British Journalism threatened by State Surveillance

By Tim Dawson

In April 2015 critical newspaper articles started to appear about the Police investigation of a decade-old murder near Glasgow, Scotland. These suggested that, despite spending more than £4m trying to track down Emma Caldwell's attacker, the failure to secure a conviction was the result of bungling by detectives.

Senior Police officers were piqued. If the media stories were accurate, a Europe-wide investigation, involving extensive secret recordings of suspects and a massive deployment of officers had burned valuable resources while a seemingly obvious 'prime suspect' was at liberty under Police noses.

As a result of the articles, however, the Police set about unlawfully seizing phone records in an attempt to track down the source of the newspaper stories. A subsequent independent investigation was highly critical of the Police for doing so, as a result of which the force in question issued an unreserved apology to those affected.

The case made headlines, but is by no means unique.

Phone records led to the source

In April 2017 the Assistant Chief Officer of Cleveland Police, in the north east of England, resigned after the force admitted that it had monitored the phone records of three journalists whose stories had caused the Police concern. It was one of a raft of cases that became public involving law enforcers using phone records – not to try and track down criminals, but to try and uncover whistleblowers and the journalists to whom they spoke.

All these cases arose as a result of the Regulation of Investigatory Powers Act (Ripa). The scale of the problem at that time was laid bare in a report by the UK Government's own Interception of Communications Commissioners Office. In the three years up to 2015, it reported, the phone records of 105 journalists had been accessed in pursuit of 242 sources. (https://www.ipco.org.uk). Several of these cases caused national scandals; as a result the Government promised new legislation.

IPCO - Investigatory Powers Commissioner's Office
www.ipco.org.uk
Oversight, Legislation, IPA, Technical Advisory Panel, Double lock, Communications Data, Equipment Interference, Surveillance, Intelligence, Bulk Communications, CHIS ...

Simon Hughes MP, then a justice minister in the Conservative/Liberal Democrat coalition administration, promised that in future there would be a presumption that: journalists were acting in the public interest; that they would be notified of applications to see their phone records; and that such applications would be considered in a public court hearing.

As the resulting Bill passed though its legislative stages during the course of 2016, however, it became clear that Hughes' liberal tests had fallen by the wayside. What eventually became the Investigatory Powers Act (2016) created no special provisions for the protection of 'journalistic material'. And, to obtain access to journalists' phone records, the Police would have to apply to 'judicial commissioners' who would deliberate in secret. A journalist whose phone records were to be released to the Police would receive no notification that this was going to happen, nor would they be given the opportunity to contest the sharing of their records.

No protection for journalistic material

The issues this creates will be obvious to most journalists. They were succinctly expressed by Alan Rusbridger, then editor of The Guardian, speaking at an event co-hosted by the NUJ and IFJ in 2014. “All journalists know that some of the best and most useful information we have is unauthorised information. The use of unauthorised sources who are willing to tell the truth, be they civil servants, employees of companies, teachers or nurses – whistleblowers – is vital to what we do and to public understanding of issues. If the authorities are going to get the identities of these people then the work of journalists is over. It is that serious.”

Protecting the identity of sources has always been the watchword of British journalism, and the requirement that journalists do so is intrinsic to the NUJ’s 80-year-old code of conduct. England’s ‘common law’ heritage’ means that it has never been enshrined in law, however.

What legal protections do exist arise from a ruling by the European Court of Human Rights (ECHR). In 1989, NUJ member Bill Goodwin, then a graduate trainee on The Engineer magazine, received a confidential tip off about financial health of a company. Goodwin made follow-up enquiries, as a result of which the company in question first obtained an injunction preventing publication of the story and then an order requiring disclosure of the identity of the source.

Risked jail to protect his sources

Goodwin refused to comply, thereby risking jail for contempt of court. The NUJ took up his case, but applications to the Court of Appeal and to the House of Lords failed to overturn these instructions.

In 1996, however, the European Court of Human Rights ruled on the case. Its judgement was that: “Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society and the potentially chilling effect an order of source disclosure has on the exercise of that freedom, such a measure cannot be compatible with Article 10 of the European Convention on Human Rights unless it is justified by an overriding requirement in the public interest.”

Many believe that the IPA is incompatible with this precedent – and the test of this in court is already underway. The Bureau of Investigative Journalists and others have a case before the ECHR that predates the passing of the IPA. When judgement finally comes, however, it is the current legislation that it will impact.

At an EHRC hearing of this case in December 2017, Dinah Rose QC, representing the Bureau and ten other non-governmental organisations, said that it was clear there was no independent mechanism of accountability (in the surveillance of journalists) and that the government’s case amounted to: “trust us and we will keep you safe”. She added that what the government refers to as safeguards were simply judgements made by officials about their surveillance practices. The British Government, meanwhile, is defending its position robustly.

Old school tradecraft back in vogue

Vital as the ruling in this case may prove many British journalists are already resorting to ‘old school’ methods to safeguard their sources. Veteran investigative journalist Duncan Campbell, for example, recently spoke to NUJ members about the tactics he uses to keep his contacts from prying eyes. “Tradecraft, not technology is the key to protecting your sources”, he said. “You have to be working on very hard targets against very hard people to bother with (technology such as the Signal app). I do that, I have the kit, and month in month out it's never used,” he said.

Instead Campbell favours a panoply of techniques that might come straight from a John Le Carré novel: being very selective with use of one's smartphone, meeting contacts in busy places, avoiding patterns of behaviour that are easily tracked and meeting contacts only in busy public places.

Some might scoff at Campbell's methods. The testimony of Michelle Stanistreet, the general secretary of the National Union of Journalists in Britain and Ireland, lends credence to Campbell's warnings, though.

As the Investigatory Powers legislation was considered by Parliament, Stanistreet met with government ministers to make the case for safeguarding journalists' sources. As well as politicians and civil servants, the meeting was attended by members of the security services. Stanistreet chided the spooks that they had the capacity to listen in on journalists at will, however the legislation was eventually framed.

"They swiftly interjected to say it was untrue that the proposed legislation would enable them to bug journalists,' she remembers.

"I replied that I knew that they no longer stuck microphones in lampshades. Why would they when you can turn any smart phone into a listening device,without its owner knowing? At this, they had to sit back and concede, yes, of course, in principle this is something they could do".

Sadly, the Investigatory Powers Act is by no means the only legal threat to journalism in the UK that arises as a result of apparently unintended consequences of legislation. The General Data Protection Regulations that are currently before Parliament will almost certainly end journalists' exemption from data protection provisions. This will allow a judge to rule on the legality of a journalists' use of personal data prior to an articles publication. Broadcasters are terrified that such provisions could mean an end to the use of secret recordings of alleged wrongdoers.

Revisions to the Official Secrets Act currently under consideration by the Government's Law Commission could criminalise journalists who communicate with whistleblowers. Provisions in the Digital Economy Act (2017) could also be used to target whistleblowers and those to whom they hand documents.

As in many other countries, of course, economic conditions and the flight of advertising to the internet in general and social media in particular have also hit the media hard. The contraction of newsrooms and closure of papers has radically reduced the number of professional truth seekers and fact finders in the established media. Some would identify this diminution as the media's most potent challenge.

The paradox, however, is that more people in the UK describe themselves as journalists than at any other time. And all ply their trade against a legislative backdrop that, by error or commission, makes free and fair reporting increasingly difficult.

British jails might not teem with reporters and columnists as those of some countries do. Unless journalists fight to defend their time-honoured freedoms, however, these liberties will surely evaporate every bit as quickly as has secure work with traditional media employers.

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