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Rt Hon Tom Tugendhat MBE VR MP

Security Minister

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Rt Hon Dame Diana Johnson MP
Chair of the Home Affairs Select Committee
House of Commons
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By Email Only

18 October 2023

Dear Diana,

THE INVESTIGATORY POWERS ACT 2016 (REMEDIAL) ORDER 2023

You may recall that I previously wrote to you in December last year to inform you, as the Chair of the Home Affairs Select Committee, of the laying of a proposal for an Statutory Instrument (SI) under Section 10 of the Human Rights Act 1998 (power to take remedial action) to amend section 154 of the Investigatory Powers Act 2016 (IPA) in response to the judgment in *Big Brother Watch and Others v UK (BBW)*. That proposed SI would replace the current section 154 to provide additional protections in respect of Confidential Journalistic Material (CJM) and Sources of Journalistic Material (SJM).

Update on progress

As you may be aware, under the Human Rights Act 1998 (HRA), the Government must lay before Parliament proposals for a draft Remedial Order before laying the draft SI. The proposal for a draft SI must be laid as part of an unnumbered act paper in both Houses of Parliament for a period of 60 sitting days to allow for parliamentary consideration. This initial 60-day period came to a close on 19 June.

Under the HRA, the Joint Committee on Human Rights (JCHR) is required under its Standing Orders to report on any such proposals, and the JCHR published its report on the suitability of the draft instrument on 13 June. We have carefully considered their feedback and a formal response to the report will be laid along with the SI. The report made one recommendation to amend the SI to remove the ability for the Investigatory Powers Commissioner (IPC) to authorise the retention of journalistic, with conditions, where there is no overriding public interest in its retention. In practice, such an authorisation would not have been given by the IPC since he would be obliged to act in accordance

with the HRA. Nevertheless, we have accepted this recommendation and the amendment has been incorporated in the revised draft of the SI that has today been laid in Parliament.

Further amendments to the draft have also been made to implement provisions for an urgency procedure, aligned to similar existing processes in the IPA for other confidential material such as that containing legal professional privileged information. This means that where an agency urgently needs to search for CJM or SJM, and where it is not practicable to seek the prior approval of a Judicial Commissioner, a Senior Official may give the approval. In this scenario, the Secretary of State must inform the IPC about the urgent authorisation as soon as practicable and the IPC must consider whether the approval was appropriate. If not, the Senior Official's approval ceases to have effect.

This SI

As a reminder, the Grand Chamber of the European Court of Human Rights ruled in May 2021 that in order to be compliant with Article 10 of the European Convention on Human Rights, an intelligence agency must seek the approval of the IPC where they intend to select for examination material obtained under a bulk warrant that they believe contains CJM, or where it is highly likely that it contains CJM. This also applies where an agency intends to retain CJM or SJM where it has been discovered as part of selection for examination.

This SI creates a new section(s.) 154 and 154A of the IPA that implements this part of the judgment. The new sections also require that the IPC in his consideration of an application to select or retain CJM or SJM must have regard to the public interest of the agency doing so. Where that test is not met, the IPC must direct that such material be destroyed. It also creates an urgency process for dealing with requests for clearance to use certain selectors for the examination of data which need to be approved out of hours. We are also updating s.229 of the IPA to make specific reference to the new functions for a Judicial Commissioner which have been created in s.154 and s.154A.

The draft SI will now lay in both Houses for a further 60-day period for consideration ahead of the necessary debates. These will take place as soon as Parliamentary time allows after the 60-day consideration period has elapsed.

Yours,

A handwritten signature in blue ink, appearing to read 'Tom Tugendhat', is positioned above the printed name and title.

Rt Hon Tom Tugendhat MBE VR MP
Security Minister