unlawfully obtained.

The government has recognised the need to provide statutory protection of the identification of journalistic sources. Clause 73 of the Investigatory Powers Bill stipulates that generally any authorisation by a designated senior officer in a relevant public authority to obtain communications data for the purpose of identifying or confirming a journalistic source must be approved by a Judicial Commissioner (a former or serving High Court judge). The Commissioner is required by clause 73(6) to have regard to the public interest in protecting a source of journalistic information and the need for there to be another overriding public interest before a public authority seeks to identify or confirm such a source.

Despite these measures journalists are still uneasy, and Viscount Colville of Culross, a BBC producer and journalist, tabled an amendment during the House of Lords committee stage of the Bill on 11 July seeking extra safeguards for sources of journalistic material and information. While welcoming the measures contained in clause 73, Viscount Colville sought to extend the protections for journalists' sources to other powers set out in the Bill. In particular he was keen for a safeguard to cover targeted equipment interference, which could include looking at a journalist's electronic notebook and footage shot in the course of a story, and also the ability to use a mobile telephone's microphone as a bug. He also wanted to reverse the current position where an applicant for authorisation to identify or confirm journalistic sources is not required to inform the person to whom the authorisation relates or that person's legal representatives ((cl 73(4)).

Lord Black, Executive Director of the Telegraph Media Group, said that the Bill in its current form does not offer enough protection to journalists' sources. Investigative journalism becomes almost impossible if whistleblowers feel that too much risk is involved in coming forward to the press – something that is already happening. Lord Colville's amendment was withdrawn, but he expressed the hope that further discussions could take place before the Bill's report stage. With the Society of Editors, the National Union of Journalists and the News Media Association all supporting further safeguards, the debate seems set to continue.

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