



Joint Committee on Human Rights

Committee Office · House of Commons · London · SW1A 0AA



Minister of State for Security
The Rt Hon Tom Tugendhat MP

[By Email]

17 November 2023

Dear Minister of State,

The Investigatory Powers Act 2016 (Remedial) Order 2023

I am grateful for your department's response dated 18 October 2023 to the Joint Committee on Human Rights' report concerning the Investigatory Powers Act 2016 (Remedial) Order 2023. As part of the JCHR's scrutiny of the draft remedial order, which was laid before Parliament on 18 October 2023 along with your department's response, an accompanying statement and an Explanatory Memorandum, I am writing to request clarification on three issues.

Compatibility with Article 10 ECHR of the new urgent procedure for prior authorisation of selectors by a senior official in urgent cases

As you are aware, the draft remedial order now contains an urgent procedure (contained in new sections 154(2)(a) and 154A) which was not present in the proposed draft remedial order. The JCHR has therefore not had an opportunity before now to scrutinise the procedure for its human rights compatibility or its consistency with the terms of the *Big Brother Watch* judgment.

In cases which a senior official subjectively considers urgent, the new urgency procedure would permit that senior official to authorise the use of selectors with the purpose of selecting intercepted content to identify any confidential journalistic material or to identify or confirm a source of journalistic information, or to authorise the use of selections which are highly likely to identify confidential journalistic material or identify or confirm the source of such material. Outside such urgent cases, the prior authorisation for selectors could only be given by the Investigatory Powers Commissioner (or a Judicial Commissioner acting on their behalf).



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The documents accompanying the draft order state that this urgent procedure has been added at the request of the UK Intelligence Community and the Investigatory Powers Commissioner's Office in the interests of 'consistency' with other provisions of the Investigatory Powers Act 2016. However, no analysis has been provided in those documents explaining how the procedure is compatible with the UK's obligations under Article 10 ECHR. Moreover, no explanation has been given regarding how the new urgent procedure can be reconciled with the unequivocal and un-caveated statement of the Grand Chamber at paragraph 448 of its judgment in the *Big Brother Watch* case:

“[B]efore the intelligence services use selectors or search terms known to be connected to a journalist, or which would make the selection of confidential journalistic material for examination highly probable, the selectors or search terms **must have been authorised by a judge or other independent and impartial decision-making body...**” [emphasis added]

I would be grateful for your department's analysis of:

1. The compatibility of the proposed urgent procedure with the UK's obligations under Article 10 ECHR; and
2. How the urgent procedure can be reconciled with the Grand Chamber's judgment in the *Big Brother Watch* case, in particular paragraph 448.

Review of material selected for examination and retained since the Grand Chamber's judgment in May 2021

In our report, the JCHR recommended that the Home Office and the security agencies engage with the Investigatory Powers Commissioner so a review can take place of any journalistic material which has been retained and remains retained before the remedial order is made to ensure that it meets the public interest requirements identified by the Grand Chamber for compatibility with Article 10 ECHR.

The Home Office has declined to follow this recommendation. By way of reasoning, the Home Office response states that the current version of section 154 of the Investigatory Powers Act 2016, coupled with paragraph 9.89 of the Interception of Communications Code of Practice, already ensure compliance with the requirements of Article 10 ECHR for a decision to retain journalistic material. The thrust of the Home Office's response therefore appears to be that the procedure followed by the Judicial Commissioners under the unamended Investigatory Powers Act 2016 and the Interception of Communications Code since May 2021 were sufficient to ensure any journalistic material was retained in a manner compatible with Article 10.



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The Committee would welcome clarification of this argument. If the current regime under the unamended Investigatory Powers Act 2016 is already compatible with Article 10 ECHR, the Home Office would not be introducing the current remedial order to correct the legislative framework to ensure that the process of authorising the retention of journalistic material is compatible with Article 10 ECHR or the requirements identified by the Grand Chamber in the *Big Brother Watch* case.

I would be grateful if you could clarify:

3. Whether the Home Office's position is that all decisions to retain journalistic material since the May 2021 judgment have been compatible with Article 10 and the requirements identified by the Grand Chamber in the *Big Brother Watch* case, particularly as regards the obligation for an independent authority to order destruction of the material unless the public interest test is met; and, if so,
4. Why the Home Office is proposing to use the remedial order to amend the provisions of the 2016 Act as regards the decision to retain journalistic material.

Investigatory Powers (Amendment) Bill

As you are aware, an Investigatory Powers (Amendment) Bill was announced in the King's Speech on 8 November 2023 and introduced in the House of Lords on the same day. The background briefing documents published by the Government alongside the King's Speech explain that one of the principal purposes of the Bill will be to "strengthen independent judicial oversight" of the intelligence services' powers.

The Human Rights Act 1998 makes clear that the power to make remedial orders can only be used where there are "compelling reasons" for doing so. The power is not to be used as a matter of convenience when other, standard legislative vehicles are available.

It seems likely that the Government would have been contemplating the Investigatory Powers (Amendment) Bill for some time preceding the King's Speech. I would therefore be grateful if you could confirm:

5. Whether the contents of the draft Investigatory Powers 2016 (Remedial) Order 2023 would be in scope of the Investigatory Powers (Amendment) Bill; and, if so,
6. Why the decision was taken not to use this Bill as the legislative vehicle for making the changes proposed by the draft Investigatory Powers 2016 (Remedial) Order 2023.

Given the strict statutory deadline for the Committee to report to Parliament on the draft order, I would be grateful for a response by Thursday 30 November 2023.

Yours sincerely,

Joanna Cherry KC MP

On behalf of Harriet Harman, Chair, Joint Committee on Human Rights