

Mandates of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; the Special Rapporteur on the rights to freedom of peaceful assembly and of association; and the Special Rapporteur on the situation of human rights defenders

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Excellency,

We have the honour to address you in our capacities as Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; Special Rapporteur on the rights to freedom of peaceful assembly and of association; and Special Rapporteur on the situation of human rights defenders pursuant to Human Rights Council resolutions 25/2, 24/5, and 25/18.

In this connection, we would like to bring to the attention of your Excellency's Government information we have received **concerning provisions of the draft "Investigatory Powers Bill", which raise concerns about potential interference with the exercise of the right to freedom of opinion and expression, both within and outside the United Kingdom.**

We welcome your Government's efforts to initiate a review process aiming towards the adoption of legislation in relation to balancing the right to freedom of expression on the Internet, on the one hand, and the need to protect national security and prevent serious and organised crime, on the other. We share the position, outlined in the statement of 4 November 2015, taken by the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, who welcomed the public and legislative scrutiny to which the draft Investigatory Powers Bill is being subject.

In this communication, we would like to bring a number of specific provisions of the draft Investigatory Powers Bill to the attention of your Excellency's Government that are of particular concern. On 21 December 2015, some of the Special Rapporteurs will make a formal submission directly to the Joint Committee on the Draft Investigatory Powers Bill through the established procedure in response to the call for written evidence.

According to the information received:

On 4 November 2015, the Home Secretary, Ms. Theresa May, introduced the draft Investigatory Powers Bill (the "draft Bill" from herein) in Parliament, which aims

to protect privacy and security by improving transparency and changing the way investigatory powers are authorised and overseen.

The draft Bill is currently subject to pre-legislative scrutiny by the Joint Committee on the Draft Investigatory Powers Bill, which is expected to present its report by 11 February 2016.

Clause 61 on the authorisation required to identify or confirm journalistic sources

Clause 61(1) requires public authorities to obtain authorisation from a Judicial Commissioner in order to execute a warrant for collecting communications data for “identifying or confirming a source of journalistic information”. Such authorisation must be obtained from a Judicial Commissioner after the warrant has been approved by a “designated senior official of a relevant public authority.”

Under Clause 61(7), a “source of journalistic information” is defined as to “an individual who provides material intending the recipient to use it for the purposes of journalism or knowing that it is likely to be so used.” Serious concern is expressed about the definition of “a source of journalistic information”, which does not clarify whether these warrants could encompass information provided by non-traditional news sources, such as civil society organisations, academic researchers, human rights defenders, citizen journalists and bloggers. Such provisions may stifle fundamental freedoms and have a chilling effect on the exercise of the right to freedom of expression and to freedom of association in the country.

The Judicial Commissioner may authorise the warrant as long as it is “necessary and proportionate to obtain the data” for one or more of the purposes specified under clause 46(7), including “national security,” “public safety,” “preventing disorder,” assessing and collecting taxes, and “for the purposes of exercising functions relating to ... financial stability.” We express particular concern about the purposes for which such a warrant may be executed, as they are vague and seem not to be tethered to specific offences. Consequently, the Judicial Commissioner may enjoy the authority to approve surveillance for taxes and financial matters, beyond the narrow range of circumstances where it would be necessary and proportionate to achieve one or more of the legitimate objectives of protecting the rights or reputations of others, national security, public order, or public health and morals, as provided under article 19(3) of the International Covenant on Civil and Political Rights (ICCPR).

Furthermore, the authorities are not required to give notice of such requests or authorisation to the subjects of such warrants or their legal representatives. We are concerned that this would deprive individuals and associations of their ability to challenge suspect or illegal surveillance, even after the warrant for such surveillance has been executed and the investigation closed. This would violate their right to an effective remedy.

Moreover, the draft Bill exempts the intelligence services from seeking approval for obtaining journalistic information. We are seriously concerned about the exemption of the intelligence services, which would appear to allow the Government to obtain such data for intelligence purposes without any independent oversight.

Clauses 71 to 73 on powers to require telecommunications operators to retain certain communications data

Clause 71 permits the Secretary of State to issue notice requiring telecommunications operators to retain “relevant communications data” for a maximum of 12 months. Under Clause 71(9), such communications data include information identifying the sender, recipient, time and duration of the communication and Internet protocol addresses.

The Secretary of State may issue such notices as long as he or she deem retention “necessary and proportionate” for the range of purposes, including “national security”, “public safety”, “preventing disorder”, “assessing and collecting taxes” and for “exercising functions relating to... financial stability”. We are concerned about the purposes for which retention notices may be issued, which are vague and could permit the Secretary of State to require third-party data retention that is excessive and disproportionate with regard to the right to freedom of expression.

Clause 73 permits operators to refer notices issued to them back to the Secretary of State. Before deciding the review, the Secretary of State must consult the Technical Advisory Board (which must “consider the technical requirements and the financial consequences” for the affected operator), and the Commissioner (who must consider whether the notice is “proportionate”). Under clause 73(10), the Secretary of State may decide the review “after considering the conclusions of the Board and the Commissioner.” We have concern about the review process of data retention notices, which seemingly does not provide meaningful independent oversight. While the Secretary of State has a duty to consult the Board and the Commissioner, their conclusions are not binding and the Secretary of State retains unilateral authority to vary, revoke or confirm the terms and conditions of the notice, which may infringe the right to freedom of expression and privacy.

Clause 77(2) states that a “telecommunications operator, or any person employed for the purposes of the business of a telecommunications operator, must not disclose the existence and contents of a retention notice to any other person.” We express additional concern regarding the prohibition on telecommunications operators to disclose data retention notices, which may deprive affected customers of their right to challenge the retention of their data, even after such notice has expired and the investigation concerning such data has been closed, and would conflict with the rights of customers to an effective remedy for violations of their fundamental rights of which they may not be aware.

Moreover, it is unclear whether the prohibition in clause 77(2) extends to the disclosure of statistics concerning such notices, including the number and type of notices operators receive, the number or percentage that they send back for review, and the number or percentage that are modified, varied or revoked.

Clauses 106, 107, 109 and 112 on Bulk interception warrants; power to issue bulk interception warrants; approval of warrants by Judicial Commissioners; duration of warrants

Under clause 106, intelligence services may apply for a warrant to, *inter alia*, intercept communications and related communications data in bulk “in the course of their transmission by means of a telecommunication system.”

The “main purpose” of the warrant must be to intercept communications or communications data that are sent to or received by individuals “outside the British Islands”. Additionally, under clause 107, the warrant must be “necessary” to serve at least one of three purposes: the “interests of national security”; the interests of national security and “for the purposes of preventing or detecting serious crime”; or the “interests of the economic well-being of the United Kingdom so far as those interests are also relevant to the interests of national security” and provided that the information sought to be obtained relates to “the acts or intentions of persons outside the British Islands”. We express serious concern about the scope of national security purposes that would justify bulk interception, which are vague and not tied to specified offences, as well as other open-ended justifications for bulk interception like the interests of “economic well-being,” heightening the risk of disproportionate interception.

Under clause 107 and 109, such warrants must be issued by the Secretary of State and approved by a Judicial Commissioner respectively. The Secretary of State must assess under clause 107(1), and the Judicial Commissioner must review under clause 109(1), among other matters, whether the warrant is necessary for one or more of the purposes described above, and “proportionate to what is sought to be achieved” by the conduct authorised in the warrant. In the event that the Judicial Commissioner refuses to approve a warrant, the Secretary may petition the Investigatory Powers Commissioner to overturn that decision under clause 109(4).

Under clause 112(1), a bulk interception warrant is valid for a maximum of six months. However, at any time before or once the warrant expires, the Secretary may renew it subject to the procedures described above. Further concern is expressed regarding the power to renew bulk interception warrants indefinitely, which is not a meaningful limit on the duration of these activities, a critical safeguard against undue interferences with the rights to freedom of expression and privacy.

Clauses 189 to 191 on Powers to require the “removal of electronic protection applied by a relevant operator to any communications or data”

Under clause 189(4)(c), the Secretary of State may make regulations imposing obligations on telecommunications operators “relating to the removal of electronic protection applied by a relevant operator to any communications or data.” Clause 189(6) authorises the Secretary to issue a technical capability notice requiring an operator to “take all the steps specified in the notice for the purpose of complying with those obligations.” For operators outside the United Kingdom, such notice may require “things to be done, or not to be done, outside the United Kingdom.” The power to remove electronic protections is of serious concern, in light of the Secretary of State’s power to establish regulations that interfere with the ability of telecommunications operators to protect their users’ communications through end-to-end encryption. In particular, we express concern regarding the broad discretion to regulate, which could authorise blanket restrictions on encryption that affect massive numbers of persons, which would most likely result in a breach of the requirements of necessity and proportionality.

Clause 190(3) and 191 establish criteria for issuing and challenging technical capability notices that are materially similar to those for data retention notices described above. Further, Clause 190(8) prohibits the subject of technical capability notices from disclosing the “existence and contents of the notice to any other person”.

Clauses 167 to 168 on the appointment of Judicial Commissioners

Under clause 167, the Prime Minister appoints Judicial Commissioners, in consultation with various ministers specified and the Investigatory Powers Commissioner (the head of the Judicial Commissioners). Judicial Commissioners are also required to hold or have held a high judicial office. Each Judicial Commissioner is appointed for a term of three years under clause 168. At the end of each three-year term, the Prime Minister may reappoint a Judicial Commissioner for another term. This power is vested exclusively in the Prime Minister, without input (consultative or otherwise) from the Parliament, judiciary, or any other independent body in the vetting or approving candidates. We have serious concern about this power, which compromises the independence and impartiality of the Judicial Commissioners, who oversee the surveillance procedures outlined in the draft Bill.

We appreciate the importance of the draft Investigatory Powers Bill aiming to place certain investigatory powers under the sanction of a clear and consistent legal regime governed by the rule of law. Nonetheless, under the mandates provided to us by the Human Rights Council, we wish to express concern that the above-mentioned provisions of the draft Investigatory Powers Bill, in its current form, contain insufficient procedures without adequate oversight and overly broad definitions that may unduly interfere, both inside and outside of the United Kingdom, with the rights to privacy,

freedom of opinion and expression and freedom of association as provided under articles 19 and 22 of the International Covenant on Civil and Political Rights (ICCPR), ratified by the United Kingdom on 20 May 1976. At the Annex we provide brief identification of relevant provisions under the Covenant and applicable international standards.

We also wish to note concern is expressed regarding the review process of the draft Bill, which many stakeholders in civil society, the private sector, the technical community and others believe provides with insufficient time to contribute meaningful input on such a comprehensive, lengthy and controversial draft Bill.

In connection to the above alleged facts and concerns, please refer to the **Reference to international law Annex** attached to this letter which cites international human rights instruments and standards relevant to these allegations.

In view of our comments, we would like to call on your Excellency's Government to take all steps necessary to conduct a comprehensive review of the draft Investigative Powers Bill to ensure its compliance with international human rights law standards. We would also be pleased to discuss the draft Bill in the context of the concerns raised in this communication with representatives of your Excellency's Government.

As it is our responsibility, under the mandates provided to us by the Human Rights Council, to seek to clarify all cases brought to our attention, we would be grateful for your observations on the following matters:

1. Please provide any additional information and any comments you may have on the above-mentioned concerns.
2. Please provide detailed information about how the purpose of warrants for journalists' communications data, data retention notices, warrants for bulk interception, and technical capability notices specified in clauses 46(7), 106, 107, 189 and 191 of the draft Bill, meet the requirements of international norms and standards, including the International Covenant on Civil and Political Rights.
3. Please provide detailed information how the right to appeal and the right to an effective remedy are promoted and protected in relation to the lack of disclosure of warrants for journalists' communications data, data retention notices, warrants for bulk interception, and technical capability notices as contained in the draft Bill and how the draft Bill complies with international norms and standards.
4. Please provide information about how warrants for journalists' communications data, data retention notices, warrants for bulk interception, and technical capability notices as contained in the draft Bill, have the requisite independent judicial oversight to meet with international norms and standards.
5. Please elaborate in detail on the definition of a "source of journalistic information" in the draft Bill, including whether warrants for journalists' communications

data could encompass information provided to non-traditional news media, such as civil society organisations, academic researchers, citizen journalists and bloggers.

We would appreciate receiving a response within 60 days. Your Excellency's Government's response will be made available in a report to be presented to the Human Rights Council for its consideration.

Some of the Special Rapporteurs shall submit the concerns above directly to the Joint Committee on the Draft Investigatory Powers Bill in response to the call for written evidence. The submission will indicate that we have been in contact with your Excellency's Government.

Please accept, Excellency, the assurances of our highest consideration.

David Kaye
Special Rapporteur on the promotion and protection of the right to freedom of opinion
and expression

Maina Kiai
Special Rapporteur on the rights to freedom of peaceful assembly and of association

Michel Forst
Special Rapporteur on the situation of human rights defenders

Annex

Reference to international human rights law

In connection with the above alleged facts and concerns, we would like to refer your Excellency's Government to the right to freedom of opinion and expression as set forth in article 19 of the International Covenant on Civil and Political Rights (ICCPR), ratified by the United Kingdom on the 20 May 1976, which guarantees the right to freedom of opinion and expression. The freedom of opinion is absolute, and no interference, limitation or restriction is allowed. Any restriction on the right to freedom of expression, including restrictions that strongly implicate expression, must be consistent with article 19(3) of the ICCPR, and thus be provided by law, be necessary in a democratic society and serve a legitimate government interest, namely for respect of the rights or reputations of others; for the protection of national security or of public order; or of public health or morals.

We would also like to remind your Excellency's Government of Article 17(1) of the ICCPR, which provides for the rights of individuals to be protected, inter alia, against arbitrary or unlawful interference with their privacy and correspondence and provides that everyone has the right to the protection of the law against such interference. In this connection, we would like to emphasize the connection between articles 17 and 19 of the ICCPR, recalling that the right to privacy is often understood as an essential requirement for the realization of the right to freedom of expression, as analyzed by the Special Rapporteur on freedom of expression in his report the implications of States' surveillance of communications on the exercise of the human rights to privacy and to freedom of opinion and expression (A/HRC/23/40).

We would also like to remind your Excellency's Government of the right to freedom of association as contained in Article 22 of the ICCPR.

We would also like to refer your Excellency's Government to Article 2(3) of the ICCPR, which provides for the right to an effective remedy for violations of fundamental rights.

In paragraph 35 of General Comment No. 34, the Human Rights Committee stated that when a "State party invokes a legitimate ground for restriction of freedom of expression, it must demonstrate in specific and individualized fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat."

To satisfy the requirements set out above by the Human Rights Committee, the Special Rapporteur on freedom of opinion and expression has stated that "[l]egislation must stipulate that State surveillance of communications must only occur under the most exceptional circumstances and exclusively under the supervision of an independent judicial authority. Safeguards must be articulated in law relating to the nature, scope and duration of the possible measures, the grounds required for ordering them, the authorities

competent to authorize, carry out and supervise them, and the kind of remedy provided by the national law” (see A/HRC/23/40, para. 81).

We would also like to refer your Excellency’s Government to the report of the High Commissioner for Human Rights, which states that “any limitation to privacy rights reflected in article 17 must be provided for by law, and the law must be sufficiently accessible, clear and precise so that an individual may look to the law and ascertain who is authorized to conduct data surveillance and under what circumstances. The limitation must be necessary for reaching a legitimate aim, as well as in proportion to the aim and the least intrusive option available” (see A/HRC/27/37, para. 23).

In the report of the Special Rapporteur on the right to freedom of opinion and expression, it states that in addition to the normal rules that apply to surveillance, “a higher burden should be imposed in the context of journalists and others gathering and disseminating information” and in particular measures to “circumvent the confidentiality of sources of journalists, such as secret surveillance or metadata analysis, must be authorized by judicial authorities according to clear and narrow legal rules” (see A/70/361, paras. 24 and 62 respectively).

We would also like to remind your Excellency’s Government that States are bound by the same duties and obligations under Articles 19(3) and 17(1) when they require or request corporate actors (both domestically and abroad) to participate in or cooperate with their surveillance activities (see A/HRC/23/40, para. 51).

In the context of mandatory third party data retention, the Special Rapporteur on freedom of expression has stated that “[t]he provision of communications data by the private sector to States should be sufficiently regulated to ensure that individuals’ human rights are prioritized at all times. Access to communications data held by domestic corporate actors should only be sought in circumstances where other available less invasive techniques have been exhausted” (A/HRC/23/40, para. 85).

Further, the Special Rapporteur on freedom of expression has found that “States should enable service providers to publish the procedures they apply when dealing with State communications surveillance, adhere to those procedures, and publish records of State communications surveillance” to ensure accountability and transparency (see A/HRC/23/40, para. 92).

In the Report of the High Commissioner for Human Rights, it provides that bulk surveillance may “be arbitrary, even if they serve a legitimate aim and have been adopted on the basis of an accessible legal regime. In other words, it will not be enough that the measures are targeted to find certain needles in a haystack; the proper measure is the impact of the measures on the haystack, relative to the harm threatened” and at the very least, the onus is on the State to demonstrate that its mass surveillance activities are “neither arbitrary nor unlawful” (A/HRC/27/37, paras. 24 and 20 respectively).

In the reports of the Special Rapporteur on freedom of expression and the High Commissioner for Human Rights, meaningful limits on the duration of bulk interception activities are a critical safeguard against undue interferences with the right to freedom of expression and privacy (see A/HRC/23/40, para. 81; A/HRC/27/37, para. 28).

The former Special Rapporteur has recommended that the surveillance of communications content “must only occur under the most exceptional circumstances and exclusively under the supervision of an independent judicial authority” (see A/HRC/23/40, para. 81), and the surveillance of communications data, “should be monitored by an independent authority, such as a court or an oversight mechanism” (see A/HRC/23/40, para. 86).

We would like to refer to Human Rights Council resolution 24/5 (operative paragraph 2) in which the Council “reminds States of their obligation to respect and fully protect the rights of all individuals to assemble peacefully and associate freely, online as well as offline, including in the context of elections, and including persons espousing minority or dissenting views or beliefs, human rights defenders, trade unionists and others, including migrants, seeking to exercise or to promote these rights, and to take all necessary measures to ensure that any restrictions on the free exercise of the rights to freedom of peaceful assembly and of association are in accordance with their obligations under international human rights law.”

Finally, we would like to refer your Excellency's Government to the fundamental principles set forth in the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, also known as the UN Declaration on Human Rights Defenders. In particular, we would like to refer to articles 1 and 2 of the Declaration which state that everyone has the right to promote and to strive for the protection and realization of human rights and fundamental freedoms at the national and international levels and that each State has a prime responsibility and duty to protect, promote and implement all human rights and fundamental freedoms.

In that context, we bring to the attention of your Excellency's Government the following provisions of the UN Declaration on Human Rights Defenders:

- article 5 (a) and (b), which provide for the right to meet or assemble peacefully and the right to form, join and participate in non-governmental organizations, associations or groups;
- article 5 (c), which provides for the right to communicate with non-governmental or intergovernmental organizations;
- article 6 point a), which provides for the right to know, seek, obtain, receive and hold information about all human rights and fundamental freedoms; and
- article 6 points b) and c), which provides for the right to freely publish, impart or disseminate information and knowledge on all human rights and fundamental

freedoms, and to study, discuss and hold opinions on the observance of these rights.

We would also like to refer to Human Rights Council resolution 22/6, which urges States to ensure that legislation designed to guarantee public safety and public order contains clearly defined provisions consistent with international human rights law and that it is not used to impede or restrict the exercise of any human right (OP 4), and which also calls on States to ensure that measures to combat terrorism and preserve national security are in compliance with their obligations under international law and do not hinder the work and safety of individuals, groups and organs of society engaged in promoting and defending human rights (OP 10).