

Earl Howe, Deputy Leader of the House of Lords
Investigatory Powers Bill, House of Lords
11 October 2016
Extracts from Hansard

My Lords, in moving Amendment 30, I shall speak also to the other government amendments grouped with it. We come to the safeguards associated with confidential journalistic material and sources of journalistic information, which have been the subject of significant debate during the passage of the Bill. This package of amendments protects the fundamental role that journalism plays in a healthy democracy. While it is right that the Bill provides for the investigation of individuals where they are suspected of serious illegality or wrongdoing, whatever their chosen profession, it is also right that particularly sensitive professions are afforded specific additional protections.

In limited circumstances, it may be necessary to use the powers provided in this Bill for the necessary and proportionate investigation of a journalist—for example, where they are suspected of serious illegality or wrongdoing or where there is an immediate threat to life. In such circumstances, the Bill and the associated codes of practice already contain significant protections for journalists and their sources, recognising the strong public interest in protecting a free press and freedom of expression in a democratic society, including the willingness of sources to provide information to journalists anonymously. So it already places into primary legislation for the first time the requirement for all public authorities to obtain judicial approval for an authorisation to acquire communications data to identify or confirm a journalistic source. We responded to concerns raised in the Commons by clearly setting out in the Bill that the judicial commissioner, a current or former High Court judge, must first consider the public interest in protecting a source of journalistic information and then be satisfied that there is another, overriding public interest before approving such an application.

On top of that, we went further and introduced Clause 2, the overarching privacy clause, which makes it explicit that public authorities using any power in the Bill must have regard to a number of matters, including whether what is sought to be achieved by an authorisation may reasonably be achieved by other, less intrusive means and the public interest in the protection of privacy. Public authorities would, of course, also be subject to the requirements of the Human Rights Act and all the relevant rights and freedoms that it provides for. Of course, all applications to acquire material must be authorised by a relevant authority and approved by a judicial commissioner. The accompanying draft codes of practice require the Secretary of State, or law enforcement chief for law enforcement use of equipment interference, to apply particular consideration in cases where the subject of the warrant might reasonably assume a high degree of privacy, or where confidential information is involved.

Finally, statutory oversight of the use of investigatory powers, whether in relation to journalists or not, is provided through the creation of the Investigatory Powers Commissioner. Further to this comprehensive oversight regime, the Bill creates a number of offences that apply to the public authorities using the powers to sit alongside existing relevant offences in other legislation. This includes a specific offence of unlawfully obtaining communications data, which will sit alongside the offence of misconduct in a public office in common law, to ensure that, where a public authority

knowingly or recklessly acquires communications data without lawful authority, appropriate penalties are available.

My noble and learned friend Lord Keen has already spoken about the government amendment requiring the Investigatory Powers Commissioner to include in his annual report information relating to the operation of particular safeguards, such as those for legally privileged material. I want to make it clear that this requirement also applies to those safeguards protecting confidential journalistic material and sources of journalistic information. It is also important to remember that the Investigatory Powers Commissioner will be able to call on whatever expertise he or she sees fit, and will be provided with sufficient resources to do so. This may be technical or communications expertise or, indeed, professional expertise, such as that of media advisers or lawyers.

We have been clear that the commissioner will lead an outward-facing organisation, and we consider that engagement with professional bodies, such as media representative groups, on how the use of a particular power affects their members is exactly the sort of thing the commissioner and their team should be doing. While we do not think that it would be appropriate to mandate this through legislation, it will form part of the role for the commissioner. These further new amendments will strengthen the safeguards in the Bill even further to ensure that the vital public interest of freedom of expression is protected, while still allowing those who are charged with keeping us safe to continue their vital work.

Amendments 30 and 75 protect the key principle that individuals who provide information to journalists should have an expectation of privacy. The Government accept that it is important that confidential journalistic material is handled with the sensitivity that it deserves. So where a relevant authority applies for a warrant where the purpose, or one of the purposes, is to authorise or require the obtaining of confidential journalistic material, the amendment would require the application to contain a statement confirming that this is the purpose, or one of the purposes.

The same requirement would apply in relation to a targeted examination warrant that seeks to authorise the selection for examination of such confidential journalistic material acquired in bulk. This means that the Secretary of State or law enforcement chief and judicial commissioner will have to be fully aware that they are authorising the obtaining of confidential journalistic material when they come to consider a warrant. The Government are seeking to protect legitimate journalism, while ensuring that those who wish to do us harm cannot hide behind spurious claims of journalism.

For this reason, Amendment 268 makes it clear that material acquired or created to further a criminal purpose is not considered journalistic material in the context of the Bill. That seeks to avoid those such as the media wing of Daesh attracting a safeguard intended for legitimate journalists. In addition to the requirement to clearly state in the application whether the purpose, or one of the purposes, is to obtain confidential journalistic material, the person to whom the warrant application is addressed must also be satisfied that there are specific arrangements in place for the handling, retention, use and destruction of communications containing such confidential journalistic material.

I turn to the amendments which protect sources of journalistic information. A free press cannot operate without journalists, and journalists cannot operate without sources. That is why the Government have focused protections on journalists' sources and the important public interest in protecting the confidentiality of sources of journalistic information. Amendments 31 and 76 provide further protection by making clear that when a relevant authority seeks a warrant to identify or confirm a source of journalistic information, the application must contain a statement to that effect.

This will mean that the Secretary of State or law enforcement chief and judicial commissioner will be fully aware of the intention to identify or confirm a source when they are considering the necessity and proportionality of the warrant. Again, the person to whom the warrant application is addressed must also be satisfied that there are specific arrangements in place for the handling, retention, use and destruction of communications that identify sources of journalistic information.

There are a number of consequential amendments which relate to modification of a warrant. These amendments make it clear that, when modifying a warrant when the purpose is to obtain confidential journalistic material, the same factors must be considered as would be the case in an application to obtain confidential journalistic material.

Amendments 53, 90, 194 and 217 will ensure that, where confidential journalistic material is obtained by a public authority which intends to retain it, the Investigatory Powers Commissioner must be notified as soon as is reasonably practicable. This applies when the material is obtained through interception or equipment interference through a targeted warrant and when it is selected for examination having been collected in bulk. This is an important safeguard. It ensures that the commissioner is fully aware of the confidential material held by the agencies. It assists in his oversight of the particular handling arrangements that must be in place when this type of material is retained by the agencies.

I turn to the amendments in relation to bulk provisions. Amendments 194 and 217 make it clear that, where confidential journalistic material is obtained by a public authority which intends to retain it, the Investigatory Powers Commissioner must be notified as soon as is reasonably practicable. This applies when the material is obtained through interception or equipment interference through a targeted warrant and when it is selected for examination having been collected in bulk. It ensures that the commissioner is fully aware of the confidential material held by the agencies and it assists in his oversight of the particular handling arrangements that must be in place when this type of material is retained by the agencies. There are also a number of consequential amendments on this which provide for the definition of a journalistic source to apply to the Bill as a whole rather than solely to Part 3, as previously drafted.

I hope that what I have said by way of explanation of these amendments demonstrates to the House that the Government have listened to the concerns raised in Committee by a number of your Lordships and to representations from journalists' organisations and that we have responded in a constructive and helpful way. I beg to move.

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