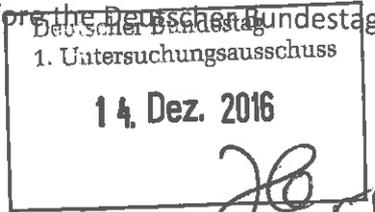


Testimony of Eric King before the Deutscher Bundestag
15th December 2016



Deutscher Bundestag
1. Untersuchungsausschuss
der 18. Wahlperiode

Introduction

MAT A SV-17/1c
zu A-Drs.: 542

I wish to thank the Committee of Inquiry for giving me an opportunity to testify.

My work is focussed around human rights and signals intelligence. For the last year I have acted as Director of the Don't Spy On Us coalition of UK NGOs campaigning for the reform of surveillance laws. Prior to that I was Deputy Director of Privacy International. I represent neither of those entities today, and instead appear in my own capacity as an independent expert.

I understand the Committee has received evidence on the recent changes to UK surveillance law with the passing of the Investigatory Powers Act 2016. I also understand the Committee has heard from witnesses on the state of UK-based litigation from numerous parties, including Privacy International, relating to a range of surveillance capabilities revealed by Edward Snowden. I do not wish to duplicate that evidence.

I have noted an interest on behalf of the Committee regarding the so-called Five Eyes "no-spy pact", so I will use this opportunity to set out very briefly a summary of my research in this narrow area and its relevance to the intelligence sharing partnerships of which Germany is a part.

1. The original 1943 UK-USA Agreement does not expressly create a no spy pact

Beginning in 1946, an alliance of five countries (the US, the UK, Australia, Canada and New Zealand, also known as Second Parties), developed a series of bilateral agreements over more than a decade that became known as the UKUSA agreement, establishing the Five Eyes alliance for the purpose of sharing intelligence, primarily signals intelligence.

The UKUSA intelligence agreement is commonly believed to have created a 'no spy pact' between its parties, and this fact is often reported. The existence of a no spy pact implies that the parties to the agreement have an obligation to refrain from collecting signals intelligence on each other's citizens.

However, within the original text of the UKUSA arrangement (declassified and publically released in 2010) there is no clause that attempts to create such an express obligation. Other clauses dealing with the exchange of communications intelligence carve out

exceptions that material “prejudicial to national interests” need not be exchanged, and acknowledges that while liaison officers would normally have unrestricted access to other parties’ agencies, this doesn’t extend to “un-exchangable information”. This implies that parties may obtain information on other parties’ citizens where it would be in the national interest to do so.

2. Interpretation of the agreement developed an understanding not to intentionally target citizens of the Five Eyes

Documents released by Edward Snowden provide some of the only insight into how the original UKUSA arrangement has been interpreted by the parties and applied to modern day practices. There is no formal prohibition on intelligence-gathering by Five Eyes States with respect to the citizens or residents of other Five Eyes States. There is instead a general understanding that citizens will not be directly targeted, and where communications are incidentally intercepted there will be an effort to minimize the use and analysis thereof by the intercepting State. A leaked copy of a US National Security Agency (“NSA”) directive on the “Collection, Processing and Dissemination of Allied Communications” states that:

“Under the British-U.S. Communications Intelligence Agreement of 5 March 1946 (commonly known as the United Kingdom/United States of American (UKUSA) Agreement), both governments agreed to exchange communications intelligence products, methods and techniques as applicable so long as it was not prejudicial to national interests. This agreement has evolved to include a common understanding that both governments will not target each other’s citizens/persons. “

The Head of the New Zealand Government Communications Security Bureau (“GCSB”), Ian Fletcher, had said in public that he views the arrangement in a similar manner. He has stated:

“...[Y]ou cannot read [the UKUSA agreement] without coming to the conclusion that the full sharing – which is described – can only be done if there is no deliberate targeting against each other’s government or nationals. And that expectation [...], is made explicit in the policies of each, which are then shared, and in the practice, which is then shared, and the compliance frameworks of all five, which involve a degree of challenge each of the other. So what you have is an underlying agreement framework, with this as an implicit provision. That’s why it has been referred to in the past as a gentleman’s agreement, made explicit in policy and practice over the last 67 years.”

It is assumed, but not known, that the other parties to the Five Eyes arrangement, Canada, Australia and the UK, view the arrangement in the same light. Numerous documents disclosed as part of the Snowden revelations show that this understanding manifests itself not just in policy documents, but also the underlying technical architecture of the appropriate SIGINT collection systems. Even with bulk intercept systems, there are technical rules that minimise metadata and content from IP addresses known to be in UKUSA countries.

3. Five Eyes States can collaborate and provide permission to spy on Five Eyes citizens

However, such a general understanding does not prevent Five Eyes states from targeting each other's nationals, or collaborating to analyse information about their own citizens collected by a second party on a bulk scale.

When Five Eyes partners want to target citizens from another Five Eyes country, they first attempt to do so with the other country's consent. It is unclear on what basis consent may be given or withheld, but the NSA directive explains:

"There are circumstances when targeting of second party persons and communications systems, with the full knowledge and co-operation of one or more second parties, is allowed when it is in the best interests of both nations."

The directive goes on to state that these circumstances might include "targeting a UK citizen located in London using a British telephone system;" "targeting a UK person located in London using an internet service provider (ISP) in France;" or "targeting a Pakistani person located in the UK using a UK ISP."

Leaked GCHQ documents also show that additional authorisation is needed by British intelligence services should they wish to target the citizens of a Five Eyes country.

As of Oct 2007

Legalities - GCHQ Databases eg Pilbeam, Salamanca, UDAQ etc

In the event that both the nationality and the location of the target is confirmed:

metadata content	UK persons	2nd Party persons	Others
UK location	OK warrant required	OK warrant required	OK warrant required
2nd Party location	OK STA	OK STA	OK STA
Other country	OK STA	OK STA	OK OK

Legalities - NSA Databases eg Marina, Mainway, Dishfire etc

In the event that both the nationality and the location of the target is confirmed:

metadata content	UK persons	2nd Party persons	Others
UK location	OK NO	NO NO	OK NO
2nd Party location	NO NO	NO NO	NO NO
Other country	OK 1-off STA	NO NO	OK OK

*NB - Dishfire is dealt with as a CONTENT database
Marina is dealt with as a METADATA database*

There have also been instances in which Five Eyes states have consented to other parties in the Five Eyes alliance making use of material intercepted under bulk interception programs related to their citizens.

Previous practice across the Five Eyes requires the minimization or immediate deletion of such incidentally-collected material to comply with UKUSA. Such practice could mean removing the names of identifiable UKUSA citizens from finalise intelligence reports or, when conducting analysis of large datasets that involve UKUSA citizens, replacing personally identifiable information with a pseudonymous hash.

In individual cases, permission could then be sought by the relevant government to seek to un-minimise such material.

This previous requirement appears to be being relaxed in some areas. One example is the UK change of policy in 2007 to permit the NSA to “unminimize all incidentally collected UK contact identifiers, including IP and email addresses, fax and cell phone numbers, for use in analysis.”

Given the reported scale of NSA collection, this change in policy means that for many UK citizens, for example, their communications are being intercepted by the NSA, which is permitted to analyse them. This change in policy essentially permits the analysis of information relating to UK citizens by allied countries, which information the UK intelligence agency would not be permitted to analyse without specific authorisations. The NSA could then share the information derived from analysed communications with the British intelligence agencies, potentially circumventing UK authorisation procedures.

As all policy relating to intelligence exchange is subject to “Neither confirm nor deny” this change in policy has not been officially acknowledged by the UK government and as such there no reason or further detail given as to why the UK permitted such change in policy.

4. Five Eyes States reserve authority to act unilaterally and target Five Eyes citizens

While there is a preference and understanding that Five Eyes governments will not target each other’s citizens, if consent isn’t provided then States reserve the right to act unilaterally. The same NSA “Collection, Processing and Dissemination of Allied Communications” directive referenced above goes on to state:

“when it is in the best interest of each nation, each reserve the right to conduct unilateral COMINT against each other’s citizens/persons. Therefore, under certain circumstances, it may be advisable and allowable to target Second Party persons and Second party communications systems unilaterally when it in the best interests of the U.S and necessary for U.S national security.”

It is for this reason that any suggestion that the UKUSA arrangement creates a no-spy could be seen as misleading. Certainly, the arrangement makes it clear that there is no absolute

prohibition on the targeting of allied Five Eyes parties. It is perhaps for this reason that President Obama felt able to state “[t]here’s no country where we have a no-spy agreement.” Former NSA Director Michael Hayden has supported this statement explaining ““No, we're not going to do no-spy agreements. It's just too hard to do, not even with the British.”

5. There are no restrictions to limit the targeting of Third Parties by Second Parties

Outside the Five Eyes States, there are other countries that have agreed to the exchange of intelligence, known as Third Parties. This includes Germany, which is a Third Party to the UKUSA arrangement.

There are 41 such Third Parties. In Europe, there are 23 Third Party countries. Of these, 14 countries have formed a group called Sigint Seniors Europe (“SSEUR”). Beyond the existence of the group, there is very little known about the state of exchange between the parties, or whether any attempt has been made to provide for similar protections for each other’s countries citizens as exists between Second Parties of the Five Eyes

However, there should be no ambiguity about the policy regarding targeting of Third Parties by Second Parties. An internal NSA presentation made clear: “[w]e can, and often do, target the signals of most 3rd party foreign partners.”

Conclusion

The UKUSA arrangement does not in my view amount to a no-spy pact. It does however in practice afford greater safeguards to those Five Eyes citizens who would otherwise would be afforded none.

My view is that a better way of achieving this same goal is to respect the privacy rights of every individual, no matter where in the world they may be, and furnish them with the same statutory protections that a country’s own citizens are entitled to. This needn’t be constrained to just the Five Eyes countries. Indeed, I would encourage all states to provide such protections and encourage other states to do the same.

I would be pleased to answer questions on any aspect of this evidence, or any other related areas to the extent I am able.