

INVESTIGATORY POWERS BILL: PROTECTIONS FOR COMMUNICATIONS INVOLVING SENSITIVE PROFESSIONS

Whilst everyone has a right to privacy, certain professions handle particularly sensitive or confidential information, which may attract additional protections. These professions include medical doctors, lawyers, journalists, Members of Parliament and the devolved legislatures, and Ministers of Religion.

Communications Data

Accessing the communications data of an individual does not disclose what that person wrote or said, rather when they communicated, where, how and with whom. Communications data does not therefore attract, for example, legal professional privilege in the same way as the content of a communication between lawyer and client. However, additional protections for sensitive professions are as a matter of policy applied to requests for communications data.

All applications for communications data known to be of a member of a sensitive profession must set out clearly any circumstances which could lead to an unusual amount of intrusion, invasion of privacy or infringement of a person's right to freedom of expression. In addition the Designated Senior Officer who signs off an authorisation to access the communications data of a member of a sensitive profession must consider whether obtaining the information is in the public interest.

The Interception of Communications Commissioner published a report on 4 February 2015 in respect of journalists' sources. Following this report, law enforcement applications to find the source of information given to a journalist can currently only be granted if a court order is obtained from a judge under the Police and Criminal Evidence Act 1984 (PACE). This was an interim measure.

The Bill will put in statute a requirement for all applications to access the communications data for the purpose of identifying or confirming the identity of a journalist's source to be authorised by a Judicial Commissioner. The Bill will also require that statutory Codes of Practice issued in respect of communications data must make provision for additional safeguards that apply to sensitive professions.

Interception and Equipment Interference Warrants

Information obtained by interception or equipment interference can reveal the content of a communication and make clear what is being said or written. As a consequence these techniques often involve a higher level of intrusion, specifically where particularly confidential or sensitive information is involved.

The Bill introduces a two stage authorisation process in which warrants must be issued personally by the Secretary of State, and only after being approved by a Judicial Commissioner. Strict procedures will govern how any information collected under the warrant is used, kept and destroyed. In addition to these general safeguards,

additional provision is made on the face of the Bill in respect of legally privileged material. These additional protections will ensure that when activity authorised by a warrant is intended to obtain legally privileged material, it is only authorised in exceptional and compelling circumstances. Where activity authorised by a warrant is likely to obtain such material, the application for a warrant must make this clear. The Bill also makes clear that the IPC must be informed when legally privileged material has been intercepted or obtained under an equipment interference warrant, or examined and retained in relation to bulk collection.

In addition, the Codes of Practice make clear that where the law enforcement agencies and security and intelligence agencies wish to obtain the communications of, or with, a member of one of the sensitive professions, particular consideration must be given where confidential information might be involved. They must make a compelling case to the Secretary of State explaining why it is necessary and proportionate to seek the warrant and what additional protections they will apply to any particularly sensitive material obtained.

More detail on the current protections afforded to confidential material is available in the draft Codes of Practice published alongside the Bill.

The Bill has been amended to provide that, in addition to approval by a Judicial Commissioner, the Prime Minister must agree before the Secretary of State can decide to issue a warrant to intercept a Member of Parliament's communications. This applies to all warrants for targeted interception and equipment interference that is carried out by the security and intelligence agencies. It also includes a requirement for the Prime Minister to agree prior to the selection for examination of a Parliamentarian's communications collected under a bulk interception or equipment interference warrant. A Parliamentarian includes MPs, members of the House of Lords, UK MEPs and members of the Scottish, Welsh and Northern Ireland Parliaments/Assemblies.