



Investigatory Powers
Commissioner's Office

PO Box 29105, London
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Sir Michael Burton
President, Investigatory Powers Tribunal

By email

28 November 2017

Dear Sir Michael,

I thought it appropriate to write to you to clarify a statement made in our letter of 28 September 2017 concerning the former Intelligence Services Commissioner Sir Mark Waller's reluctance to consider the use of inspectors within his oversight regime.

While Sir Mark was very clear that he did not believe that he required his own inspectors (and stated that in public on a number of occasions) he was also clear that he considered oversight to be a judicial responsibility that he should undertake personally. I have attached below a number of extracts from two of his annual reports to illustrate this and his overall approach to oversight. Further, it is also apparent that Sir Mark, and his predecessors in that role, received numerous technical briefings from the agencies on a broad range of areas within his remit.

Intelligence Services Commissioner – Annual Report 2013

Page 12: "In practice I have access to all information around the intelligence, resource and legal cases governing executive actions. I am provided with more information than is strictly necessary for the purposes of adding context. I can conclude with some confidence that, as far as the authorisations concerning the activities I oversee, officials and Secretaries of State comply with the necessary legislation, in so far as they are bound to do so."

Page 15: "From the range of (MI5) officers I met and questioned during my inspections I was left with the clear impression that my external oversight was welcome and that compliance with the legislation is an integral part of the organisation."

Page 18: - "My formal oversight visits of SIS began with a briefing of operations taking place across the world under the warrants and authorisations I oversee. The SIS legal compliance team and an SIS lawyer were present. "

Page 22: *“An officer from the compliance team was available to me at all times during my pre-read to clarify any technical points or acronyms.”* (our emphasis)

Page 41: *“The process for me to receive in-country briefings in relation to challenging partners is much more qualitative in nature. However, I have received throughout the year during my station visits a number of such briefings.”*

Intelligence Services Commissioners – Annual Report 2015

Oversight by the Commissioner

Page 3: *“A cornerstone of my regime is personal responsibility and I do my job rigorously, independently of government, Parliament and the agencies, without political favour or personal bias. All Commissioners are required to be holders or past holders of high judicial office, meaning that they are independent and will form their own impartial judgement, that they will have had long experience of drawing out the facts and that they should be seen to carry authority because of their position.”*

Page 7: *“The reason why it is effective in my judgment is that there is a culture both in the agencies, the MOD and at the offices of the Minister which wants to ensure that they act within the constraints that Parliament has imposed and to get things right – the fact that a senior judge is going to come in and probe and ask questions of all persons involved in the process discourages the pushing of boundaries never mind worse. If the agencies themselves were as institutions determined to act unlawfully that would take a massive conspiracy from top to bottom and they would not be seeking warrants or authorisations to so act. A thing of primary importance is to check that there are systems in place to prevent a rogue using the very powerful tools available without authorisations. But I stress it is important to have a system of oversight which seeks to ensure that the boundaries that the law imposes are strictly complied with and my experience is that the after the event audit does meet that requirement because the authorisers do not want criticism or worse to be told the authorisation was in fact unlawful.”*

Abuse of Bulk Personal Data Systems

Page 8: *“As already indicated what must be guarded against is any individual, or group of individuals, who seek to abuse the systems. They would not seek authorisation. They would try to circumvent the system for their own ends.*

So a vitally important part of my oversight is about mitigating that risk. To do so I look at: the safeguards in place within the agencies to prevent inappropriate access to or use of information obtained by the agencies to allow them to carry out their statutory functions; the policies and procedures the agencies have put in place to deal with the acquisition, use, retention and deletion of information obtained by use of the powers available to them and to prevent any misuse; the systems and processes officers must go through to access such material; that individuals are not free to act on their own or without supervision; and the culture and ethos in an organisation.

Of course discussing what these processes and policies are in any detail here would be counter productive, allowing anyone who would attempt to abuse the system the knowledge by which to do so. But I can say that the systems and policies in place in all the agencies are designed to ensure that no one person can act on their own or access information on any of the systems holding sensitive information individually, without someone else knowing about it and without having to go to a more senior officer.

This would deal with a rogue individual. But not with a top down conspiracy, the scale of which would have to be massive to be successful. A further mitigation is an effective appointments process, thorough vetting at the outset and appointing individuals of integrity at the top. The culture and ethos across the agencies must be closely monitored. In addition to my interactions with staff during my inspections, my under the bonnet visits and visits to stations overseas, I regularly attend training courses for new recruits and established staff all of which give me a good insight into the culture and ethos of the organisation and its staff."

Technical Support

Page 25 - 26: "GCHQ Technical Planning Meeting

At GCHQ I attended one of their weekly technical planning meetings. The meeting provides all relevant parties, including GCHQ's policy and legal, with oversight and assurance that EI tools, techniques and usage have been assessed as necessary given the potential benefit to be gained, and that they have been risk assessed.

This assurance and oversight is provided by peer assessment, covering development, infrastructure, operations and policy implications. Key agreements and decisions made during the meetings are documented to provide an audit trail and may be used in submissions to support the necessity and proportionality of using the technique in specific operations.

The meeting spent some time on the technical capabilities of using the technique and the challenges from peer review were at times adversarial. These are obviously bespoke techniques which are very technical but the meeting had to be in plain English so that the legal and policy people could also understand the proposal."

Random Audits of the Use of BPDs

Page 33(and also in IPCO's letter dated 2 June 2017): "In addition to my oversight of BPD, the agencies have a number of internal oversight mechanisms which include controls such as completing mandatory training and signing terms and conditions or codes of practice before access is granted, internal monitoring and audits, this includes the audit of the individual search justifications at SIS and GCHQ."

"At SIS inspections I also make a random selection from the total number of actual searches of BPD that have been conducted by officers since my last visit. I then interview the individuals who have carried out the searches and they must explain how they justified their search to me. It is important that they demonstrate to me: the necessity of why they needed to run the search; why the information could not have been obtained using a less intrusive method; how they narrowed their search criteria to reduce collateral intrusion; as well as explaining the outcome of the search and how the results contributed to their operation. If GCHQ and MI5 could also make this possible during their inspections I would find this particularly useful."

Page 36: "At all three agencies there are automatic processes in place to monitor and record each search of BPD in analytical systems... There are also random audits on individual searches."

Page 36: "During my inspections the protective monitoring teams at each agency present all of the investigations into possible cases of misuse and the results of random audits they have conducted since my last inspection. From this I am able to discuss any investigations which I feel are particularly concerning, or if I would like further information to determine that the investigations conducted have been thorough and that the correct conclusion has been reached. I am also very interested in what actions have been taken as a result of the investigation conclusions".

As the appointed commissioner under RIPA 2000 it was up to Sir Mark (and his predecessors) to determine how he performed his functions. As noted above he considered it a personal responsibility and felt that he should do *this activity personally, with rigour and independently of government*, given his formal role under the Act. This is clearly stated in the introduction to his Annual Report in 2014.

While the investigative model developed by IPCO under the Investigatory Powers Act 2016 uses a range of investigative, technical and legal resources in addition to direct Commissioner involvement, it would be incorrect to infer from that statement that the approach adopted by the predecessor organisations were either less than rigorous or effective. It should be noted that unlike RIPA 2000, the IPA 2016 makes substantial provision for the use of staff to assist the Commissioner as well as creating formal delegation of functions powers. Therefore, the landscape I operate under is significantly different from that of my predecessors.

I hope this clarifies any confusion.

Finally, in the above letter we also referred incorrectly to a member of Sir Mark's staff as "secretarial support". Records indicate that this member of staff actually performed a far broader role within ISComm and attended inspections with Sir Mark as well as assisting in the drafting of his Annual Report.

Yours Sincerely

A handwritten signature in black ink that reads "Adrian Fulford". The signature is written in a cursive, slightly slanted style.

Rt Hon. Lord Justice Fulford
The Investigatory Powers Commissioner