

Mass Surveillance and Britain's Legal "Dark Web": "The Pick 'n' Mix Law"

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[The International Working Group on Video Surveillance (IWGVS) published an open letter to the Mayor of London Sadiq Kahn on 27th January 2017 [0], asking him to reverse a decision of his predecessor Boris Johnson.

This article lays out the back story to that letter.]

On 27th January 2015, then Mayor of London signed an order increasing the data collection capability of the Metropolitan Police Service's (MPS) number plate camera network by 300%. He achieved this without adding any cameras.

The story of how Johnson was able to sign away the liberties of millions of drivers in London illustrates the rise of a new administrative despotism, and a contempt for individual freedoms and values once cherished.



For the beginnings of this current wave of administrative despotism please bear with me for a few short paragraphs as we travel back to the latter part of the nineteenth century.

It was then that government began to increase its areas of concern, shifting from a non-interventionist attitude regarding many domestic affairs to the current position where there are few areas of public and even personal life in which they have no concern at all [1].

Whilst enjoying the increased reach of government, those in power still felt hampered by the normal legislative process and so looked for sneaky ways to circumvent it.

In 1896, John Theodore Dodd, a councillor and Poor Law guardian, wrote about the "almost insuperable" task of obtaining an Act of Parliament for the Poor Law reforms he wanted. He saw that reform by administrative processes was much swifter and was protected from the views of those who didn't agree, whom he dubbed "the obstructive minority" [2].



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Administrative Lawlessness

In 1929, further to inspiring a parliamentary committee to investigate Ministers' Powers, then Lord Chief Justice, Lord Hewart coined the phrase "Administrative Lawlessness" to describe a worrying trend in English politics - the exercise of arbitrary power, where decisions are made in the shadows, not based on evidence and without proper scrutiny. Hewart wrote [3]:

"Arbitrary power is certain in the long run to become despotism, and there is danger, if the so-called method of administrative "law", which is essentially lawlessness, is greatly extended, of the loss of those hardly won liberties which it has taken centuries to establish."

In 2017 Hewart's language may seem antiquated but in our not so distant past words like "liberty", "constitution" and "freedoms" were in common usage. Liberty was at the heart of the constitution, that is to say that the importance of liberty to the way of life in England

went before the laws and the laws were built upon that foundation.

Now the constitution is considered merely a dry academic topic and the spirit of liberty is all but forgotten. Amidst this historic amnesia the surveillance state is able to flourish and a renewed assault on administrative processes is going unnoticed.

Johnson's part-work manifesto

Back to the Mayor's story. In 2012, Johnson published a multi-volume part-work manifesto. Issued over several weeks this collection contained gripping editions such as 'Investing in Transport', 'Value from the Olympics' and many more. Hidden deep within the one on crime [4], Johnson stated he would ensure that Automatic Number Plate Recognition (ANPR) cameras would be used across London to "help identify and track down the vehicles of criminals". This, he said, he would do by getting the police and Transport for London (TfL) to share their high tech tracking toys, seeing as TfL already had a load of congestion charge and low-emission zone cameras which were practically standing idle whilst criminals drove around the capital with impunity - or words to that effect.

The problem with part-works, as we all know, is that after the first edition with the free gift on the front it's difficult to keep up the enthusiasm and in the case of Johnson's manifesto there wasn't even a free gift. So alas not much attention was paid to the prose style of the ANPR section on page 14 of the crime edition, nor for that matter what it actually meant for the freedoms of the people of London.

When Johnson was re-elected in May 2012 he did get a free gift, the job of Police and Crime Commissioner for London which now comes as an added extra to the mayoral job. Johnson palmed the job off immediately (via delegation of powers) to his deputy, Stephen Greenhalgh.

In the months after Johnson's re-election it seemed that the TfL/MPS camera sharing idea had been forgotten. But deep within London's back offices administrators, police and transporty people were punching keys on their keyboards, sending emails, having meetings in rooms and generally getting things done, in private, away from the harsh glare of the public eye.

In August 2013, Greenhalgh signed an order [5] requesting a quarter of a million pounds to conduct a "consultation" exercise (and to assess the signage required to facilitate ANPR camera sharing between TfL and MPS - not to pre-empt the consultation's outcome or anything).

Poll, Poll

Greenhalgh's "consultation" was launched in February 2014 on the 'Talk London' website [6], which allowed registered users to take part in an exhaustive four question survey containing gems like:

"TfL have around 1400 cameras on major roads in London, collecting vehicle number plate data which is currently used to enforce congestion and low emission zone charges.[...] Do you think the police should or should not have access to data collected by these cameras to help them tackle crime?"

You might notice the question doesn't state that most of the data collected will be of vehicles in no way whatsoever connected with crime, as the police use ANPR cameras to capture the details of every passing car, storing this and journey details in a national database for at least two years [7]. But most people would know that, no? Well, doctoral research undertaken by the University of Huddersfield in collaboration with West Yorkshire Police [8] found that:

“although the majority of people indicate awareness of ANPR (i.e. 66%), they seem to have inadequate understanding of the aims and consequences of ANPR surveillance to make reasonable judgements about ANPR's effectiveness in tackling crime.”

The TfL/MPS camera sharing survey was completed by 2,315 people, almost 8 out of 10 of whom, we are told, agreed definitely or probably with the policy. That is to say 1,805.7 people. The population of London is over 8 million but there are, we are told, 1.3 million drivers who will be affected by the policy. So we're talking about approximately 0.15% of affected drivers who support the policy.

That might not look very impressive. But it doesn't include the 4,000 people who took part in further online surveys in February/March 2014, plus the consultation report also added some polling from 2013 (before the consultation) to help boost the number surveyed to a more respectable 8,315. Ultimately the best they can do is a total figure surveyed equivalent to 0.69% of the drivers affected by the policy - surely a quorum in anyone's book.

It certainly is in Johnson's book. In response to a Mayor's Question in 2015 [9] he said:

“In 2014, I carried out an extensive and wide-ranging public consultation with Londoners around my manifesto pledge to direct TfL to share access to ANPR cameras with the MPS for crime fighting.”

Interestingly, the polling company who analysed the survey data found that [10]:

“very few thought that the police didn't already have full or partial access to TfL's ANPR data (3% in September 2013 and 4% in February 2014).”

So to summarise, of the 0.001% of Londoners surveyed, almost 8 out of 10 people who mostly thought the police already had access to TfL's ANPR cameras were in favour of a policy that would allow their somewhat inaccurate view of reality to become more accurate. That's the headline figure for the consultation report, surely.

The mayoral decision

Following the consultation there was another long period of what looked like nothing happening until Johnson quietly signed the Mayoral Decision [11] enacting the ANPR sharing policy in January 2015.

This Johnson did using powers under section 30 of the Greater London Authority (GLA) Act 1999, which allows the Authority to “do anything which its considers will further any one of

its principal purposes". He picked the purpose "promoting social development in Greater London".

One can describe Johnson's decision as quasi-judicial (as defined by the 1929 committee referenced above) in that it had some of the attributes of a judicial decision, but not all, and it ended in an exercise of discretion (by Johnson).

In 1945 an Oxford academic pre-empted this part of my article when he wrote [12]:

"It may be asked why, if a quasi-judicial process ends only in an exercise of discretion, it is worth while insisting on the strict presentation of rival claims and the proper ascertainment of evidence! The answer is that a discretion which is demonstrably groundless, or exercised in ignorance or at random, is not, in the eyes of the law, discretion at all, but mere caprice."

The desire to present administrative decisions as more than "mere caprice" can be seen in the so-called "consultations" and the contrived justifications administrators use to explain their actions.

Disturbingly, the police now act as though they too are administrators - through their central role in decision making and the equally contrived justifications they give for their actions. Emails released under the Freedom of Information Act (FOI) reveal a veritable jamboree of such prestidigitatory justifications constructed by the police. These, along with other key documents [13] that help understand the policy, were not released until months after the consultation ended. And it required an anorak wearing FOI spotter to notice the releases and wade through the reams of redacted paperwork to reveal anything...

One such revelation was that Johnson wasn't in fact the author of the policy. An email from 2012 reveals that it had been "the subject of dialogue between TfL and the MPS at an operational level for a while" [14] and, reading between the lines in the released emails, it isn't hard to see that it wasn't TfL's idea either.

Another document shows that the police had wanted access to TfL's cameras for general policing purposes for some time, at least since 2007 when they had indicated they were waiting for a "change in the law" to occur [15]. This suggests that the police were waiting for an actual change in legislation - maybe they were hoping for the 'Police can now do whatever the hell they like Act 2008'. But by the time we get to Johnson's manifesto pledge the police have decided to opt for an administrative route that would avoid their reforms being spoilt by an "obstructive minority".

Rather intriguingly, almost three years before Johnson's camera sharing policy, the police were already using TfL camera data for "general policing" purposes [16]. This despite the only permission they had being very limited (and already controversial) access to the data for "national security" purposes alone [17]. The justification they gave for this apparent misdemeanour was [18]:

"The MPS receive a copy of the Transport for London (TfL) data under Section 28 of the Data protection Act 1998 for use with National Security. Then, being in lawful possession of the data, the MPS rely on Section 29 of the DPA to enable us to use it for 'Crime' matters."

In other words, having obtained the data “lawfully”, the police claimed they could then do whatever they liked with it.

A similar display of prestidigitatory justification is evidenced in the 2015 documents published alongside the mayoral decision. According to Assistant Commissioner Dick [19]:

“The Met has examined the benefits of having access to TfL ANPR camera data and concluded that this proposal meets the requirements of a pressing social need that includes national security, public safety, the economic well-being of the country, the prevention of disorder or crime, the protection of health and morals, or the protection of the rights and freedoms of others. Having access to this data will help to solve crime and have a positive impact on Londoners’ quality of life.”

Here they decided to draw on European Court of Human Rights jurisprudence [20], copied out wholesale the qualifications in article 8 of the European Convention on Human Rights (ECHR), before adding an unsubstantiated claim to bolster the principal purpose of the GLA Act used by Johnson to enact the policy.

What is even more galling is the almost exclusive focus by police and administrators on transplanted legal principles [21] and recent legislation deriving from the ECHR, as though no other body of law exists and there were no history of liberties and freedoms to draw upon.

A recent paper on the impact of the Human Rights Act (HRA) on policing [22] found that:

“far from constraining police work, the HRA is regarded as a development that enables and facilitates policing, allowing officers to justify their decision making and, in doing so, providing them with a safety net in the event that they are asked to account for their actions.”

Pick’n’Mix Law

The HRA forms just part of the administrative armoury used to contrive justifications and legislative labyrinths, which might better be described as ‘Pick’n’Mix Law’ (or what the IWGVS termed a legal “dark web” [0]). This is a way of using a pick and mix of statutes, statutory frameworks, powers, duties and quasi-legal constructs that are devoid of any moral code or tradition. Pick’n’Mix Law is used to create legal narratives that follow the letter of the law but ignore issues of right and wrong, allowing decision-makers to hide behind a vacuous proposition that if a policy can be shoe-horned into a state of alleged compliance with legislation then it must be good.

So now we can see that a multi-volume part work facilitated the manufacture of consent; that Pick’n’Mix Law was used to create what looks to the untrained eye like legal narratives; that a system of cameras introduced to reduce congestion was turned into a mass surveillance tool without any evidence that such a perversion of traffic cameras would “make London safer” or promote “social development”. And the majority of the public will remain satisfied that it’s all done in accordance with codes of practice and is standards compliant.

Or in the words of Neil Postman [23]:

“The bureaucrat considers the implications of a decision only to the extent that the decision will affect the efficient operations of the bureaucracy, and takes no responsibility for its human consequences.”

Endnotes:

- [0] Open Letter to Sadiq Kahn from International Working Group on Video Surveillance (IWGVS), Jan 2017 <http://iwgvs.org/open-letter-to-london-mayor-jan-2017/>
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- [3] ‘The New Despotism’, Lord Hewart, 1929, page 52, <https://archive.org/details/LordHewart-TheNewDespotism1929>
- [4] ‘Fighting Crime in London, Boris Johnson’s Crime Manifesto, 2012, <http://www.london.gov.uk/sites/default/files/Boris-Johnson-2012-Crime-Manifesto.pdf>
- [5] ‘DMPCD 2013 110 Automatic Number Plate Recognition’, <https://web.archive.org/web/20150912174232/http://www.london.gov.uk/sites/default/files/DMPCD%202013%20110%20Automatic%20Number%20Plate%20Recognition%20Part%201.pdf>
- [6] <https://web.archive.org/web/20140308200350/http://www.london.gov.uk/priorities/policingcrime/consultations/cutting-crime-with-road-cameras>
- [7] ‘What’s wrong with ANPR?’, No CCTV 2013, http://www.no-cctv.org.uk/whats_wrong_with_anpr.asp
- [8] Haines, Alina (2009) ‘The role of automatic number plate recognition surveillance within policing and public reassurance. Doctoral thesis, University of Huddersfield, p218, <http://eprints.hud.ac.uk/8760/>
- [9] Mayor’s Question Time, 15/7/15, Jenny Jones, ‘MPS – ANPR’, http://questions.london.gov.uk/QuestionSearch/searchclient/questions/question_282836
- [10] Consultation Report, published 2015, https://www.london.gov.uk/sites/default/files/gla_migrate_files_destination/Appendix%20A%20%20Automatic%20Number%20Plate%20Recognition%20consultation%20report.pdf
- [11] ‘MD1439 Delegation to Transport for London (TfL) to grant the Metropolitan Police Service (MPS) direct access to Automatic Number Plate Recognition (ANPR) data’, <https://www.london.gov.uk/decisions/md1439-delegation-transport-london-tfl-grant-metropolitan-police-service-mps-direct-access>
- [12] p72, ‘Law and Orders. An Inquiry into the nature and scope of Delegated Legislation and Executive Powers in England’, C. K. Allen, Stevens and Sons Ltd, 1945
- [13] IWGVS Evidence Pack 01 http://iwgvs.org/press/IWVVS_Evidence_pack_ANPR_CAMERA_SHARING-01.pdf
- James Bridle’s Freedom of Information Requests, https://www.whatdotheyknow.com/user/james_bridle?user_query=anpr
- [14] p119, IG Emails 2014 05 20 REDACTED.PDF, FOI, Transport for London, released June 2014, part of FOI ‘General Policing use of ANPR data from CCZ/LEZ’, IWGVS Evidence Pack 02 http://iwgvs.org/press/IWVVS_Evidence_pack_ANPR_CAMERA_SHARING-02.pdf
- [15] p4, ‘Briefing Note for the Information Commissioner’, released December 2013, part of FOI ‘Congestion Charge ANPR Certificate of Access’ <https://www.whatdotheyknow.com/request/175160/response/462279/attach/12/Briefing%20Note%20for%20the%20Information%20Commissioner.pdf.pdf>
- [16] p4, ‘Redacted Fifth Annual ICO report.pdf.pdf.tif.pdf’, released December 2013, FOI ‘Congestion Charge ANPR Certificate of

Access' <https://www.whatdotheyknow.com/request/175160/response/462279/attach/5/Redacted%20ifth%20Annual%20ICO%20report.pdf.pdf.tif.pdf>

[17] 2007, 'Document setting out the reasons for granting a Certificate under section 28 of Data Protection

Act' <http://webarchive.nationalarchives.gov.uk/20130128103514/http://www.homeoffice.gov.uk/about-us/freedomof-information/released-information/foi-archive-crime/7393-DPA-real-time-cameras/7393-Certificate?view=Binary>

[18] FOIA Complaints Decision email to journalist James Bridle from Met Police, 26th June 2014

[19] 2014 'Letter of response from AC Cressida Dick', MPS, published

2015 https://www.london.gov.uk/sites/default/files/gla_migrate_files_destination/Appendix%20C%20-%20Letter%20of%20Response%20from%20Cressida%20Dick.pdf

[20] Handyside v. United Kingdom 1976, <http://hudoc.echr.coe.int/eng?i=001-57499>

[21] Margit Cohn, 'Legal Transplant Chronicles: The Evolution of Unreasonableness and Proportionality Review of the Administration in the United Kingdom' (May 3, 2010). American Journal of Comparative Law, Vol. 58, pp. 583-629, <http://ssrn.com/abstract=1619864>

[22] 'The Impact of the Human Rights Act 1998 on Policing in England and Wales', Karen Bullock and Paul Johnson <http://bjc.oxfordjournals.org/content/52/3/630.full>

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