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Mass Surveillance, Secrecy and "Intelligence Sharing": Prism and Upstream. The Illegality of UK-US "Bulk Collection"

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"The world owes Edward Snowden a great debt for blowing the whistle, and today's decision is a vindication of his actions." – Eric King, deputy director of Privacy International, Feb 6, 2014

It is a relationship seemingly beyond question – the sharing of intercepted data between the United Kingdom and the United States has been a norm etched in stone. Not that such bodies as the otherwise clandestine Investigatory Powers Tribunal would agree – at least entirely. The IPT found on Friday that regulations covering access by GCHQ of phone records and emails intercepted by its US counterpart, the National Security Agency, actually breached human rights.

For the first time since its establishment in 2000, the IPT has done something few human rights advocacy groups thought possible: go against the establishment, even if that resistance was, in the end, minor in effect. The wisdom of establishing such review bodies tends to involve more window dressing than substantive change, and for the most part, the IPT has not disappointed its masters. Its role is to justify, within law, what would otherwise be deemed unjustifiable.

When it came to various intelligence practices, the tribunal did not take issue with the legality of collection programs such as Prism and Upstream. These, they Tribunal has stated, were known. (That such knowledge was only occasioned by the Edward Snowden leaks is never once mentioned.)

In its December 5, 2014 order, the IPT declared (para 156) that, "Save in one possible (and to date hypothetical) respect… the current regime, both in relation to Prism and Upstream and to s. 8(4) [of the Regulation of Investigatory Powers Act 2000], when conducted in accordance with the requirements which we have considered, is lawful and human rights compliant."

The compliance hinged upon the warrant regime under RIPA, though the Tribunal did suggest that there would be instances (albeit none they had noted) when a request for communications might be made in the absence of such a warrant. It would then fall on the Secretary of State to decide that matter, noting, for instance the proportionality and necessity that the intelligence services obtain those communications.

The twist in the order made in *Liberty (The National Council of Civil Liberties) & Others v The Secretary of State for Foreign and Commonwealth Affairs (and others)*, was one of publicising safeguards associated with privacy in the intelligence sharing regime.[1] Eric

King, deputy director of Privacy international, had claimed that, “For far too long, intelligence agencies like GCHQ and NSA have acted like they are above the law” (*The Guardian*, Feb 6).

“In the absence of the Disclosures [of such safeguards],” as put forth by counsel for Liberty, “any such indications would have been insufficient and the intelligence sharing regime would not have been ‘in accordance with the law/prescribed by law.’” It was a view the IPT accepted.

In a lengthy sentence, but one relevant to the legality of the sharing regime prior to December 2014, the tribunal took note of how violations of the European Convention on Human Rights, notably Article 8 (privacy) and 10 (freedom of expression) would have taken place.

> “We would accordingly make a declaration that prior to the disclosures made and referred to in the Tribunal’s judgment of 5 December 2014, the regime governing the soliciting, retrieving, storing and transmitting by UK authorities of private communications of individuals located in the UK, which have been obtained by US authorities pursuant to Prism and/or (on the Claimant’s case) Upstream, contravened Articles 8 and 10 ECHR, but now complies.”

King saw the decision as confirming “what many have said all along – over the past decade, GCHQ and the NSA have engaged in an illegal mass surveillance sharing programme that has affected millions of people around the world.”

While Privacy International and its associates should be allowed their moment of grim satisfaction at scoring a fair share of points against the intelligence sharing giants, the reality of such collection continues. Her Majesty’s government, a fact acknowledged by King, effectively got out of gaol with a speedy effort at publicising arrangements previously kept secret – a mild, and in the end fairly ineffectual gesture.

The cosmetic spin provided by GCHQ was that the Tribunal, rather than actually ruling on any illegality, had merely affirmed the legality of bulk interception. “We are pleased,” claimed a spokesman, “that the court has once again rules that the UK’s bulk interception regime is fully lawful.” Its statement lauded “the processes and safeguards within the intelligence-sharing regime”. All that was required on their part was publicising safeguards. As for the issue of human rights violations prior to the December 5, 2014 ruling of the IPT, the agency remained steadfastly silent.

James Welch, the legal director of Liberty conceded that, “the intelligence services retain a largely unfettered power to rifle through millions of people’s private communications”. To that end, the Tribunal could not escape the vital sentiment of the intelligence community – one that treasures secrecy, even if the process of secrecy tears shreds in any legal regime. Only minor corrections, rather than major alterations, will be tolerated. Bulk sharing and the collection of private communications, in many cases without warrant, is here to stay.

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Notes

[1] http://www.theguardian.com/uk-news/2015/feb/06/liberty-vs-gchq-read-the-order-and--judgment-of-the-tribunal-pdf

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