

The Surveillance society in and out of the workplace

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1. Since the Information Commissioner published his report on the Surveillance Society in September 2006, the phrase has become a commonplace of legal and political debate. It is often invoked in conjunction with the “database state”, which was one of the subjects considered at the Convention on Modern Liberty in February 2009, and was also the subject of a recent Rowntree report (March 2009).
2. Developments that are sometimes said to be either manifestations of a surveillance society, or steps in that direction, include:
 - the ID cards project;
 - the maintenance or creation within the public sector of large databases of personal information;
 - the widespread collection and retention of DNA information by the police;
 - covert surveillance by public authorities;
 - data sharing initiatives within the public sector;
 - the collection of information about telephone, email and internet usage;
 - comprehensive vetting of those working with children or vulnerable adults;
 - the increasing use of CCTV; and
 - private sector initiatives, such as Google Streetview.
3. The surveillance society debate tends to focus largely – though not exclusively – on the activities of the public sector, as the above list illustrates. A recurring theme is the increasing ease with which modern technology allows personal information to be stored, disseminated and analysed.

4. Simultaneously, there is a wider debate about personal privacy. This includes:
 - discussion of how article 8 of the European Convention has shaped the development of a new tort of misuse of private information, ostensibly under the rubric of breach of confidence; and
 - concern about the extent to which the internet will on occasion facilitate gross violations of individual privacy, often with no apparent legal remedy whatsoever.
5. Surveillance society issues, in legal terms, tend to involve consideration of article 8 of the Convention. The article 8 right to respect for privacy is qualified, not absolute; the legal debate tends to focus on, first, identifying whether the article 8 right is engaged at all, and secondly, assessing whether any interference is proportionate. For instance in *Marper* (the DNA database case) the House of Lords doubted whether the retention of DNA information engaged article 8 at all: [2004] UKHL 39. The ECtHR had no doubt that it did, and also that the UK's retention regime was disproportionate: judgment of 4th Decembe 2008, *Applications nos 30562/04 and 30566/04*).
6. The political debate is often heavily polarised; there are those who suggest that we are blundering into an Orwellian nightmare world; on the other hand, there are those who emphasise the important of systematic information gathering for the sake of national security, or for traditional social democratic and welfarist goals. The legal debate is rather more nuanced, focusing as it does on issues of proportionality.
7. This paper does not attempt anything like a comprehensive survey of recent development. It focuses on four issues, two of them specifically related to employment vetting:
 - recent decisions in relation to the statutory banning lists;
 - the new Independent Safeguarding Authority (ISA);
 - developments relating to surveillance under RIPA; and
 - the latest proposals in relation to communications data.

STATUTORY BANNING LISTS

8. Currently there are three statutory banning lists; these prohibit individuals from working in specified employment, and also prohibit employers from engaging them.
 - There is a list maintained under section 142 of the Education Act 2002. This covers education in schools, and other education-related work. For historical reasons it is often known as “list 99”.
 - There is a separate list under section 1(1) of the Protection of Children Act 1999 (“the POCA list”), covering those considered unsuitable to work with children.
 - There is also a list for the protection of vulnerable adults (“the POVA list”), which sets out the names of those considered unsuitable to work with this group. It is maintained under Part 7 of the Care Standards Act 2000.

9. Individuals placed on any of these lists have a statutory right of appeal. Appeals formerly went to the Care Standards Tribunal. The work of this Tribunal has been transferred to the Health, Education and Social Care Chamber of the First-tier Tribunal, with effect from 3rd November 2008, under the *Tribunals, Courts and Enforcement Act 2007*.

10. The operation of these lists has important human rights implications. Two recent cases have considered these, although the main focus has been on article 6 (the right to a fair hearing) rather than article 8. In *Wright v Secretary of State* [2009] UKHL 3, the House of Lords concluded that the scheme for provisional listing under the POVA scheme was incompatible with article 6; there was no opportunity for a judicial hearing until after a lengthy administrative process, for most of which the worker would provisionally be on the list.

11. Also significant in this context is the recent decision of the Administrative Court in *R(G) v Governors of X School and Y City Council* [2009] EWHC 504 (Admin). A music assistant employed at a primary school was dismissed; the allegation was that he had formed an inappropriate relationship with a 15 year old boy who was on work experience at the school. The school’s disciplinary committee told the employee that they would be reporting the case to the Secretary of State for potential inclusion in list 99.

12. The Court quashed the decision because the school had refused to allow legal representation at the dismissal hearing or at a forthcoming appeal. The disciplinary proceedings, and the referral to the Secretary of State for a potential banning direction, formed part of one and the same proceedings. Those proceedings were not criminal in nature for the purpose of article 6 of the Convention. However, their potential consequences were grave; and procedural fairness required the claimant to be allowed legal representation, before both the school's disciplinary committee and its appeal committee.

EMPLOYMENT VETTING AFTER THE SOHAM MURDERS: THE INDEPENDENT SAFEGUARDING AUTHORITY

13. The employment vetting regime is undergoing radical reform, as the *Safeguarding Vulnerable Groups Act 2006* comes into force. The 2006 Act is intended to give effect to the recommendations of the Bichard enquiry, following the Soham murders. It creates a new agency, the Independent Barring Board. The Board operates as the Independent Safeguarding Authority (ISA).

14. The scheme created by the 2006 Act, in outline, is this.

- The three existing lists will be replaced by two new lists, one relating to work with children and one relating to work with vulnerable adults.
- A person included on either list will be barred from “regulated activity” relating to the relevant group. It will be an offence for an individual to seek to engage in regulated activity from which he is barred. It will also be an offence for an employer to use a barred person for regulated activity.
- The ISA will maintain the two new barring lists.
- So that the ISA can keep the lists up to date:
 - persons seeking to engage in regulated activity must register for monitoring with the ISA;

- the ISA must consider information about such persons both when they apply for monitoring, and at intervals thereafter; and
 - there are detailed provisions requiring employers, local authorities and others to refer information to the ISA: sections 35-42 of the Act.
15. The definition of “vulnerable adult” is in section 59 of the 2006 Act. It is very different from the existing definition. Broadly, a person is a vulnerable adult if he is in certain settings or situations or receives certain services.
16. “Regulated activity” is defined in Schedule 4 to the Act: part 1 deals with children, and part 2 with vulnerable adults.
17. There are four possible bases for inclusion on the either barred list¹:
- automatic inclusion;
 - automatic inclusion, subject to consideration of representations;
 - inclusion on grounds of behaviour; and
 - inclusion on grounds of risk of harm.
18. The Act also makes provision about controlled activity. This is a distinct category of work with children or vulnerable adults, defined in sections 21 and 22 of the 2006 Act. Broadly speaking the difference is that a barred individual may not be employed in regulated activity; such an individual may be employed in controlled activity, but the employer must put appropriate safeguards in place.
19. Where an individual is included in either barring list there is a right of appeal to the Health, Education and Social Care Chamber of the First-tier Tribunal, under section 4 of the 2006 Act. An appeal can be brought on a point of law or an issue of fact; but the decision whether it is appropriate for an individual to be included in a barred list is specifically stated not to be an issue of law or fact (see section 4(4)).
20. The new scheme will operate alongside the CRB disclosure scheme, and does not replace it. Hence employers will be entitled to standard or enhanced CRB checks, as at present, and in addition will be entitled (and obliged) to check whether individuals are on a relevant ISA barring

¹ See Schedule 3 to the 2006 Act.

list. The scope of the scheme is very wide indeed; apparently it is anticipated that once it is fully operational some 11 million individuals will be subject to ISA monitoring.

21. The 2006 Act is being brought into force in stages².

- From 20th January 2009, the ISA has taken over the task of updating the three existing statutory lists.
- As from 12th October 2009 these three lists will be replaced by the two new lists introduced by section 2 of the 2006 Act.
- From July 2010, new entrants to roles working with vulnerable groups, and those switching jobs within the sector, will be able to register with the ISA. Employers will be able to check registration status online.
- By November 2010 new entrants and those moving jobs will be obliged to register with the ISA, and employers will be obliged to check their status.
- The intention is to bring the whole of the existing workforce into the scheme by 2015.

RECENT DEVELOPMENTS UNDER RIPA

22. The Regulation of Investigatory Powers Act 2000 (RIPA) covers a wide range of subjects, including covert surveillance, and the use of covert human intelligence sources.

23. There has been considerable recent discussion about the use of the RIPA powers by public authorities, allegedly in relation to trivial matters. For instance, surveillance has been used in order to monitor whether parents have lied about their home address so as to bring themselves within a particular school catchment area.

24. A Home Office consultation launched in April 2009 proposes to limit the use made by local authorities of these powers, not by amending the legislation, but by setting out new guidance in proposed statutory Codes under section 71 of the Act. See in particular section 3 of the Draft Code of Practice on Covert Surveillance and Property Interference.

² For information about the progress of implementation, see the ISA's website: e.g. at <http://www.isa.gov.org.uk/Default.aspx?page=372> and at <http://www.isa.gov.org.uk/Default.aspx?page=385>

RETAINING COMMUNICATIONS DATA

25. Communications data is information about telephone or internet communications, but not including the content of the communications. In the case of a telephone call, for example, it would include the number that was called, from where, and when, but it would not include the content of the call. In relation to internet access it could include the identity of a website that was accessed, but not the specific page in question.
26. At present communications providers (eg telecoms companies and ISPs) are required to retain communications data for 12 months. It can then be accessed by various public authorities under RIPA. The regulations providing for retention were made in October 2007 and April 2009.
27. The government's draft legislative programme for 2008–09 was published in May. This contained the first reference to a Communications Data Bill, intended to complete the implementation of the Directive. The draft programme is uninformative about the detailed content of the proposed Bill, though it is clearly envisaged that the Bill will extend to ISPs – since these were not covered by the 2007 Regulations.
28. Media concern about the implications of the Bill began with a story in The Times of 20th May 2008, suggesting that what was being contemplated was the creation of a central database under government control, containing all the retained records. Instead of merely retaining communications data and providing it on request, providers would automatically pass all of their communications data to the database. In July 2008, the Information Commissioner, Richard Thomas, at the launch of his annual report, commented any such proposal would be “a step too far for the British way of life”.
29. Any proposal for a large central database has now been abandoned, for the time being at any rate. A Home Office consultation published in April 2009 instead refers to two possible options: one is requiring UK communications services provider to collect and retain information about communications services provided from overseas; and a second option would, in addition, require them to match that information with their own records.

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