



Investigatory Powers
Commissioner's Office

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13 October 2017

FAO: Dr Gus Hosein, Renate Samson, Martha Spurrier & Jim Killock

By email to: scarlet@privacyinternational.org

Dear Sirs, Madams

Re: Oversight of intelligence sharing between Her Majesty's Government and foreign governments

I write in response to your letter of 13 September 2017 in which you collectively highlighted your concerns about the transparency of intelligence sharing arrangements between the UK and overseas governments. You also requested information about my oversight of these intelligence sharing arrangements.

Thank you for raising these important issues and also for your very useful briefing document on the issue of intelligence sharing. Your letter raises a number of very significant issues that I would like to address directly.

As you are aware, I am responsible for overseeing the use of investigatory powers by public authorities in the UK which include law enforcement, the intelligence agencies, prisons, local authorities and other government agencies. I am supported by 15 judicial commissioners as well as a broad range of support staff, including experienced inspectors and technical experts. On current plans, the total staff of the Investigatory Powers Commissioner's Office (IPCO) will be around 70 – twice the size of the three predecessor organisations. In addition to specific technical, legal and operational expertise, I am also recruiting an engagement team, with a view to improving transparency and maintaining a close working relationship with civil society and academia.

Having the powers set out in the answers below is not the same as using them, but there are two important ways that IPCO is different from previous organisations. I hope these will give you reassurance that we will be providing fully robust oversight. First, we will be larger and with greater expertise on technical and intelligence matters. Second, my powers of review – the 'double lock' – place a far greater onus, indeed a duty, on the intelligence agencies proactively to inform me of any relevant considerations when we conduct our review of a Secretary of State's decision to approve a warrant. Any planned or permitted disclosure is clearly a relevant consideration and I would expect it to be included in any application and will monitor that that occurs through our oversight powers.

Turning to your specific questions I will answer each in turn.

1. Is the government and/or the intelligence agencies required to inform you about intelligence sharing arrangements they have made with other governments?

- Yes. You are aware that under the IPA 2016 All relevant persons have a statutory duty under s235 (ss (2), (3) & (4)) to provide my office with all information necessary to enable us to conduct our oversight function.
- s208 IPA 2016 contains the relevant provisions for Judicial Commissioners to review and approve warrants for a number of powers. Any sharing of this intelligence would, we believe, be material to the proportionality case and so it is anticipated would form part of the warrant application reviewed by a Judicial Commissioner following approval by a Secretary of State.
- We are also considering how any potential duty of candour upon the applicant will facilitate our oversight in this area. This is a matter we are currently working on.

2. Does your mandate include independent oversight of the intelligence sharing activities of your government?

- Independence is at the heart of the new organisation; IPCO is an Arms Length Body of the Home Office but retains the authority to perform its statutory duties. My powers of oversight are derived from s229 of the IPA 2016 and, noting what I have said above, are I believe sufficient to oversee intelligence sharing. Should my view on this issue change, I will not be slow in identifying any perceived deficiencies.

3. Do you have the power to access in full all relevant information about the intelligence sharing activities of your government?

- Yes. I have the power under s235 (2), (3) & (4) of the IPA to access any information relevant to my oversight. While my understanding is that the predecessor organisations have never been refused access to documentation that has been requested in respect of intelligence sharing, I intend to use these powers actively to ensure effective oversight.
- The Act provides me with broad-ranging powers to request all the information I require to enable me to fulfil my functions effectively as Investigatory Powers Commissioner. I am exploring with those bodies I oversee how best to ensure a full understanding of their complete intelligence sharing activities. There are a number of possible approaches that could be taken to provide adequate oversight of sharing, including (but not limited to) - detailed analysis of sharing policies and any relevant undertakings set out contractually or in other agreements to assess whether these are adequate to protect individual rights; direct inspection of organisations not apparently covered by the IPA, but who are in receipt of material collected under IPA authorisation; agreements with partner oversight bodies that would shadow any sharing agreements, and, enable oversight to be carried out by partners on our behalf.

Our initial view is that each of these approaches, and probably others not listed here, may be appropriate on a case by case basis depending on my assessment of the risk to individual rights in each situation.

4. Do you have the power to review decisions to share intelligence and/or undertake independent investigations concerning the intelligence sharing activities of your government?

- Yes. As part of my power of inspection under s229 (2) & (3a) of the IPA, I can review and undertake independent investigations of any sharing of intelligence. As set out above, the Act provides broad-ranging powers to undertake independent investigations and review decisions relating to intelligence-sharing arrangements.

5. Do you cooperate with any other oversight bodies, domestic or foreign, to oversee the intelligence sharing activities of your government?

- Cooperation between oversight bodies is something that I am committed to developing, however, it must be recognised that there are challenges due to the differing legislative regimes and issues around privacy and data sharing that will need to be explored. You will note that the Act specifically restricts me from doing anything that would undermine national security and, consequently, I am pursuing this work with care.
- I have held extremely positive discussions with oversight bodies from the 'Five Eyes' countries, including on the oversight of intelligence sharing. Preliminary discussions have led to a proposal to form a review body whose objectives include exchange of views on subjects of mutual interest and concern, the sharing of best practice in oversight methodology, and exploring areas where cooperation on reviews and the sharing of results is appropriate.

Finally, it is worth being aware of the Consolidated Guidance, which is designed to ensure that sharing of intelligence does not put someone in the position of their Article 3 rights being breached. This is something that I will continue to have oversight of, taking over from the Intelligence Services Commissioner's role in this regard.

IPCO has only existed since 1 September 2017 so I am regrettably unable at this stage to share 'non-confidential work products' which reflect my answers to the above questions. I intend, however, to cover the issue of intelligence sharing oversight in our first annual report. I am committed to transparency, wherever that is sensible and possible.

I trust my response answers the specific questions you have asked. Please do not hesitate to let me know if you have any further questions.

Yours



Rt Hon. Lord Justice Fulford
The Investigatory Powers Commissioner