

Updates to Chapter on Privacy in Cyberspace (1): US Domestic Spying & UK Phone-Hacking Scandal

M. E. Kabay, PhD, CISSP-ISSMP

I just completed another marathon editing task, working on updating a chapter about privacy that had not been updated since 2008. Here are some new sections that may interest readers.

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As this chapter was going to press in July 2013, cyber-privacy issues in the US and Europe were actively being covered by the news media and generating concern among civil liberties groups. The domestic spying programs of the US National Security Agency and questions about illegal phone tapping in the United Kingdom were top news items.

Several cases have caused interest among privacy advocates in the first decades of the 21st century.

NSA Domestic Spying

The Electronic Frontier Foundation (EFF) page about extra-legal surveillance of US residents includes this succinct summary:

In October 2001, President Bush issued a secret presidential order authorizing the NSA to conduct a range of surveillance activities inside of the United States without statutory authorization or court approval, including electronic surveillance of Americans' telephone and Internet communications. This program of surveillance continues through today, although the legal justifications have changed over time, and works with the major telecommunications and Internet companies.

In 2005, after the New York Times broke the story of the surveillance program, the President publicly admitted one portion of it—warrantless surveillance of Americans believed to be communicating with people connected with terrorism suspects—Senior Bush Administration officials later confirmed that the President's authorization went beyond the surveillance of terrorists and conceded that the program did not comply with the Foreign Intelligence Surveillance Act (FISA). The President, invoking a theory of limitless executive power to disregard the mandates of Congress, reauthorized this warrantless surveillance more than thirty times, including after the Department of Justice found the program to violate criminal laws. President Obama has continued the program, but with differing secret legal justifications. Obama has given no public legal justification for it and, in some situations, appears to be strategically denying certain portions of it. For other portions, including the collection of telecommunications records, the Obama Administration said it could neither confirm nor deny its actions until May, 2013, when the DNI finally admitted additional portions of it. Members of Congress have confirmed that additional domestic surveillance by the NSA still remains a secret.[1]

NSA PRISM in US

In July 2013, the Electronic Privacy Information Center (EPIC) reported on its efforts to block the widespread collection of call detail records (metadata) about phone calls originating or terminating in the US:

EPIC has filed a petition with the US Supreme Court, asking the Court to vacate an unlawful order by the Foreign Intelligence Surveillance Court that enables the NSA's collection of all domestic

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phone records. On April 25, the secret court ordered Verizon to turn over all “call detail records” for calls made “wholly within the United States, including local telephone calls.”

The FISC’s order is based on Section 215 of the USA PATRIOT Act, which allows the court to compel the disclosure of business records that are “relevant to an authorized investigation.” The Verizon order, however, requires the disclosure of all telephone records in the company’s database.

“It is simply not possible that every phone record in the possession of a telecommunications firm could be relevant to an authorized investigation,” EPIC states. “Such an interpretation of [the law] would render meaningless the qualifying phrases contained in the provision and eviscerate the purpose of the Act. “To define the scope of the records sought as ‘everything’ nullifies the relevance limitation in the statute,” EPIC continues. “If law enforcement has ‘everything,’ there will always be some subset of ‘everything’ that is relevant to something.”

The call detail records provided to the NSA, called “telephony metadata,” contain an immense amount of sensitive personal information. The records identify the phone numbers of both parties on a call, the call’s time and duration, and the geographic location of each phone number. When aggregated, such records can map out “the daily activities, interactions, personal and business relationships, religious and political affiliations, and other intimate details of millions of Americans,” says EPIC.

EPIC’s petition asks the Supreme Court to issue a “writ of mandamus” vacating the Verizon Order issued by the FISC. Mandamus is a command from a higher court to a lower court or government official, used when a lower court extends beyond the scope of its legal authority. EPIC writes, “Mandamus relief is warranted because the FISC exceeded its statutory jurisdiction when it ordered the production of millions of domestic telephone records that cannot plausibly be relevant to an authorized investigation.”

EPIC brought the petition directly to the Supreme Court because no other court has jurisdiction to address the unlawful order. The Foreign Intelligence Surveillance Act (FISA) allows only the government and the recipient of a production order (i.e. Verizon) to appear before the FISC or the Court of Review. Additionally, the law limits these courts to hearing only certain types of appeals. EPIC, a Verizon customer whose call records are subject to the order, would not be able to obtain relief from these courts.[2]

Phone Hacking in UK

The Telegraph provides a detailed timeline of the events known as the UK phone-hacking scandal.[3] Key events include

- 2005-11: The Royal Family complains about interception of private voicemail messages revealing a knee injury to Prince William.
- 2006-08: “Detectives arrest the *News of the World*’s royal editor Clive Goodman and private investigator Glenn Mulcaire over allegations that they hacked into the mobile phones of members of the royal household.”
- 2007-01: “The *News of the World*’s royal affairs editor Clive Goodman is jailed for four months. Private investigator Glenn Mulcaire is given a six-month prison term. Goodman and Mulcaire admitted conspiring to intercept communications while Mulcaire also pleaded guilty to five other charges of intercepting voicemail messages.”
- 2009-07: “It emerges that *News of the World* reporters, with the knowledge of senior staff, illegally accessed messages from the mobile phones of celebrities and politicians while Coulson was editor from 2003 to 2007. It is also reported that News Group Newspapers, which publishes the *News of the World*, has paid out more than £1 million

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to settle cases that threatened to reveal evidence of its journalists' alleged involvement in phone hacking."

- 2011-01: "British police open a new investigation into allegations of phone hacking at the tabloid called 'Operation Weeting' after actress Sienna Miller, MP George Galloway and RMT union leader Bob Crow claim their phones were hacked."
- 2011-02: "The Met Police release a statement saying officers have identified more potential victims of hacking while reviewing files relating to the original Goodman and Mulcaire case. They say they are urgently notifying people who had previously been told that police had "little or no information" about them.
- Former Deputy Prime Minister Lord Prescott, Labour MP Chris Bryant, ex-Scotland Yard commander Brian Paddick and journalist Brendan Montague, all alleged victims of phone hacking, win a High Court bid for a judicial review into the police inquiry. They believe their human rights were breached.
- Lawyers for a football agent suing the *News of the World* claim Glenn Mulcaire passed information directly to the newsdesk rather than an individual reporter, Goodman. They say the desk could have been staffed by "a number of journalists", and suggest that this means knowledge of phone-hacking was more widespread than previously admitted. A judge rules that Mulcaire must provide information about whether other journalists at the NoW were involved in hacking. He had tried to claim he should be exempt from giving evidence for fear of incriminating himself."
- 2011-03: "The BBC's Panorama reveals that in 2006, a then *News of the World* executive, Alex Marunchak, obtained e-mails belonging to an ex-British Army intelligence officer that had been hacked in to by a private detective."
- 2011-04: "Former *News of the World* editor Ian Edmondson, chief reporter Neville Thurlbeck and senior journalist James Weatherup are arrested on suspicion of conspiring to intercept mobile phone messages. They are released on bail until September. The *News of the World* admits it had a role in phone hacking. The *News of the World* publishes apologies on both its website and newspaper. News International also announces it will set up a compensation scheme to deal with "justifiable claims" fairly and efficiently. However, the publisher adds it will continue to contest cases "that we believe are without merit or where we are not responsible."
- 2011-05: "Former Deputy Prime Minister Lord Prescott, Labour MP Chris Bryant, ex-Scotland Yard commander Brian Paddick and journalist Brendan Montague, all alleged victims of phone hacking, win a High Court bid for a judicial review into the police inquiry. They believe their human rights were breached."

In November 2012, Lord Justice Leveson released his report on the scandal.[4] Some of the key findings in the *Executive Summary* follow:

- "The evidence placed before the Inquiry has demonstrated, beyond any doubt, that there have been far too many occasions over the last decade and more (itself said to have been better than previous decades) when these responsibilities, on which the public so heavily rely, have simply been ignored. There have been too many times when, chasing the story, parts of the press have acted as if its own code, which it wrote, simply did not exist. This has caused real hardship and, on occasion, wreaked havoc with the lives of innocent people whose rights and liberties have been disdained. This is not just the famous but ordinary members of the public, caught up in events (many of them, truly tragic) far larger than they could cope with but made much, much worse by press behaviour that, at times, can only be described as outrageous."
- "For many years, there have been complaints that certain parts of the press ride roughshod over others, both individuals and the public at large, without any justifiable

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public interest. Attempts to take them to task have not been successful. Promises follow other promises. Even changes made following the death of Diana, Princess of Wales, have hardly been enduring. Practices discovered by the Information Commissioner, during Operation Motorman, which led to the publication of two reports to Parliament,⁸ revealed that large parts of the press had been engaged in a widespread trade in private and confidential information, apparently with little regard to the public interest. A private detective, Steve Whittamore, had certainly been engaged in wholesale criminal breaches of data protection legislation and, prima facie, journalists who engaged his services or used his products (and paid substantial sums for the privilege) must or should have appreciated that the information could not have been obtained lawfully.”

- “When Clive Goodman, a journalist employed by the *News of the World* and Glenn Mulcaire, a private detective, were convicted of hacking into the telephone messages of members of the Royal Household and others, it was implicit during the course of the criminal prosecution that others must have been involved, whether knowingly or not, in using information that was the product of phone hacking. Most responsible corporate entities would be appalled that employees were or could be involved in the commission of crime in order to further their business. Not so at the *News of the World*. When the police had sought to execute a warrant, they were confronted and driven off by the staff at the newspaper. Cooperation, if provided, was minimal. The two that were sentenced to terms of imprisonment were paid very substantial sums as compensation for loss of employment when they were released.”
- Then came exposure of the fact, albeit as long ago as March 2002, that the mobile phone of Milly Dowler had been hacked by someone at the *News of the World*. The information obtained had led the paper to publish false leads as a result of its misunderstanding of a message which had simply been left on the wrong phone in error. It was also believed that a message or messages had been deleted (thereby giving rise to a false moment of hope in her family). On 5 July 2011, these facts were reported by the *Guardian*. The outcry was immediate; Two days later it was announced that the *News of the World* would close.”
- “Phone hacking in itself, even if it were only in one title, would justify a reconsideration of the corporate governance surrounding the way in which newspapers operate and the regulatory regime that is required. Without making findings against anyone individually, the evidence drives me to conclude that this was far more than a covert, secret activity, known to nobody save one or two practitioners of the ‘dark arts’. Yet it was illegal. And after the prosecution, at more than one title and more than one publisher, there was no in-depth look to examine who had been paid for what and why or to review compliance requirements.”

ENDNOTES

- [1] “What is the NSA domestic spying program?” NSA Spying on Americans, Electronic Frontier Foundation (2013-07-31). <https://www.eff.org/nsa-spying/faq#37>
- [2] “EPIC Urges US Supreme Court to Suspend NSA Domestic Surveillance.” EPIC Alert 20.14 (2013-07-12). http://epic.org/alert/epic_alert_20.14.html
- [3] Chandrasekhar, M. Wardrop and A. Trotman. “Phone hacking: timeline of the scandal: The key events in the phone hacking scandal, which has led to the closure of the News of the World, halted Rupert Murdoch’s BSkyB takeover bid, and prompted the arrest of several key figures.” *The Telegraph* (2012-07-23). <http://www.telegraph.co.uk/news/uknews/phone-hacking/8634176/Phone-hacking-timeline-of-a-scandal.html>
- [4] Lord Justice Leveson. *An Inquiry into the Culture, Practices and Ethics of the Press: Executive Summary*. <http://media.ft.com/cms/643fca7e-3a2c-11e2-a00d-00144feabdc0.pdf>

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M. E. Kabay, < <mailto:mekabay@gmail.com> > PhD, CISSP-ISSMP, specializes in security and operations management consulting services and teaching. He Professor of Computer Information Systems in the School of Business and Management at Norwich University. Visit his Website for white papers and course materials. < <http://www.mekabay.com/> >