[GB] Decision on police accessing journalists' communications data

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The case arose from the "Plebgate" affair in September 2012, in which it was reported that the then Government Chief Whip had verbally abused a police officer when prevented from leaving Downing Street on his bicycle through the main gate. Official police logs were leaked, and the Sun newspaper received anonymous phone calls about the event on its tip hotline. This fact lead to a concern that, in addition to the leaking of information, there was a conspiracy to bring down a member of the Government and the perversion of the course of justice by certain officers. The Chief Whip resigned from the Government in October 2012.

To ascertain whether there was a conspiracy, the police sought to obtain the communications data not only from police officers, but also from Sun journalists. Four authorisations were issued, all relying on section 22 of the Regulation of Investigatory Powers Act (RIPA) and the associated Code of Conduct - at that time Acquisition and Disclosure of Communications Data, 2007. That version of the code, which has since been updated, contained no specific protection for journalists or their sources.

Following the publication of the police report into the investigation, the journalists learned of the access of their data, and made a complaint to the Investigatory Power Tribunal (IPT), which is a statutory body that investigates complaints against the police's use of surveillance. The question before the IPT was whether RIPA and the 2007 version of the code provided adequate protection or rather constituted a breach of Article 10 of the European Convention of Human Rights (ECHR).

On most issues, the IPT found for the police. Thus, it accepted that the relevant officers honestly and reasonably believed that there were grounds for suspecting the commission of an offence which was of sufficient seriousness to justify taking steps to identify the source of the leak. Further, the investigation could not be effective without the communications data. In respect of the authorisations, the IPT held that three of the four were necessary and proportionate. As regards the final authorisation ("the third authorisation"), it was not necessary as the identity of the informant had already been discovered.

There was, however, another issue to consider which concerned the protection (or rather lack of protection) of journalists' sources. In considering this question, the IPT referred to the case law of the European Court of Human Rights (ECtHR). It held: "...cases directly engaging the freedom of the press require to be treated differently. The case of Goodwin makes clear that the protection of journalistic sources is one of the basis (sic) conditions for press freedom, and that the necessity for any restriction on press freedom must be convincingly established" (see IRIS 1996-4/4).

So, while the safeguards in the system generally may have provided protection against the arbitrary use of power, it was deficient in that the system in operation at the time did not contain any safeguards for the press. This was the case even though the police would have no access to the material itself, nor require the journalist to disclose the source. The court noted that the safeguards in the system operate after the event: "Subsequent oversight by the Commissioner, or, in the event of a complaint, by this Tribunal, cannot after the event prevent the disclosure of a journalist's source. ... Where an authorisation is made which discloses a journalist's source that disclosure cannot subsequently be reversed, nor the effect of such disclosure mitigated."

The IPT also noted that there was no requirement for the use of section 22 powers in respect of a journalist to be highlighted to the Commissioner, running the risk that any issues in such an instance might not be subject to effective review. Given the nature of the RIPA powers, it is only because the Metropolitan police disclosed the access that the journalists knew to bring a complaint. Furthermore, although the designated officer had experience in human rights issues generally, as required by the 2007 code, he had had no experience of investigations of journalists' sources or the issues thereby raised. The matter was then judged as though it were a standard case, without these considerations being taken into account.

The 2015 version of the code now takes these matters into account.

News Group Newspapers Ltd & Ors v Commissioner of Police of the Metropolis [2015] UKIPTrib 14_176-H (17 December 2015)

http://www.bailii.org/uk/cases/UKIPTrib/2015/14_176-H.html

Home Office, Code of practice for the acquisition and disclosure of communications data (March 2015)

https://www.gov.uk/government/publications/code-of-practice-for-the-acquisition-and-disclosure-of-communications-data