

No CCTV – Protection of Freedoms Bill - 2nd Reading Briefing



The 'Protection of Freedoms Bill' [1] will receive its 2nd Reading in the House of Commons on 1st March. Below is an analysis of the Bill in relation to surveillance cameras.

A Noting of the Explanatories

Beyond the hype, what does the Government really hope to achieve with The Protection of Freedoms Bill in relation to CCTV and overt camera surveillance? The Explanatory Notes [2] that accompany the Bill answer this question with utmost certainty:

Chapter 1 of Part 2 makes provision for the further regulation of Closed Circuit Television ("CCTV"), Automatic Number Plate Recognition ("ANPR") and other surveillance camera technology operated by the police and local authorities.
[Explanatory Notes page 2]

But the form this "further regulation" is to take comes across somewhat less confidently:

The provisions will require the Secretary of State to publish a code of practice in respect of the development and use of surveillance camera systems and provide for the appointment of a Surveillance Camera Commissioner to monitor the operation of the code.
[Explanatory Notes page 2]

Meanwhile the Home Office Press release that accompanied the publishing of the Bill [3] simply resorted to EU speak to say nothing:

the introduction of a code of practice for CCTV and Automatic Number Plate Recognition systems (overseen by a new Surveillance Camera Commissioner) to make them more proportionate and effective

Perhaps we should look at the Bill itself to get a real sense of the great protection to our freedoms this piece of legislation represents in relation to the use of overt camera surveillance.

"Regulation of CCTV"?

The main provisions are contained in Part 2 (Regulation of Surveillance) Chapter 1 (Regulation of CCTV and other surveillance camera technology), and can be summarised as follows:

The Secretary of State MUST prepare a code of practice for surveillance camera systems (section 29(1)) which MUST contain guidance about "one or more" of, um, two choices:
(a) "the development or use of surveillance camera systems", and/or
(b) "the use or processing of images or other information obtained by virtue of such systems" (section 29(2)).

"Processing" here has the same meaning as Section 1(1) of the Data Protection Act 1998 [4] (section 29(7)), namely:

obtaining, recording or holding the information or data or carrying out any operation or set of operations on the information or data, including—

- (a) organisation, adaptation or alteration of the information or data,*
- (b) retrieval, consultation or use of the information or data,*
- (c) disclosure of the information or data by transmission, dissemination or otherwise making available, or*
- (d) alignment, combination, blocking, erasure or destruction of the information or data;*

[Data Protection Act Section 1(1)]

"Surveillance camera systems" by the way are defined as follows (we'll comment briefly on subsection (a) of this definition below...):

- (a) closed circuit television or automatic number plate recognition systems,*
- (b) any other systems for recording or viewing visual images of objects or events for surveillance purposes,*
- (c) any systems for storing, receiving, transmitting, processing or checking images or information obtained by systems falling within paragraph (a) or (b), or*
- (d) any other systems associated with, or otherwise connected with, systems falling within paragraph (a), (b) or (c).*

[Protection of Freedoms Bill Section 29(6)]

For all the extremely detailed definitions the Bill contains, there is no definition of "freedoms" and what exactly the Bill is supposed to be protecting. Whether this is because the Bill's authors prefer to maintain an air of mystery in this regard, or simply don't understand the word themselves is a matter for conjecture.

There then follows a list of what the code MAY also include, several of which should surely be fundamental MUSTs if our protection is the aim:

- (a) considerations as to whether to use surveillance camera systems,*
- (b) types of systems or apparatus,*
- (c) technical standards for systems or apparatus,*
- (d) locations for systems or apparatus,*
- (e) the publication of information about systems or apparatus,*
- (f) standards applicable to persons using or maintaining systems or apparatus,*
- (g) standards applicable to persons using or processing information obtained by virtue of systems,*
- (h) access to, or disclosure of, information so obtained,*
- (i) procedures for complaints or consultation.*

[Protection of Freedoms Bill Section 29(3)]

The "Explanatory Notes" clarify section 29(4)'s apparent vagueness about what the code will cover (that it "need not contain provision about every type of surveillance camera system" and

it "may make different provision for different purposes") and in turn states the intention that the code will be ambiguous and inconsistent in how it is to be applied to protect our freedoms in the face of unfettered technological advancement:

136. Subsection (4) provides that the code need not provide guidance in relation to every type of surveillance camera system. This is intended primarily to avoid a requirement to provide comprehensive guidance in relation to niche or emerging technologies not yet likely to have widespread application. It further provides that the extent of any guidance provided need not be identical in respect of each type of system, or may be suitably tailored to the type and usage of the system in question. [Explanatory Notes page 31]

The Code Consultees

But anyway it's ok because the Secretary of State MUST consult a broad spectrum of people in the preparation of the code, in particular surely those whose freedoms are under threat, namely:

- (a) such persons appearing to the Secretary of State to be representative of the views of persons who are, or are likely to be, subject to the duty under section 33(1) (duty to have regard to the code) as the Secretary of State considers appropriate,*
- (b) the Association of Chief Police Officers,*
- (c) the Information Commissioner,*
- (d) the Chief Surveillance Commissioner,*
- (e) the Surveillance Camera Commissioner,*
- (f) the Welsh Ministers, and*
- (g) such other persons as the Secretary of State considers appropriate.*

[Protection of Freedoms Bill Section 29(5)]

The Code Procedure

Having consulted with this array of bodies keen to get their mits on our personal data and three government appointed Commissioners part of whose remit is to assist those bodies to do just that with legal endorsement, for the code to come into force (Section 30) the Secretary of State MUST then:

- (1)(a) prepare it as per section 29
- (1)(b) draft an order
- (2&3) if and only if the draft order is approved by a resolution of both Houses of Parliament, make the order and issue the code
- (4) if the draft is not, or not likely to be, approved the Secretary of State MUST prepare another one...

For Order read Statutory Instrument (section 30(6)) which "may contain transitional, transitory or saving provision" - and for Statutory Instrument read legislation enacted without proper parliamentary debate. Section 30(7) suggests that the relevant order might find itself in a "hybrid instrument", that is an instrument that affects some members of a group (whether individuals or bodies) more than others in the same group. The parliament.uk website [5] tells us what usually happens with such instruments:

*Hybrid instruments are subject to a special procedure which gives those who are especially affected by them the opportunity to present their arguments against the SI to the Hybrid Instruments Committee and then, possibly, to a Select Committee charged with reporting on its merits.
[Parliament website]*

Why the order for the coming into force of the code would be in such an instrument is another matter but suffice to say that in this situation such a "hybrid instrument" would proceed as if it were not one. Clear?

Once the code is in force, it MAY be altered or replaced by the Secretary of State in light of his ongoing requirement to keep it under review under section 31. The Secretary of State MUST first consult his mates (as listed above) then MUST put his altered or replacement code before Parliament, then full steam ahead and issue away if he hears nothing from either House within 40 days - regardless of whether or not Parliament is open for business.

The Code - does it bark let alone bite?

So what will the code do (section 33)? Well "a relevant authority" MUST have regard to it (section 33(1)) but a failure of "any person" to act in accordance with it will not in itself be prosecutable (2), though it is admissible in evidence (3) and a failure by a "relevant authority" to have regard to it MAY be taken into account in determining a question during judicial proceedings.

A "relevant authority" is a peculiarly detailed list given that, if this is about protecting the freedoms of the citizens, it should effectively mean any public body or arm of the state:

- (a) *a local authority within the meaning of the Local Government Act 1972,*
- (b) *the Greater London Authority,*
- (c) *the Common Council of the City of London in its capacity as a local authority,*
- (d) *the Sub-Treasurer of the Inner Temple or the Under-Treasurer of the Middle Temple, in their capacity as a local authority,*
- (e) *the Council of the Isles of Scilly,*
- (f) *a parish meeting constituted under section 13 of the Local Government Act 1972,*
- (g) *a police and crime commissioner,*
- (h) *the Mayor's Office for Policing and Crime,*
- (i) *the Common Council of the City of London in its capacity as a police authority,*
- (j) *any chief officer of a police force in England and Wales,*
- (k) *any person specified or described by the Secretary of State in an order made by statutory instrument.*

[Protection of Freedoms Bill Section 33(5)]

No specific mention of private companies or contractors conducting surveillance in the public arena. There is however provision for the Secretary of State to put more names on the list but fear not, before anyone extra is added they themselves MUST have been asked if they are indeed happy to go on the list and the Secretary of State's mates MUST be consulted again. And no order can be made adding to the list without a resolution from both Houses (again if that order is in a hybrid instrument, it isn't one...)

How many Commissioners does it take to change a record?

Under section 34, a Surveillance Camera Commissioner MUST be appointed by the Secretary of State. The Commissioner's role is to encourage compliance with, review the operation of and provide advice about the code – no doubt he will do all this with a rod of iron. It is completely up to the Secretary of State who gets this job and how much he is paid. The two of them together will decide what resources the Commissioner needs – and the Secretary of State will make sure he gets them. The 'Explanatory Notes' estimate the cost of all this as £250,000 per annum for the first three years – with the support of Home Office staff.

The Commissioner MUST report annually on the exercise of his functions "as soon as reasonably practicable after the end of each reporting period", publish the report, copy the report to the Secretary of State who MUST then lay a copy before Parliament. The reporting period starts from whichever is later of the coming into force of the code or the appointment of the Commissioner, and ends with the following 31st March unless this is less than 6 months away in which case it's the 31st March after that. So the first report may not be due for 18 months (s.35).

In his article "Protection of Freedoms Bill promotes efficient CCTV surveillance not effective privacy" [6] Chris Pounder points out one major issue created by the Bill in the guise of Commissioner/code of practice Top Trumps:

So, if a Surveillance Camera Commissioner regulates the CCTV Statutory Code of Practice and the Information Commissioner presumably maintains his own voluntary CCTV Code of Practice, then Local Authorities and Police have the pleasure of dealing with two Codes. If these Codes diverge, there will be confusion as to what set of rules take precedent. The Bill does not set out a mechanism to resolve any conflict between these Codes.

There is also a possibility of at least two regulators with apparently overlapping responsibilities; this does not seem to be a useful proposal if privacy protection is an objective. The Surveillance Commissioner could be a third regulator if CCTV is used in combination with covert directional microphones.

The Bill's current text ensures that conflict between the two Codes is a distinct possibility.

Tut tut, who's been servicing your boiler?

In the "Background" section of the "Explanatory Notes" we learn that all this is further to "The Programme for Government (section 3: civil liberties)" which announces this government's plan to "further regulate CCTV" in light of the regulatory situation they inherited:

CCTV systems (including ANPR systems) are not currently subject to any bespoke regulatory arrangements. However, the processing of personal data captured by CCTV systems (including images identifying individuals) is governed by the Data Protection Act 1998 ("DPA") and the Information Commissioner's Office ("ICO") has issued guidance to CCTV operators on compliance with their legal obligations under the DPA. In addition, the covert use of CCTV systems is subject to the provisions of the Regulation of Investigatory Powers Act ("RIPA") and the Code of Practice on 'Covert

Surveillance and Property Interference' issued under section 71 of that Act [...]. On 15 December 2009, the previous Government announced the appointment of an interim CCTV Regulator [...].

[Explanatory Notes page 6]

The situation they inherited from New Labour included several suggestions that ANPR cameras would require their own legislation. In 2004, following an ANPR trial, the then Home Secretary David Blunkett wrote that experience gained in the pilot: "is likely to lead to the introduction of ANPR enabling legislation as soon as Parliamentary time allows" [7]. The Chief Surveillance Commissioner's 2005-2006 Annual Report [8] said: "The unanimous view of the Commissioners is that the existing legislation is not apt to deal with the fundamental problems to which the deployment of ANPR cameras gives rise. This is probably because the current technology, or at least its very extensive use, had not been envisaged when the legislation was framed". But in response to FOI requests both ACPO [9] and NPIA [10] said that no legislation is required for ANPR cameras, whilst a 2009 National Policing Improvement Agency Practice Improvement document on ANPR [11] states:

The question of whether the use of ANPR equipment is lawful can be determined by identifying the legislation being relied on during the deployment. For example, section 163 of the Road Traffic Act 1988 (as amended) enables a police officer in uniform to stop a motor vehicle, or other mechanically propelled vehicle, on the road, and section 4 of the Police and Criminal Evidence Act 1984 (as amended) (PACE) enables a road check to take place in certain circumstances.

Is the government suggesting that merely explicitly including ANPR in the definition of surveillance camera systems for a legally unenforceable code (see definition above as per section 29(6)) is equivalent to the creation of a new legislative framework for ANPR cameras – it is difficult to see how this can be so.

Tough decisions – two options

It is interesting to note that according to the Protection of Freedoms Bill Impact Assessment [12] the government considered two options to meet their policy objectives following their statement of intent in the Coalition Programme for Government [13]:

We need to restore the rights of individuals in the face of encroaching state power, in keeping with Britain's tradition of freedom and fairness.

These two options were:

** Option 1: Retain the current position. Do nothing*

** Option 2: Introduce the Protection of Freedoms Bill that will take a significant step toward reducing state interference and restoring freedoms. Implement the Bill in full [Impact Assessment page 1]*

Or to translate this into plain English – the two options the government gave itself to choose from were:

** Option 1: Do nothing.*

** Option 2: Look like you might be doing something but do nothing.*

Their considered decision was:

*Option 2 is preferred option to progress the Government's ambition to reduce the burden of the state on its citizens and to restore the balance between the Government's duty to keep communities safe and protecting individual civil liberties.
[Impact Assessment page 1]*

To enter into the spirit of the whole sorry business, all you therefore need to do is nothing – avoid reading the Bill or any of the accompanying documents, and for goodness sake do not read any analysis of the Bill unless it has been written by the Home Office.

Summing it all up

What therefore is this spanking new regime that is going to protect our freedoms in the face of the uninhibited expansion of camera surveillance? An additional or is it alternative code of practice that only applies to certain public bodies (in fact the very public bodies that created it), the breach of which has no consequences other than the potential to be mentioned in judicial proceedings, and a government selected Commissioner (the Surveillance Camera Commissioner) whose job is to advise those bodies how to comply with the unenforceable code and to encourage them to do so. And what is this an improvement on? A single code of practice that applies to public and private bodies, the breach of which has no consequences other than the potential to be mentioned in judicial proceedings and a government selected Commissioner (the Information Commissioner) whose job is to advise those bodies how to comply with the unenforceable code and encourage them to do so.

An informed debate?

So can we expect a vibrant and informed debate on civil liberties, the erosions of personal freedom and damage to society caused by CCTV? If coalition MP Phillip Davies is anything to go by then the answer is a resounding no. In the run up to today's debate Davies posted an article on the Conservative Home website entitled 'Increased use of CCTV and DNA profiling would actually enhance our freedom' [14]. In it he says:

A Scotland Yard study into the effectiveness of surveillance cameras revealed that 86 out of 90 murder cases over a one year period used CCTV during the investigation. Scotland Yard's head of homicide, Simon Foy, stated that: "CCTV plays a huge role in helping us investigate serious crime. I hope people can understand how important it is to our success in catching people who commit murder."

Davies is basing this claim on a sensational 2009 Daily Telegraph entitled 'Seven of ten murders solved by CCTV' [15]. The actual Metropolitan Police report [16] reveals that in 65 out of the 90 murder cases (about 72%) CCTV was viewed by police and a policeman in each case thinks it helped a bit.

A 2004 Home Office report 'Reviewing murder investigations: an analysis of progress reviews from six police forces' [17] stated that: "The majority of murder investigations are solved relatively soon after the offence and with limited investigative effort." The 2004 report does not place emphasis on the use of surveillance cameras and one of the six police forces featured in the report was – the Metropolitan Police.

Basically if this Bill in any way constitutes one of the "sweeping reforms to restore British liberties" [3] then the entries in the Oxford English Dictionary for "sweeping", "reforms", "restore" and "liberties" all need a serious rewrite.

- No CCTV, March 2011

References:

- [1] - <http://services.parliament.uk/bills/2010-11/protectionoffreedoms.html>
- [2] - <http://www.publications.parliament.uk/pa/cm201011/cmbills/146/en/11146en.pdf>
- [3] - <http://www.homeoffice.gov.uk/media-centre/press-releases/sweeping-reform>
- [4] - <http://www.legislation.gov.uk/ukpga/1998/29/section/1>
- [5] - <http://www.parliament.uk/business/bills-and-legislation/secondary-legislation/hybrid-instruments/>
- [6] - <http://amberhawk.typepad.com/amberhawk/2011/02/protection-of-freedoms-bill-promotes-efficient-cctv-surveillance-not-effective-privacy.html>
- [7] - http://www.popcenter.org/problems/residential_car_theft/PDFs/Henderson.pdf
- [8] - <http://www.official-documents.gov.uk/document/hc0506/hc12/1298/1298.pdf>
- [9] - http://www.whatdotheyknow.com/request/details_of_statutory_powers_rela?unfold=1#incoming-48504
- [10] - <http://www.whatdotheyknow.com/request/20655/response/49879/attach/html/2/NRSB99%200111%20091016%20Final%20Response%2046925.pdf.html>
- [11] - <http://www.acpo.police.uk/documents/crime/2009/200907CRIANP01.pdf>
- [12] - <http://www.homeoffice.gov.uk/publications/legislation/freedom-bill/pof-bill-ia?view=Binary>
- [13] - http://www.cabinetoffice.gov.uk/sites/default/files/resources/coalition_programme_for_government.pdf
- [14] - <http://conservativehome.blogs.com/platform/2011/02/philip-davies-mp-increased-use-of-cctv-and-dna-profiling-would-actually-enhance-our-freedom.html>
- [15] - <http://www.telegraph.co.uk/news/uknews/law-and-order/4060443/Seven-of-ten-murders-solved-by-CCTV.html>
- [16] - <http://www.whatdotheyknow.com/request/41665/response/105618/attach/3/CCTV%20in%20Homicide%20investigations.doc.pdf>
- [17] - <http://rds.homeoffice.gov.uk/rds/pdfs04/rdsolr2504.pdf>