INTELLIGENCE AND SECURITY IN THE 21ST CENTURY

UNDERSTANDING THE IMPORTANCE OF EXPERT AND INDEPENDENT INTELLIGENCE OVERSIGHT IN LIGHT OF RECENT TECHNOLOGICAL ADVANCES IN DATA COLLECTION: A CASE STUDY OF THE UNITED KINGDOM

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Abstract:
The Snowden revelations concerning the use of bulk surveillance have uncovered shortcomings in the existing intelligence oversight architectures in several leading democracies and confronted them with a variety of new challenges generated by rapid technological advances. The impact of the disclosures has also been reflected in scholarship, namely in the way intelligence oversight is being reconceptualized as a broader form of governance beyond legal compliance. This article examines the case of the UK and investigates instances when the two main oversight institutions, namely IPCO and the ISC, have been shaping the public debate through their published reports and their engagement with civil society actors. The paper argues that oversight institutions are better equipped for shaping the democratic debate on bulk surveillance than any other societal actors due to their configuration of institutional features and statutory power. Empowering existing or creating new independent oversight entities with access to classified information and reliant on technical expertise is the way forward for democratic governance of intelligence services.

Keywords: *intelligence oversight, bulk surveillance, Big Data, societal debate, democratic intelligence governance, United Kingdom.*

Introduction

Intelligence oversight institutions are key actors in shaping the societal framing and public understanding of intelligence collection

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technologies in liberal democracies. This is because the rationale of an intelligence oversight mechanism is to protect citizens against misuse of these technologies and to facilitate informed public debate on ensuing societal issues. Having said that, an issue which has yet to be adequately addressed is the increased reliance of intelligence services on Big Data and bulk data collection. While civil society, including the media, non-governmental organizations (NGOs), academia, and other watchdog bodies, such as whistleblowers, all contribute to and shape the public debate on bulk surveillance, these actors are limited in their understanding of the matter by their lack of access to classified information. Intelligence oversight institutions, on the other hand, are optimally placed to act as a liaison between the intelligence community and the community of citizens due to their access to classified information and direct working with intelligence agencies. This privileged position permits oversight institutions to initiate and play a key role in framing relevant public debates on important public issues, such as the use of large-scale surveillance technologies for national security. Given their independent status, oversight bodies are thus "ideally placed to provide credible and reliable information to educate the public about the activities and role of intelligence services" (Fundamental Rights Agency [FRA], 2017, p. 87). This article therefore argues that oversight institutions are better equipped than other stakeholders for shaping the current and future public debates on intelligence and security practices involving controversial technologies such as bulk collection and algorithmic surveillance. The high-level security clearance and reliance on experts on the one hand, and the ability to engage with civil society and citizens in an open manner on the other, are features that place certain oversight bodies in a pivotal position for shaping this societal debate.

The empirical focus of this research is the United Kingdom (UK). There are several reasons for this choice. One of these is that the UK has a long history of technological innovation in the field of signals intelligence and are currently wielding one of the most advanced and extensive SIGINT collection infrastructures in the world. Another important justification for this selection is the ongoing public debate about the use of bulk surveillance powers in the UK. A study from 2019

focusing on bulk interception regimes placed the UK alongside a few other democracies (Finland, Sweden, Norway, and the Netherlands) which have or are having consistent public debates on this issue (Kind, 2019). According to the same study, the United States (US), for example, still lacks a debate mainly due to the secrecy constraints advocated by the intelligence community on grounds of national security (Kind, 2019). Lastly, an important reason for choosing to focus on the UK was the availability of a considerable number of public documents, legislation, and official expert reviews offering detailed information about the operational and regulatory aspects of the current bulk collection regime, thus allowing this analysis.

The article takes a qualitative approach and will start with a literature review of theoretical approaches on how intelligence oversight can engage more with the public. Next, we will examine how this approach has been implemented in practice by focusing on the UK's main oversight bodies, the Investigatory Powers Commissioner's Office (IPCO) and the Intelligence and Security Committee of Parliament (ISC). Finally, we will analyse how the activities, discourse, and reports of these two oversight bodies have been reflected by civil society. In this way, we can get a sense of how the oversight has been shaping the public debate on bulk surveillance in the UK.

The elements of an intelligence oversight system

Intelligence oversight can be broadly interpreted as a function of controlling intelligence services both in democratic and non-democratic systems, albeit with different objectives. Intelligence oversight as a functional concept is an attribute of liberal democratic systems and formally emerged in the US in the 1970s as a result of the congressional investigations into the misconducts of the intelligence community. Used interchangeably with terms such as "accountability" and "review", intelligence oversight refers fundamentally to "mechanisms for scrutinizing the intelligence services, with the aim of ensuring their compliance with specific standards or guidelines, such as legal frameworks, executive directives, or international law" (Wegge, 2017,

p. 688)[1]. In a democracy, therefore, intelligence oversight must fulfil a twofold role. One the one hand, it must oversee the quality and efficiency of the intelligence product, and on the other hand, try to guarantee that intelligence activities are conducted legally and in accordance with citizens' rights and liberties. Hence, another defining feature of intelligence oversight is this duality, referred to by Clift (2007) as the "coin of intelligence accountability." Nevertheless, the side of the coin which is of interest for our current research is the one about the propriety of the intelligence services, namely their conduct and compliance with legal and ethical norms required in a democracy (Caparini & Born, 2007). These dimensions are especially important, if not necessary, in order to have an open and comprehensive public debate on a sensitive topic such as the use of bulk surveillance. In other words, the activities and policies of intelligence agencies must be reviewed in terms of legality, proportionality and effectiveness. In this way, intelligence oversight is a vital element for both democratic mechanisms and national security as "[g]etting it [intelligence oversight] right is hard and getting it wrong is dangerous", as Zegart (2011, p. 5) succinctly argues.

Main actors and scope of control

According to the *Report of the Special Rapporteur Martin Scheinin*, "intelligence services are overseen by a combination of internal, executive, parliamentary, judicial and specialised oversight institutions whose mandates and powers are based on publicly available law" (United Nations Human Rights Council [UNHRC], 2010, as cited in FRA, 2017, p. 63). In addition, there are actors performing watchdog functions in democratic states, such as media, national human rights institutions, civil society organisations, ombuds institutions and whistle-blowers (FRA 2017). In this way, intelligence oversight is usually a function shared between all three branches of state power – executive, judicial and legislative – of which parliamentary oversight has been the most

[1] It is important to note that, for the sake of clarity, we decided to use "oversight" as a general term with reference to all branches of power and institutions involved in the accountability of intelligence community, including internal compliance departments of intelligence agencies, external expert bodies and watchdogs.

analysed and discussed (Krieger, 2009). However, while most democracies have a hybrid oversight system (e.g. the UK, France, the Netherlands), in which the intelligence oversight function is shared between several branches of power, some countries assign the intelligence oversight function exclusively to a single branch of power: executive oversight (e.g. Malta), legislative oversight (e.g. Romania), and judicial oversight (e.g. Ireland).

Executive actors exerting control on intelligence agencies include cabinet ministers (usually foreign and interior ministers) and the head of government. In the UK, for example, the Secretary of State is supported by teams of policy officials who have full access to classified activities of the intelligence agencies. Executive control of intelligence agencies can be exerted in various manners: through appointments of the agencies' senior management, by setting up priorities, or authorising certain surveillance measures (FRA, 2017). Although in a strictly technical sense, internal control within the intelligence services and control by the executive do not qualify as components of an oversight mechanism, executive and internal actors play an important role in ensuring the accountability of intelligence activities.

Parliamentary or legislative oversight is perhaps the most widespread form of intelligence oversight, becoming a standard practice for democracies and thus carrying considerable symbolic weight. Parliaments usually oversee intelligence services via specialised or non-specialised parliamentary committees. As the legislative power, it is responsible for enacting intelligence legislation and approving intelligence agencies' budget. Additionally, parliamentary committees can play a key role in scrutinising intelligence operations and policies on the basis of their legality and compliance with fundamental rights.

Judges provide valuable independent oversight and judicial review is thus an essential component of an effective intelligence oversight system. More concretely, judicial participation in oversight of intelligence agencies is related to issuing of warrants and monitoring of surveillance measures (FRA, 2017). Judges are independent, sometimes specialised, and have the task of evaluating ex-ante requests from intelligence services for the use of surveillance. In some countries, such as Ireland, judges also do ex-post oversight. Their oversight role is

therefore focused on the aspects of legality and fundamental rights protection. As a report issued by the Venice Commission states, "the value of judicial control depends upon the expertise the judges in question have in assessing risks to national security and in balancing these risks against infringements in human rights" (2007, para. 206, as cited in FRA, 2017, p. 94).

Independent expert bodies are another valuable oversight actor, focusing primarily on aspects of legality and intelligence policies but also on fundamental rights protection. Their strong expertise and independent status are usually complemented by a high-level access to classified information. Prominent examples of independent expert bodies are, as mentioned, IPCO in the UK, Commissie van Toezicht op de Inlichtingen- en Veiligheidsdiensten (CTIVD) in the Netherlands, and Commission nationale de contrôle des techniques de renseignement (CNCTR) in France. Some of these independent expert bodies have developed strategies and procedures of engagement with the civil society organisations, as we will return to in a later section.

Finally, watchdogs, e.g., civil society organisations, media, academia, and whistle-blowers, have an important role in ensuring the effectiveness of oversight. Watchdogs focus on policy aspects of intelligence and the protection of human rights (FRA, 2017). As illustrated in Figure 1, oversight entities are located between intelligence services and the public sphere, serving as a liaison between the intelligence community surrounded by secrecy, on the one hand, and the community of citizens in an open democratic society on the other.

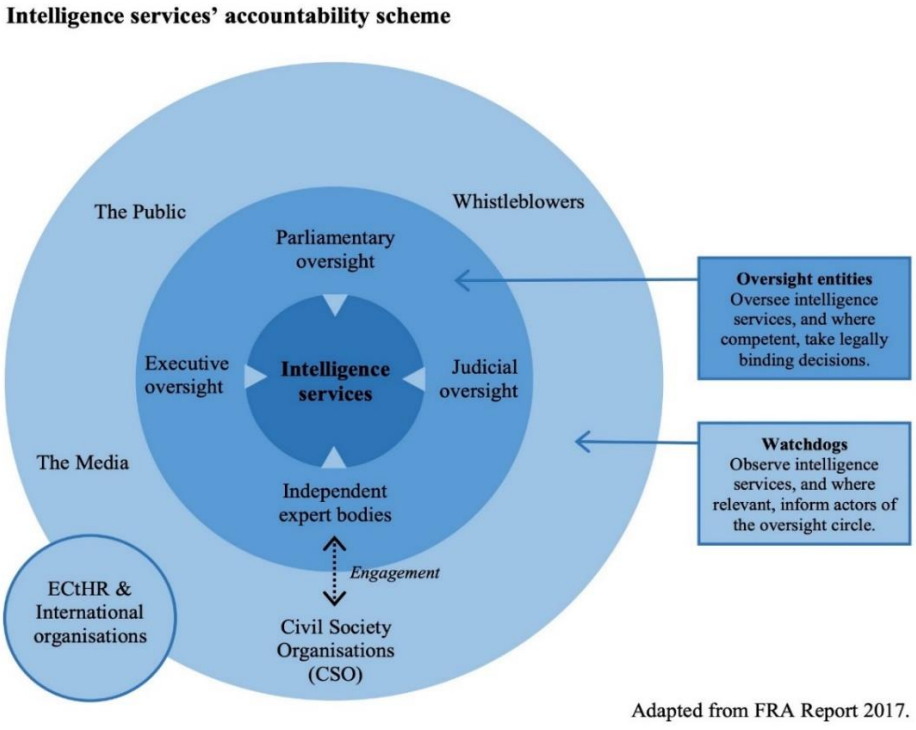

Figure 1: Intelligence oversight actors
(Source: Adapted from FRA Report 2017)

Stages of oversight: *ex ante*, ongoing and *ex post*

When oversight occurs before the surveillance measures are implemented, it is a case of *ex ante* authorisation or approval by an oversight body. Activating the control mechanism prior to the implementation of surveillance in this way is an important safeguard against the misuse of bulk surveillance powers (Wetzling & Vieth, 2018). Moreover, *ex ante* oversight offers the possibility to review the necessity of surveillance operations requested by the intelligence authority in question. This form of oversight usually involves an independent body authorising the warrant or reviewing and approving a signed warrant before its entering into force. The latter model can be observed in the UK

where intrusive surveillance warrants must be authorised first by the Secretary of State and then approved by an independent Judicial Commissioner as part of a "double-lock" approval process (Investigatory Powers Act [IPA], 2016).

Ongoing monitoring and *ex post* review are forms of oversight occurring at a later stage, either while the surveillance operations are being implemented or retroactively after the operation has ended, respectively. For example, IPCO has an *ex post* oversight function concerning the use of investigatory powers by intelligence agencies: after carrying out their audits, IPCO inspectors can share observations acquired during the review process with the Judicial Commissioners, especially when their findings are relevant to the warranty process (IPCO, 2018b).

By carrying out retrospective in-depth inspections of intelligence operations, in addition to the review of warrants mentioned earlier, IPCO is an oversight institution that performs both stages of oversight, *ex ante* and *ex post*. Combining these two responsibilities is considered very beneficial by IPCO authorities as it provides them with "a detailed level of insight into the factors relevant to applications for warrants and the use of covert powers which otherwise would not exist" (IPCO, 2018b, p. 10). Conversely, some scholars and think-tanks endorse a clear institutional separation between the two functions, arguing that the dual role of IPCO is a "basic error" which predisposes it to "conflicts of interest" (Gill, 2020, pp. 9-10; RUSI 2015). In the UN Special Rapporteur on the right to Privacy's *Legal Instrument on Government-led Surveillance and Privacy*, Cannataci (2018b) lists an independent pre-authorisation authority (*ex-ante* oversight) and an independent operational oversight authority (*ex-post* oversight) as essential components of a system of checks and balances for government-led surveillance.

Intelligence oversight and public engagement

The Snowden disclosures in 2013 have exposed significant limitations in the existing oversight systems in some major Western democracies and confronted them with a diversity of new challenges generated by the rapid technological developments. The impact of the revelations is also reflected in scholarship, namely in the way

intelligence oversight is being reconceptualized as part of a broader framework of democratic intelligence governance. The use of *governance* as a research framework has translated into more focus on improving and drafting new modes of oversight, especially as it concerns bulk surveillance (*see* Bradford Franklin & King, 2018; Goldman & Rascoff, 2016; Omand & Phythian, 2018; Vieth & Wetzling, 2019). In light of this, an important avenue of research has been the exploration of various strategies for increasing engagement between oversight institutions and the public on matters of intelligence policy. Through engaging with the public, oversight institutions can better represent and protect citizens' interests and values and can play a crucial role in building public trust and confidence in intelligence agencies. To illustrate this, Goldman and Rascoff (2016) make a case for expert bodies, such as the Privacy and Civil Liberties Oversight Board (PCLOB) in the US, to acknowledge and strengthen their roles as proxies for the American people in the governance of intelligence. Worth mentioning here is the PCLOB's capitalization on public input as part of their review process of the surveillance program based on Section 702.[2] More specifically, the Board organised public hearings with participants from a variety of fields, including privacy advocacy and academia, and temporarily introduced an online public comment section (Renan, 2016). The outcome of the PCLOB's review was a public report, published in 2014, offering recommendations for the adjustment of the surveillance program, making it a valuable resource for policymakers. In this way, the PCLOB has been framing the policy debate on bulk surveillance in the Congress. In the words of Zachary Goldman:

[2] Section 702 of the Foreign Intelligence Surveillance Act was enacted in 2008 for legalising the Bush administration's warrantless wiretapping program and has been hailed ever since by the Executive and the intelligence community as a crucial counterterrorism tool. Section 702 is directed towards targeted collection of communications belonging exclusively to non-US persons believed to be located outside the US. It forbids surveillance of American persons, including the use of foreign targets as a vehicle for gathering intelligence about Americans. However, a backdoor search loophole allows the National Security Agency to collect without a warrant, communications belonging to US citizens as part of the collection process targeting foreigners and their communications with US citizens.

> "[i]n an era of unprecedented threat and unprecedented transparency, institutions of governance must be able to mediate between the I[ntelligence]C[ommunity] and the people in order to ensure that intelligence activities in this [the US], and in all Western democracies, remain effective, legitimate, and sustainable." (Goldman & Rascoff, 2016, p. 208)

A convincing case for increasing the public engagement in the oversight process was made by Bradford Franklin and King (2018). They argue that the engagement between civil society organisations and oversight bodies can be an effective mechanism for limiting the risks posed by certain practices of intelligence collection to civil rights and liberties. They observe that engagement between oversight bodies and civil society entities largely concerns the oversight bodies' "policy or governance roles" (Bradford Franklin & King, 2018, p. 7), and, after examining the relationship between civil society organisations and bodies conducting oversight of surveillance in eight different democracies, identified several distinct models of engagement.

An important model of engagement outlined by Bradford Franklin and King (2018) is "cooperation toward a shared goal." This refers to the mobilisation of resources and expertise offered by civil society organisations in order to strengthen oversight or improve legislation with new safeguards. Particularly important is their technological expertise as it can offer valuable insights into current digital intelligence practices, including the modus operandi of bulk collection technologies and algorithmic practices. Another model of engagement is "promoting better understanding between civil society and oversight" via public forums and meetings under Chatham House rule (Bradford Franklin & King, 2018, p. 13). While public forums can help educate the public at large on aspects of intelligence activity, meetings under Chatham House rule between representatives from the governmental sector and civil society can help deepen trust and foster dialogue (Bradford Franklin & King, 2018). Concerning the potential obstacle posed by the secrecy restrictions that govern a large part of oversight activities, Bradford Franklin, a former Executive Director of the PCLOB, argues that these restrictions make the regular consultation with civil society groups even more valuable for both parties. Specifically, "it helps oversight bodies to

not only diversify their views, but also to identify and address civil liberty risks, and it allows non-government actors to better understand declassified documents and have their voices heard" (Bradford Franklin, 2020, para. 1). A relevant example for both models of engagement described above is IPCO. The British independent oversight body organises periodic consultations with civil society organisations on various aspects of intelligence accountability. One of these public consultations, for example, was focused on the issue of proportionality standards for the review of bulk powers. This illustrates IPCO's model of engagement with civil society for outside assistance and input, described by Wetzling and Vieth (2018) as "open oversight" (p. 94).

The post-Snowden trend of rethinking intelligence oversight as a more public and participatory process is also captured in David Omand's "social compact model" of security and intelligence work. Largely modelled on the British experience after 2013 and conceptually framed as a social contract, the model is based on:

> "an ideal of a democratic licence to operate being given, after open debate, to the security and intelligence authorities [...] that defines their lawful purposes, regulates their intrusive methods, provides for independent oversight by judicial commissioners and by a committee of senior parliamentarians, and establishes a specialist court (the Investigatory Powers Tribunal) to investigate and adjudicate on allegations of abuse." (Omand & Phythian 2018, p. 50-51)

In other words, intensifying public dialogue and open debate as to why secret intelligence activities are important for a democratic society would eventually persuade the public and their parliamentary representatives into accepting the ratification of such investigatory powers. Under the social compact model then, intelligence operations are being "tolerated" on the condition of the three Rs: rule of law, regulation, and restraint (Omand & Phythian, 2018, p. 51).

Omand and Phythian's (2018) conceptualization focuses on the ethical risks of intelligence collection, drawing on Just War theory and its conceptual apparatus, an analogy first introduced in intelligence studies by the British military thinker Michael Quinlan (2007). The classic concepts of *jus ad bellum* (right to resort to war) and *jus in bello* (right

conduct in war) are applied in an analogous manner to the field of intelligence collection under the newly coined expressions *jus ad intelligentiam* and *jus in intelligentia* (Quinlan, 2007). Currently, *jus ad intelligentiam* can be found in laws, publicly available codes of practices and other documents justifying secret intelligence activity, all of which are debated and ratified democratically (Omand & Phythian, 2018). Through the means of ratified statutes and codes, the range of purposes considered legitimate for intelligence agencies is limited. In other words, *jus ad intelligentiam* represents the social contract between the legislative and the executive branch, the latter of which includes the intelligence community itself. The contract determines the role which should be assigned to intelligence within a democracy, "a subject that can sensibly be debated publicly at a suitably general level of principle" (Omand & Phythian, 2018, p. 99) prior to its application. On the other hand, *jus in intelligentia* refers to the translation into action of existing statutes and ethical standards through classified orders and internal rules and authorisations. *Jus in intelligentia* concerns all the routine intelligence activities and decisions conducted under the veil of secrecy, subject to scrutiny through internal and external oversight and "hopefully […] consistent with a set of ethical principles" (Omand & Phythian, 2018, p. 100). Therefore, the open public debate and the input of the public on the role that secret intelligence activity should play in a democracy is possible in the initial phase of the making of such a social contract (*jus ad intelligentiam*). The appropriateness of intelligence agencies' behaviour under conditions of secrecy (*jus in intelligentia*), namely compliance and adherence to certain ethical standards, is reviewed ex post by oversight bodies that should protect the interests of the public. In other words, oversight bodies, such as IPCO, can serve as proxies for citizens by "reflecting their views and their values in an arena in which secrecy poses an obstacle to utilizing the normal mechanisms of obtaining popular assent" (Goldman & Rascoff, 2016, p. 220). As mentioned previously, the UK is one of few states in which there has been a public debate concerning the use of mass surveillance for national security purposes. In the next section, we explore the UK case in more detail.

How oversight institutions have been framing the societal debate on bulk surveillance in the UK

A major effect of the 2013 Snowden disclosures in the UK was to expose the existence of a gap between an outdated statutory scheme for surveillance, and the novelty of technological capabilities employed by intelligence agencies. In other words, existing legislation could no longer provide an adequate regulatory framework of surveillance in light of dramatic technological changes. The uncovering of this gap through the Snowden leaks has generated a series of policy debates between different social forces engaged in the process of shaping the new legal framework of surveillance policy. Within this analytical framework which focuses on the "politics of policy-making", surveillance policy can be seen as "a site of struggle" between different social forces, and the resulting legislation as a direct effect of these complex dynamics (Hintz & Dencik, 2016, p. 1-2).

The process of defining a post-Snowden surveillance policy in the UK has involved a variety of actors, such as oversight institutions, civil society organisations, media outlets, parliamentarians, national security institutions, and private companies. In particular, the comprehensive review carried out by the Independent Reviewer of Terrorism Legislation (IRTL) and the Intelligence and Security Committee of Parliament (ISC), had a key role in shaping the policy debate that eventually led to the adoption of the IPA of 2016. The IRTL at the time, David Anderson QC, was commissioned by the Executive to review the activities of the UK intelligence agencies on an ad hoc basis and with the highest level of security clearance. Anderson's first report, *A Question of Trust: report of the investigatory powers review* (2015), became a blueprint for the IPA of 2016. Equally impactful was the report compiled by the ISC, *Privacy and Security: A modern and transparent legal framework* (2015), offered for the first time in a consolidated form, a review of all intrusive capabilities available to the British intelligence community. As such, it can be seen as "a landmark in terms of openness and transparency surrounding the agencies' work" (ISC, n.d.). As Hintz and Dencik (2016) observed, these reports "provided a strong normative framework (and limitation) for the government's intended expansion of surveillance powers" (p. 7). A further report published by Anderson in

2016, *Report of the Bulk Powers Review,* assessed the operational case for the different bulk collection powers available to the British intelligence agencies. Through these public reports, the IRTL has also facilitated the framing of the public debate on bulk collection. However, our main focus is the two independent oversight bodies in the UK, IPCO and the ISC, and how they have been shaping this debate. We look next at instances when these two oversight bodies have engaged with civil society actors and how their reports have been reflected in the UK news media.

Direct engagement with civil society actors

Engagement with civil society was listed by the first Investigatory Powers Commissioner, Lord Justice Fulford, as one of the guiding principles underpinning the work of IPCO. (IPCO, 2017). The rationale behind this engagement policy has multiple dimensions. A key dimension, as stated by IPCO itself, is to enhance public confidence in the use of investigatory powers. Other dimensions of the engagement process are to explain IPCO's role to all stakeholders, including NGOs and academia, and to consult and seek their views on relevant aspects of intelligence activities.

An examination of the two IPCO Annual Reports published to date (for 2017 and 2018 respectively) reveals a consistent collaboration of the expert oversight body with academics and NGOs working in the field of human rights. For example, in 2018 IPCO was involved in a project at the University of Essex called the *Human Rights, Big Data and Technology Project.* As part of the project, it contributed to debates and workshops about best practices in the oversight of new surveillance methods (IPCO, 2018b). As the Report states, these workshops "enhanced IPCO's understanding of some of the public concerns about intrusive powers, including bulk collection of communications data […]" (IPCO, 2018b, p. 24). Another instance of civil society engagement is the involvement of prominent representatives from key NGOs in the induction and training programme for the Judicial Commissioners (IPCO, 2017). Moreover, the Investigatory Powers Commissioner liaised with NGOs on matters related to the use of bulk powers and organised meetings with representatives from Privacy International (PI), among others (IPCO, 2018b).

Although the lack of security clearance at times restricts the possibility of fully informing civil society representatives on intelligence operations and capabilities, IPCO's purpose, as stated by its former head, Adrian Fulford, is "to act as a bridge" (IPCO, 2017, p. 11). Engaging with civil society directly, as it is the case with IPCO, thus opens the possibility of influencing the public debate on bulk surveillance in a more pivotal manner. Given that civil society actors are liaising with the general public, making them part of the oversight process and integrating their input increases IPCO's influence and messages at a societal level. At the same time, the privileged position of having access to classified information offers IPCO a principal role when compared with the other stakeholders shaping the societal debate on bulk surveillance. Given their access to classified information and ability to review secret documents, reports published by these oversight bodies constitute a valuable resource for NGOs in the field and an important way to understand more about the use of surveillance technologies.

Shaping the public debate on bulk surveillance through publishing reports

Oversight institutions also shape the public debate by publishing reports of activity or specific programs. These are then covered and disseminated through media and NGOs, although sometimes in a critical manner. In this sense, analysing how NGOs and the media relate the findings of these reports and the following discourse is key for understanding how oversight bodies shape the public debate on bulk surveillance.

A good example of an influential report is the *Report on the draft Investigatory Powers Bill* issued by ISC in February 2016. The report was well received by the civil society and its demands for more privacy protection and transparency regarding the use of bulk powers were propagated in the public space by prominent NGOs in the field. Gus Hosein, Executive Director of PI, stated in a press release that the ISC's report "is clear on the requirement of a root and branch reconsideration of the legislation, pushing privacy to the forefront" (Lomas, 2016, para. 5). Hosein also emphasized the strong legitimacy of the report given the ISC's privileged position and access to secret documents. Another civil

society organisation, the Open Rights Group (ORG), also praised the report, with its executive director, Jim Killock, declaring that the ISC "should be given credit for highlighting the Bill's failure to consistently apply privacy protections" (ORG, 2016, para. 3). Furthermore, the report was hailed by actors from the tech sector in the UK. As the deputy CEO of TechUK put it, the ISC report "makes it clear that the bill lacks clarity on fundamental issues, such as core definitions of key terms, encryption and equipment interference" (Holden, 2016, para. 12).

Another example of the impact of publications issued by oversight bodies was the reports of inspections carried out by IPCO in 2019 regarding the inadequate manner in which MI5 stored and mishandled data obtained under warrants. These reports became public, albeit in redacted form, because of a judicial review brought against the new IPA by the UK human rights organisation Liberty and other privacy campaigners. The inspection reports and other documents, such as correspondence between IPCO and MI5, reveal important observations concerning privacy safeguards raised by IPCO at the time. In one of these documents, Commissioner Fulford characterised the MI5's handling and storage of collected data as being managed in an "undoubted unlawful manner" (Bond, 2019, para. 6). The disapproval of MI5's approach to data handling is also present in IPCO's Annual Report from 2018, which states that:

> "[t]here were serious deficiencies in the way the relevant environment implemented important IPA safeguards, particularly the requirements that MI5 must limit to the minimum necessary the extent to which warranted data is copied and disclosed, and that warranted data must be destroyed as soon as there are no longer any relevant grounds for retaining it." (IPCO, 2018b, p. 42)

Thus, we can argue that IPCO's inspection reports and the Commissioner's declarations regarding MI5's lack of compliance has influenced the debate on bulk surveillance powers by raising concerns about the effectiveness of existing safeguards. In light of these disclosures, Liberty and PI have initiated joint international legal action against MI5 (Liberty, 2019), illustrating IPCO's contribution to civil society's efforts to ensure accountability of intelligence agencies.

Oversight bodies' findings and reports regarding intelligence activity normally reach the general public through the media. The informed views of oversight authorities, which are based on expertise and access to classified information, are conveyed to citizens through the media in a less technical language. Consequently, the manner in which media frame the information and findings delivered by oversight reports on the issue of bulk surveillance influence the way and extent to which oversight institutions shape the public debate on this issue.

The UK oversight system as best practice

The efficient oversight of bulk and algorithmic intelligence collection practices in the post-Snowden landscape can be seen as a key test for contemporary democracies. Bulk collection technologies are raising serious difficulties to legislative and judicial oversight authorities who often lack technical and operational expertise, resources and access to relevant information. The Snowden case has acted as a major catalyst for rethinking the role and design of intelligence oversight across the liberal democratic world towards more public engagement. With parliamentary oversight displaying clear limits and legal compliance deemed insufficient to cover the complexities of the new digital intelligence practices, a novel category of external independent oversight bodies has emerged in recent years. These external entities have been described under different names, as "expert bodies" (FRA 2015; 2017), "institutions of governance" (Goldman & Rascoff, 2016) or "hybrid institutions" (Scott, 2019). As the FRA Report notes, "[e]xpert oversight is exceptionally valuable as it allows for the actions of the intelligence services to be scrutinised by those familiar with the subject, who have time to dedicate to the matter, and are independent of political allegiances" (2015, p. 41). The main point that we would like to emphasize here is that these independent expert bodies combine specific features that place them in an optimal position for shaping the societal debate on bulk surveillance. These core features are: reliance on experts – especially technological experts –, high level security clearances, openness towards collaboration with civil society and independence from executive. This set of characteristics allows them to shape the public discourse and dialogue on important controversial matters like

bulk surveillance. While these bodies are neither judicial, nor legislative or executive, they are "hybrid" in that they "marry" some of the features typical of political institutions with features typical of legal institutions (Scott, 2019).

The UK sets an example of how to effectively develop intelligence governance in the context of Big Data proliferation. The IPA 2016 was the outcome of a series of public policy debates sparked by the Snowden disclosures, trying to address major deficiencies in the accountability of intelligence and surveillance in the U.K. The act marks the transition towards a new phase of "expert oversight" (Leigh, 2019) through the establishment of IPCO. The new oversight body described by Anderson (2018) as a "larger, more powerful and outward-facing regulator", introduced the consolidated position of Investigatory Powers Commissioner [IPC] assisted by a number of Judicial Commissioners. IPCO took over all the prerogatives and responsibilities of three precursor organisations: the Office of Surveillance Commissioners, the Interception of Communications Commissioner's Office and the Intelligence Service Commissioner's Office. In this sense, IPCO not only that operates a broader range of functions than its precursors, but also does so in a post-Snowden societal context defined by widespread public awareness of the national security activities carried out by the executive (Scott, 2019). Furthermore, as Leigh (2019) observed, "instead of being a responsive institution that either reports or is tasked the IPC has own-initiative powers to conduct thematic reviews of capabilities and to investigate serious errors" (p. 576).

The game-changing shift brought by the IPA 2016 is the prior approval function of the Judicial Commissioners, applicable to surveillance warrants authorised by the cabinet ministers. Within this approval system known as the "double-lock" (Fig. 2) the Judicial Commissioners assisted by a Technology Advisory Panel, review all warrants for targeted surveillance and bulk powers on the basis of their compliance with the principles of necessity and proportionality. As an IPCO document states, "the purpose of the so-called "double lock" provisions of the Act are to provide an independent, judicial, safeguard as to the legality of warrants, in particular to their necessity and proportionality" (IPCO, 2018a, S. 19). From a historical point of view, the

introduction of the "double-lock" put an end to a centuries-old practice under which cabinet ministers were the sole authority granting warrants for interception (Leigh, 2019). From an institutional perspective, an important consequence of the "double-lock" scheme is the allocation to Judicial Commissioners of a prerogative (granting warrants) that has traditionally been monopolised by the executive power (Scott, 2019). Moreover, under the new law, a Judicial Commissioner "may carry out such investigations, inspections and audits as the Commissioner considers appropriate for the purposes of the Commissioner's functions" (IPA 2016, S. 235). This provision reflects the high degree of access to classified information that Commissioners are granted with. Also, the 'double-lock' mechanism is underpinned by a significant expertise component, in the sense that all Judicial Commissioners are appointed only if they hold or have held a high judicial office (IPA 2016, S. 227). The judicial "double-lock", can therefore be seen as a strong safeguard against the use of the most intrusive techniques including bulk interception and bulk hacking. By requiring that warrants must be reviewed by a Judicial Commissioner before they enter into force, the "double-lock" system establishes IPCO as an ex ante mechanism of intelligence oversight. This component of judicial review has been commended by the UN Special Rapporteur on the right to Privacy who described it as "one of the most significant new safeguards introduced by the IPA" (Cannataci, 2018a, para. 9).

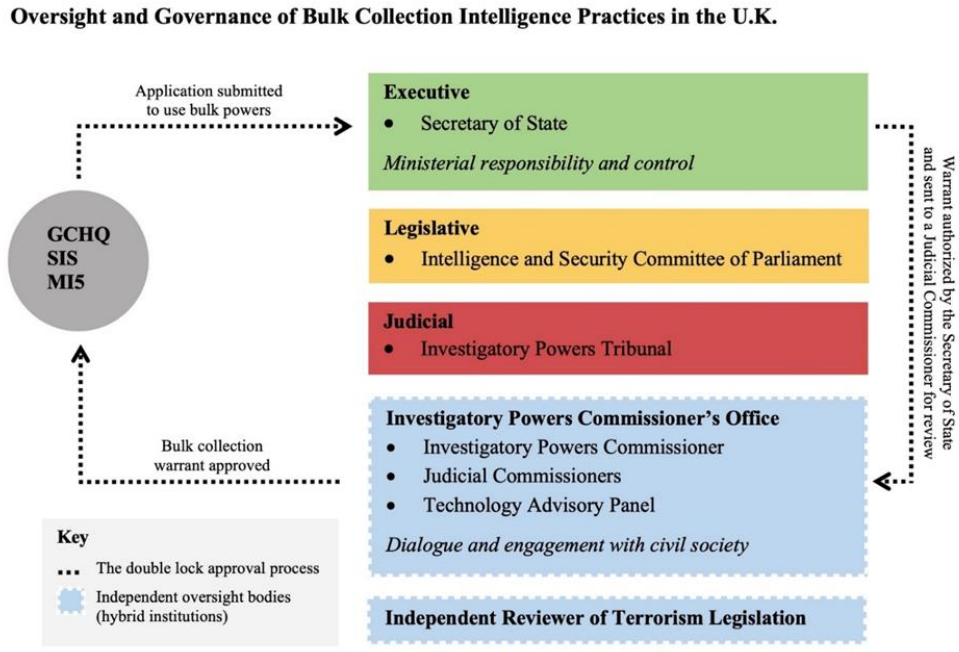

Figure 2: The "double-lock" approval process
(Source: Cannataci, 2018a, para. 9)

Besides IPCO in the UK, other examples of expert oversight include CTVID in the Netherlands and CNCTR in France. It is important to highlight that both CTVID and CNCTR have an enhanced form of access to classified information via technical oversight interfaces that offer them direct digital access to intelligence databases. A technical interface with access to collected data opens the possibility of random oversight inspections and reviews at any time and generates more incentives for intelligence agencies to comply with the regulations (Wetzling & Vieth, 2018).

Conclusion

This article has demonstrated that a key stakeholder in the process of shaping the societal debate on bulk surveillance in a

democracy is represented by intelligence oversight institutions themselves. It focused on the public dimension of oversight and their various strategies of engagement with civil society actors. We argued that independent expert oversight bodies are better equipped than all other societal actors for shaping the public debate on bulk surveillance. While societal actors like media outlets, civil society organizations, politicians, national security institutions and judicial courts all contribute and shape the public understanding of this complex issue, they still have obvious limitations. Media and civil society organizations can benefit from expert views and have a strong voice in the public arena but they lack access to classified information and, thus, to a comprehensive understanding of the matter. Although some politicians as members of parliamentary oversight committees have special security clearances, they usually demonstrate a lack of knowledge in technological aspects of intelligence collection nonetheless. Moreover, a laborious activity restricted by the rule of secrecy becomes less attractive for MPs and their electoral logic. Judicial courts have other limitations in this sense, mainly related to the exceptional character of the national security field but also because of the legislation lagging behind the new technology of surveillance. Finally, intelligence agencies shape the public debate on bulk surveillance, albeit in a limited manner, given that public trust in these institutions has been strongly damaged by the 2013 Snowden leaks exposing for the first time the scale and use of bulk collection techniques.

The paper's main argument is that external independent oversight bodies such as IPCO in the UK can play a pivotal role in the societal debate on bulk collection given their unique blend of institutional features and statutory power. The high-level access to classified information and reliance on experts on the one hand, and the ability to engage with civil society and citizens in an open manner on the other, are features which allow this independent expert oversight body to shape the societal debate on bulk surveillance and contribute to democratic governance of intelligence.

References

1. Anderson, D. (2015). *A Question of Trust – Report of the Investigatory Powers Review.* Independent Reviewer of Terrorism Legislation. https://terrorismlegislationreviewer.independent.gov.uk

2. Anderson, D. (2016). *Report of the Bulk Powers Reviews*. Independent Reviewer of Terrorism Legislation. https://terrorismlegislationreviewer.independent.gov.uk/wp-content/uploads/2016/08/Bulk-Powers-Review-final-report.pdf

3. Bond, D. (2019, June 11). MI5 under fire for 'unlawful' handling of personal data. *Financial Times*. https://www.ft.com/content/986ebc26-8c49-11e9-a1c1-51bf8f989972

4. Bradford Franklin, S., & King, E. (2018). *Strategies for Engagement between Civil Society and Intelligence Oversight Bodies*. Washington DC: Open Technology Institute, New America Foundation.

5. Bradford Franklin, S. (2020, January 29). Public engagement is key for robust intelligence oversight. *About: Intel*. https://aboutintel.eu/public-engagement-intelligence-oversight/

6. Cannataci, J. (2018a). *End of Mission Statement of the Special Rapporteur on the Right to Privacy at the Conclusion Of his Mission to the United Kingdom of Great Britain and Northern Ireland*. United Nations, Office of the High Commissioner for Human Rights. https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23296&LangID=E

7. Cannataci, J. (2018b). *Report to the Human Rights Council, A/HRC/37/62, Appendix 7 Working Draft Legal Instrument on Government-led Surveillance and Privacy*. United Nations, Office of the High Commissioner for Human Rights. https://www.ohchr.org/Documents/Issues/Privacy/SR_Privacy/2018AnnualReportAppendix7.pdf

8. Caparini, M., & Born, H. (Eds.). (2007). *Democratic Control of Intelligence Services: Containing Rogue Elephants* (1st Ed.). Routledge. https://doi.org/10.4324/9781315576442

9. Clift, A.D. (2007). The Coin of Intelligence Accountability. In L. Johnson (Ed.), *Intelligence and Accountability: Safeguards against the Abuse of Secret Power, Strategic Intelligence* (vol. 5, pp. 165-182). Westport: Praeger Security International.

10. D'Angelo, P. (2017). Framing: Media Frames. In P. Rössler, C. A. Hoffner, & L. van Zoonen, *The International Encyclopedia of Media Effects* (pp. 1-10). John Wiley & Sons Inc.

11. Deacon, D. (2007). Yesterday's papers and today's technology: Digital newspaper archives and 'push button' content analysis. *European Journal of Communication*, *22*(1), 5-25. https://doi.org/10.1177%2F0267323107073743

12. Entman, R. M. (1993). Framing: Toward clarification of a fractured paradigm. *Journal of Communication, 43*(4), 51–58. https://doi.org/10.1111/j.1460-2466.1993.tb01304.x

13. European Union Agency for Fundamental Rights (FRA). (2015). *Surveillance by intelligence services: fundamental rights safeguards and remedies in the EU Volume I: Member States' legal frameworks.* FRA. https://fra.europa.eu/en/publication/2015/surveillance-intelligence-services-volume-i-member-states-legal-frameworks

14. European Union Agency for Fundamental Rights (FRA). (2017). *Surveillance by intelligence services: fundamental rights safeguards and remedies in the EU Volume II*: *field perspectives and legal update*. FRA. https://fra.europa.eu/sites/default/files/fra_uploads/fra-2017-surveillance-intelligence-services-vol-2_en.pdf

15. Gill, P. (2020). Of intelligence oversight and the challenge of surveillance corporatism. *Intelligence and National Security, 35*(7), 970-989. 10.1080/02684527.2020.1783875

16. Goldman, Z. K., & Rascoff, S. J. (Eds.). (2016). *Global Intelligence Oversight*. *Governing Security in the Twenty-First Century*. Oxford: Oxford University Press.

17. Greenberg, J., & Hier, S. (2009). CCTV Surveillance and the poverty of media discourse: A content analysis of Canadian newspaper coverage. *Canadian Journal of Communication, 34*(3), 461–486. https://doi.org/10.22230/cjc.2009v34n3a2200

18. Hintz, A., & Dencik, L. (2016). The politics of surveillance policy: UK regulatory dynamics after Snowden. *Internet Policy Review, 5*(3), 1-16. http://dx.doi.org/10.14763/2016.3.424

19. Holden, M. (2016, February 9). Parliamentary committee criticises surveillance bill over privacy concerns. *Reuters*. https://www.reuters.com/article/uk-britain-security-surveillance-idUKKCN0VI0UC

20. Hsieh, H. F., & Shannon, S. E. (2005). Three approaches to qualitative content analysis. *Qualitative Health Research, 15*(9), 1277-1288. https://doi.org/10.1177%2F1049732305276687

21. *Investigatory Powers Act 2016*. https://www.legislation.gov.uk/ukpga/2016/25/contents/enacted

22. Investigatory Powers Commissioner's Office (IPCO). (2017). Annual Report of the Investigatory Powers Commissioner for 2017. IPCO. https://ipco-wpmedia-prod-s3.s3.eu-west-2.amazonaws.com/IPCO-Annual-Report-2017-Web-Accessible-Version-20190131.pdf

23. Investigatory Powers Commissioner's Office. (2018a). *IPCO's Advisory Notice 1/2018: Approval of Warrants, Authorisations and Notices by Judicial Commissioners*. IPCO. https://www.ipco.org.uk/publication/ipco-publication/advisory-notice-1-2018/

24. Investigatory Powers Commissioner's Office (IPCO). (2018b). Annual Report of the Investigatory Powers Commissioner for 2018. IPCO. https://ipco-wpmedia-prod-s3.s3.eu-west-2.amazonaws.com/IPCO-Annual-Report-2018-final.pdf

25. Intelligence and Security Committee of Parliament. (2015). *Privacy and Security: A modern and transparent legal framework*. Houses of Parliament. https://isc.independent.gov.uk/wp-content/uploads/2021/01/20150312_ISC_PSRptweb.pdf

26. Intelligence and Security Committee of Parliament. (2016). *Report on the draft Investigatory Powers Bill*. Houses of Parliament. https://isc.independent.gov.uk/wp-content/uploads/2021/01/20160209_ISC_Rpt_IPBillweb.pdf

27. Kind, E. (2019). *Not a Secret: Bulk Interception Practices of Intelligence Agencies*. Center for Democracy and Technology. https://cdt.org/insights/not-a-secret-bulk-interception-practices-of-intelligence-agencies/

28. Krieger, W. (2009). Oversight of Intelligence: A Comparative Approach. In G. F. Treverton & W. Agrell (Eds.), *National Intelligence Systems: Current Research and Future Prospects*. Cambridge, Cambridge University Press.

29. Kuehn, K. M. (2018). Framing mass surveillance: Analysing New Zealand's media coverage of the early Snowden files. *Journalism, 19*(3), 402–419. https://doi.org/10.1177/1464884917699238

30. Leigh, I. (2019). Intelligence law and oversight in the UK. In J.H. Dietrich and S. Sule (Eds.), *Intelligence law and policies in Europe* (pp. 535-585). Oxford: Hart Publishing.

31. Liberty. (2019). *MI5 "unlawfully" handled bulk surveillance data, liberty litigation reveals.* https://www.libertyhumanrights.org.uk/issue/mi5-unlawfully-handled-bulk-surveillance-data-liberty-litigation-reveals/

32. Lomas, N. (2016, February 9). UK Surveillance Powers Bill Slammed for Privacy, Clarity and Targeting Failures. *TechCrunch*.

https://techcrunch.com/2016/02/09/uk-ip-bill-slammed-for-privacy-clarity-and-targeting-failures/

33. Omand, D., & Phythian, M. (2018). *Principled Spying – The Ethics of Secret Intelligence.* Oxford, Oxford University Press.

34. Open Rights Group. (2016, February 9). ORG responds to the intelligence and security committee report into the investigatory powers bill. *Open Rights Group*. https://www.openrightsgroup.org/press-releases/intelligence-and-security-committee-report-investigatory-powers-bill/

35. Quinlan, M. (2007). Just Intelligence: Prolegomena to an Ethical Theory. *Intelligence and National Security, 22*(1), 1–13. https://doi.org/10.1080/02684520701200715

36. Renan, D. (2016). The FISC's Stealth Administrative Law. In Z. K. Goldman & S. K. Rascoff (Eds.), *Global Intelligence Oversight: Governing Security in the 21st Century* (pp. 121–140). New York: Oxford University Press.

37. Royal United Services Institute (RUSI). (2015). *A Democratic Licence to Operate: Report of the Independent Surveillance Review*. RUSI. https://rusi.org/publication/whitehall-reports/democratic-licence-operate-report-independent-surveillance-review

38. Scott, P. (2019). Hybrid institutions in the national security constitution: The case of the Commissioners. *Legal Studies*, *39*(3), 432-454. https://doi.org/10.1017/lst.2018.44

39. Wegge, N. (2017). Intelligence Oversight and the Security of the State. *International Journal of Intelligence and Counterintelligence, 30*(4), 687-700. http://dx.doi.org/10.1080/08850607.2017.1337445

40. Vieth, K., & Wetzling, T. (2019). *Data-driven Intelligence Oversight Recommendations for a System Update.* Berlin, Heinrich-Böll-Stift.

41. Wetzling, T., & Vieth, K. (2018). *Upping the Ante on Bulk Surveillance an International Compendium of Good Legal Safeguards and Oversight Innovations*. Berlin, Heinrich-Böll-Stift.

42. Zegart, A. B. (2011). *Eyes on Spies: Congress and the United States Intelligence Community.* Washington DC, Hoover Press.