

The Surveillance State

A report by Jenny Jones
Green Party Member of the London Assembly **January 2015**

(This report sets out my individual views as an Assembly Member and is not the agreed view of the full Assembly)

The terrible attacks in Paris were an assault on free speech and liberty, equality and fraternity. The only proper response is to strengthen our resolve in upholding those freedoms.

Yet the Mayor of London's response was to say he isn't particularly interested in civil liberties, and that the police should gain further powers to monitor anyone's emails and phone calls.



In recent years he has been content for the Met to spy on journalists, lawyers, campaigners for police accountability, and even the politicians who hold them to account.

I want those who pose a genuine threat to society watched, not everybody. When the police must use intrusive powers they should be focussed on those individuals who pose a threat of serious harm and carry out serious criminal acts, not on the people who have not committed a crime and simply seek to exercise their fundamental rights.

The police are wasting their time and money in creating a surveillance state which catches large numbers of innocent people in its web. The Mayor is choosing not to defend civil liberties and choosing not to hold the police to account on these issues.

The police have been given significant powers of surveillance to meet the significant threat we face from terrorism. However, they have overreached and misused their powers, aided by illiberal legislation that is not fit for purpose. An unhealthy culture has developed which means the police think it is not only acceptable but necessary to carry out intrusive surveillance into the lives of innocent people. Rather than focusing upon fighting terrorism, the Met Police use the special powers they are given to chase a separate category of 'domestic extremists', some of whom have never been charged with any crime.

I have raised these issues with the Mayor and the Met repeatedly. I have met with lawyers challenging unsafe convictions, and women who were deceived into long-term relationships with undercover police. I've even discovered I have been under surveillance by the police, and met others who have also been tracked by them.

The Mayor, as the elected Police and Crime Commissioner for London, could do a lot to hold the Met to account and champion civil liberties. He could be challenging the Met when they overstep the mark and he could lobby government to reform illiberal and out-of-date legislation. Instead, he is turning a blind eye.



Surveillance by undercover officers

History

There have been many issues around undercover police that have come to light since the former Met Police undercover officer, Mark Kennedy, was exposed and named by the Court of Appeal in July 2011. The use of long-term intimate relationships with female activists, giving evidence in court under false persona, fathering children with the people they have been targeting, placing an undercover police officer in the Lawrence family campaign, gathering intelligence on 18 families fighting for justice from the police and the blacklisting of trade unionists are some of the methods exposed.

I have been particularly concerned about this area of policing since I met with some of the women who were deceived into forming relationships with undercover officers. You cannot help but be moved by their accounts. The similarities in all their cases leave me in no doubt that this was a deliberate tactic that was used by officers to gather intelligence. They saw the deceiving of women as a core part of doing their job. These relationships were not accidental, they were premeditated.

For example, we know that Bob Lambert had more than one sexual relationship while he was working undercover – he fathered and abandoned a child with one of the women. We also know that he rose through the ranks within the unit (the Special Demonstration Squad) becoming a Detective Inspector and running operations for other officers. During Bob Lambert's time in charge were sexual relationships seen as a core part of doing the job? Were senior officers in the Met unaware that they had promoted and put someone in charge of operations who had deceived women into sexual relationships and fathered and abandoned a child?

Current issues

I have been asking questions of the Met and the Mayor as to whether undercover police can ever be authorised to have sexual relationships with the people they are targeting, and unfortunately the answer is unclear.

The College of Policing Code of Ethics paragraph 2.3 says officers should not engage in sexual relations¹. However, the Court of Appeal states that section 26(8) RIPA permits the authorisation of sexual relations². This matter must be clarified urgently. The Metropolitan Police Commissioner has made mixed statements on the issue. In court the leading counsel for the Met argued in relation to undercover officers engaging in intimate sexual relationships with those they are employed to infiltrate and target "that one should never say never"³.

In contrast Chief Constable Mick Creedon is the senior officer in charge of Operation Herne – the police investigation into the undercover unit The Special Demonstration Squad. The first published report said:

"... there are and never have been any circumstances where it would be appropriate for such covertly deployed officers to engage in intimate sexual relationships with those they are employed to infiltrate and target. Such an activity can only be seen as an abject failure of the deployment, a gross



Protest in support of the women outside the High Court

abuse of their role and their position as a police officer and an individual and organisational failing.⁴

The Commissioner recently told the Home Affairs Select Committee that it has never been Met policy to allow sexual relationships and that “*we are explicit – if we ever needed to be – that that is our policy and it will not happen.*” However, he went on to talk about officers needing “leeway” if they were presented with a “sex test”. He also said he couldn’t say that sexual relationships would never happen because “*We employ human beings.*⁵”

In my view it is never morally acceptable for undercover police to enter into intimate sexual relationships based on deceit and while using a fake identity that they have been given by the Metropolitan Police Service. The talk of people only being human and therefore open to falling foul of the policy is very disappointing from the head of an organisation and sends a poor message. The argument of “never say never” suggests that state agents engaging in sexual relationships to gather intelligence can be some circumstances allowable. It is already illegal in countries such as Germany and it should illegal here too.

Recommendation 1

The terms of deployment for undercover officers should make clear that officers are expressly forbidden from entering into intimate or sexual relationships as part of their job whilst under their undercover persona.

Recommendation 2

The Mayor should lobby the government to amend section 26 (8) of RIPA to remove the legal permission for such relationships.

Undercover officers still employed

In August the Crown Prosecution Service decided that no police officer would face any charges in connection with the use of sexual relationships while working undercover⁶. I think the CPS decision was wrong. The CPS appears not to have looked at the use of sexual relationships as a systematic tactic by a group of undercover officers during their deployment.

Following the CPS decision I wrote to the Met to ask how many of the four officers whose cases were examined by the CPS are still serving in the Met. They refused to answer saying that providing such information could lead to the identification of individuals and/or potentially breach their policy of “neither confirm nor deny”.

I fail to see how simply providing these numbers will lead to the identification of individual officers. These officers have behaved in a way that has been described as unacceptable by the Mayor, the Commissioner, Chief Constable Creedon and yet still the public are not allowed to know if they are still serving with the Metropolitan Police.

I asked the Mayor recently at an Assembly Plenary meeting how Londoners can have confidence in the Met if police officers who had sexual relationships while working undercover are still employed and may not face any sanction for their behaviour. He told me he would be “*... very surprised if there were officers who remained employed as undercover officers who have been found to have behaved unethically or not in accordance with the rules.*” However, the Commissioner immediately corrected him, clarifying that some of these officers remain with



Jenny outside the High Court in support of the women.

the Metropolitan Police 3 years after their misdeeds came to light and are being investigated by Operation Herne⁷.

I am concerned that the Mayor was unaware that officers who have engaged in sexual relationships while undercover are still employed by the Met. I directly asked the Mayor in July whether Jim Boyling (undercover alias Jim Sutton) was still employed by the Metropolitan Police but he refused to comment⁸. The judge involved in the case said it is “simply unsustainable” to rely on “neither confirm nor deny” in relation to his case⁹ and the Commissioner confirmed in 2011 to the Metropolitan Police Authority that he was under investigation¹⁰. The Mayor seems unconcerned by the behaviour of these undercover officers and to have no interest in examining these cases of abuse that are brought to his attention.

The women who had relationships with undercover officers have faced the greatest intrusion into their lives and suffered abuse and degrading treatment at the

hands of the police. I think the public should know if these officers will be held to account and deserve a Mayor who takes this behaviour seriously rather than describe such behaviour as “romantic entanglements¹¹”.

Recommendation 3

Police officers engaging in sexual relationships while working undercover should be a matter of gross misconduct and they should face disciplinary action.

I agree with Mr Creedon that such behaviour is not just an individual failing but an organisational one. Therefore senior officers should also face disciplinary action if such behaviour happens on operations they are responsible for.

Recommendation 4

Senior officers responsible for the deployment of officers who have engaged in sexual relationships while working undercover should face disciplinary for their failure to properly manage the operation.

The Met's use of RIPA

The Operation Alice or 'Plebgate' report revealed that the Met used the Regulation of Investigatory Powers Act (RIPA) to obtain the phone records of the Sun Newspaper's political editor Tom Newton-Dunn despite laws protecting journalists' sources. The Met also used RIPA to get the phone records of the Sun's news desk¹². It came to light recently that the Met held onto more than 1,700 News UK phone records, which were handed to them by Vodafone in error, for more than seven months.

There are some occasions where the police may need to obtain material from a journalist. However, in those circumstances they can apply through section 9 of the Police and Criminal Evidence Act (PACE) which goes before a judge and means the journalist is informed and able to argue their case. With RIPA the sign-off is not independent of the police, and comes from a superintendent in another team within the Met.

The Met have argued that their use of RIPA in this case was legal and appropriate. It may be the case that their behaviour complied with the law as RIPA is drafted. However, RIPA was not intended to be used to obtain journalistic material and in fact a case is to go to the European Court of Human Rights to decide this. I believe the Met are bending the rules – they are sticking to the letter of the law but not the spirit, and at the same time expanding their powers. It is for the Mayor and others scrutinising the police to ensure the police do not overreach.

Recommendation 5

The Mayor should lobby government for the complete reform of RIPA which is not fit for purpose, as has been shown by undercover policing, snooping on journalists and blanket collection of data.

I am concerned that the Metropolitan Police are misusing RIPA to obtain journalistic material rather than using PACE. I asked the Mayor what policy or guidance the Met has to decide whether it is appropriate to use PACE or RIPA in relation to journalists' communications, sources or journalistic material. I was told the legislation and codes of practice provide the framework but there does not appear to be any guide to police to say under which circumstances to use which piece of legislation. It has been suggested by the police that they are using RIPA – the legislation with less oversight and no judicial element – because journalists will win in court using PACE.

The Met made 94,778 requests for communications data under RIPA in 2013¹³. I doubt the majority of these are targeted at journalists, however I believe the Mayor can and should be asking the Met for more information on their use of RIPA and to reassure the public that this power is not being misused he should publish the answers.

The Mayor is the Police and Crime Commissioner for London and it is his job to scrutinise the Met and hold them to account. I have asked repeated policy questions about the Met's use of RIPA and surveillance around journalists, but I did not receive proper answers. The police ironically quote privacy rules – refusing to comment on individual cases – to stop the release of information relating to key strategic questions, just as they hide behind their policy of "neither confirm nor deny" to avoid public scrutiny of undercover officers. Even if I accepted their defence, that is exactly why the Mayor has the ability to deal with these things in private and find out the truth about what the police are doing, and stop them when they are overstepping their powers. Despite my repeated requests, the Mayor has failed to do this.

Recommendation 6

The Mayor should ask far more detailed questions about the use of RIPA by the Met. For a breakdown of what crimes it is used against, the success rate in terms of prosecutions, whether it is targeted at suspects or others such as journalists. Where possible this information should be made publicly available in some form.

Recommendation 7

MOPAC should dip sample the RIPA requests that are made to assess if PACE or other means could or should have been used instead.

Whistleblowing

The Met may be using RIPA in press leak investigations in which a whistleblower has exposed genuine wrongdoing in the police. It is important for the public and the police that whistleblowers who expose wrongdoing have the confidence to come forward and not fear retribution for doing so. In these cases, where what has been exposed is in the public interest, it is not appropriate for the Met to go after the individual. The Mayor has been unable to provide me with a single example of a Met officer or staff who was happy with their treatment after they became a whistleblower.

The Commissioner told the Leveson Inquiry that, between April 2006 and August 2011, 38 leak probes resulted from “41 allegations relating to inappropriate relationships with the media that resulted in the alleged leakage of police information.” Lord Blair told the inquiry that “examination of telephone records” were “the only proper way to deal with” press leak investigations¹⁴.

Of course the Met should investigate press leaks; police officers are public servants and should not sell information to the press. But when inaccurate statements are given to the press by the Met they should also be investigated. For example, the untrue official statement from the Met after the death of Ian Tomlinson – that police decided to move him because protestors were throwing missiles at them – should have been investigated.

However, the Met’s use of RIPA could be used against its own employees to discourage them exposing whistleblowing. I am concerned the Met may have used RIPA to obtain the phone records of journalists as part of their press leak investigations and have asked the Mayor if this is the case and to specify examples.

Recommendation 8

The Mayor should introduce a public interest test, assessed by someone independent of the police, which must be satisfied before a press leak investigation is launched, to ensure investigations are targeted at inappropriate media leaks and not whistleblowers exposing genuine wrongdoing in the police.

RIPA and legally privileged material

The government was recently forced to disclose in a case before the Investigatory Powers Tribunal advice to staff at GCHQ and MI5 that they “may in principle target the communications of lawyers.”¹⁵ I asked the Mayor whether the Met have ever targeted the communications of lawyers. The response stated that it was not MPS policy to target the

communications of lawyers. However, it also said that it was not possible to answer this question from a number of units because often the Met may not know the identity of the person about whom the request is made¹⁶.

When I wrote to Assistant Commissioner Cressida Dick to ask about the Met using RIPA to obtain legally privileged material she said that communications data does not “contain any material that may be said to be of professional legal privilege”¹⁷.

So the view of the Met seems to be that communications data or metadata isn’t legally privileged because it doesn’t contain the content of the communications. It may show who you called, when you called them, how long you spoke for, how frequently you have called them and even your location during the calls, but it does not reveal what you spoke about. The same argument was put forward when the Met defended accessing the Sun’s political editor’s phone records.

However, to quote the National Security Agency Counsel Stewart Baker, in a moment of candour:

“Metadata absolutely tells you everything about somebody’s life,” “if you have enough metadata you don’t really need content.... (It’s) sort of embarrassing how predictable we are as human beings.”¹⁸

To put this into a policing example: if you work in a unit within the Met and wish to expose wrongdoing and contact a journalist, the story appears in the paper and the police access the phone records of the journalist behind the story. They then look at who called the journalist and see if any phone numbers match Met employees. They then see that someone from the unit where wrongdoing was exposed called the journalist on several occasions leading up to the publication of the story. They may not know what you discussed during the call but could easily put together a picture.

Legal privilege is a fundamental legal right and one that must be respected as an integral part of our legal system. The rights of a journalist to protect a source is also vital to having a free press which is important to democracy.

The Mayor, after initially being supportive of the Met’s use of RIPA against journalists, has now called for judicial oversight. What Boris Johnson has failed to do is to use his Mayoral role to change the way the Met overstep their powers.

Recommendation 9

The Mayor should retain the service of a retired judge who could advise the Met if they are to make applications under RIPA. This should stand until the government reforms RIPA and introduces judicial oversight.

Databases

History

The Met has long had an issue of retaining information on innocent people on their databases. As a Member of the Metropolitan Police Authority I sat on the Civil Liberties Panel which looked into the National DNA Database and the use of DNA within policing. The concern then was that innocent people were having their DNA held on a national database without their knowledge.

The Civil Liberties Panel also produced a report into the policing of the G20 protests in London¹⁹. This report highlighted concerns about the use of Forward Intelligence Teams (FITs) and the purpose, role and access to information held on databases derived from FIT operations and activity. There were concerns that the recording of information at protests could deter people attending protests. Journalists also were concerned that they were being targeted.

Definition of 'Domestic Extremism'

At the public meeting in 2009, as part of this investigation, concerns were raised about the Met's database of 'Domestic Extremists'. This database personifies the problem of the Met retaining and tracking information about innocent people.

I applied to the Met to see if I had a file on this database and to better understand how much personal information about me was held on the database. Until very recently (and prior to my request) I had never been arrested by the police so I could see no reasonable basis for them to collect information about me, much less hold it on a database of 'Domestic Extremists'.

I was particularly surprised to see records from 2009 because I had received a letter in September that year from the previous National Coordinator for Domestic Extremism which stated that the National Public Order Intelligence Unit (which has now become subsumed into the Met's NDEDIU) "... does not and never has monitored political parties, politicians, journalists or trade unions."²⁰

But first you must consider how the Met define 'Domestic Extremists'. In the past it was so broad it could have meant cyclists staging a die-in could have been considered 'Domestic Extremists'. Under pressure from politicians such as me, the Met recently tightened up their definition of 'Domestic Extremism', to make it less catch-all. However, it took over two years of repeatedly raising this issue with the Mayor and the Met in order for this small change to happen.

The timeline on the next page is indicative of the general lack of action by the Mayor in defending our civil liberties. It took nearly two years from HMIC recommending the definition of a Domestic Extremist be changed to the Met implementing it. During this time I raised it with the Mayor on multiple occasions. Let's not forget that HMIC made this recommendation following the Mark Kennedy case which had serious implications for policing.

I am pleased that the definition had been tightened to focus on serious criminality rather than "criminal acts of direct action". I have asked the Mayor in two letters (July and September) whether the Met have checked all files on the database against the new definition of Domestic Extremism. Unfortunately, to date the Mayor is yet to directly answer this question.

Timeline

February 2012 – HMIC expressed concern about the broadness of the definition of 'Domestic Extremism' and recommended changing it to focus on serious crime¹.

June 2013 – HMIC reviewed its recommendation and found the definition hadn't been updated¹.

June 2013 – I questioned the Commissioner about the definition at a Police and Crime Committee meeting. His initial response was that it is the responsibility of the Home Office and ACPO. However, the NDEDIU sits within the Met and they lead nationally on this area so he accepted the Met could take a lead on this¹.

July 2013 – I raised the issue at Mayor's Question Time where the Mayor seemed unaware that HMIC had looked at this a second time¹.

July 2013 – I wrote to the Mayor following the meeting about the HMIC report's recommendation and asking when he will raise this issue with the Commissioner to update the definition.

August 2013 – The Mayor replied saying the definition is not actionable by the Met but by the Home Office and ACPO.

September 2013 – I replied to the Mayor quoting the transcript of the July Police and Crime Committee meeting where the Commissioner accepted the Met could lead on this.

October 2013 – The Met updated its definition of 'Domestic Extremism' which is then agreed by ACPO and the Home Office informed. The new definition takes account of HMIC's recommendation.

November 2013 – the Mayor replied to my letter and provided me with the Met's working definition of 'Domestic Extremism' and said the Met is working with partners and the working definition is the first part of the discussions to change the definition.

December 2013 – I replied to the Mayor to raise my concerns that the working definition he provided remained too broad and did not take account the concerns set out by HMIC. It could mean trespass or minor obstructions or a highway result in people being classified as Domestic Extremists.

January 2014 – The Mayor replied and said my last letter "raises some interesting points" and he had asked the Met to follow it up.

March 2014 – I raised the issue of the definition at an Assembly Plenary and I was told it had been changed¹. I was informed at the same time as MOPAC and the Mayor about this change. Further letters revealed the Met updated its definition in October 2013.

In light of the new definition I asked the Met how many individuals on the database have no criminal record and what checks, if any, they had done to check this. The response I received from the National Co-ordinator for Domestic Extremism was that the “system is not designed to search for how many criminal records exist”. If the database is unable to search for this type of information, it implies that criminality is not a criterion and it is not recorded in the files. How can the Mayor or senior officers be satisfied that innocent people who do not meet the definition of a Domestic Extremist are not on the database if they cannot search for this?

Domestic Extremism database records

The Domestic Extremist database came to prominence with the case of John Catt, the 89 year-old from Brighton who campaigns for peace and human rights. He found he had a file on the database which even included descriptions of his appearance and his habit of sketching demos. He won a legal case at the court of appeal to have information held on him deleted. The Met appealed this case to the Supreme Court in December 2014 where the Met lawyers specifically argued that they should continue to retain intelligence records on people even though they are not suspected of any offence. This seems to contradict comments made by the Commissioner to the Home Affairs Select Committee the previous month:

Sir Bernard Hogan-Howe: “We don’t. The only reason that we have an interest in anyone is if we consider them to be suspicious about the involvement in crime. That is the main reason that we have an interest in people, either as a victim or as a suspect²¹.”

In 2012 HMIC found the rationale for recording material on the database was not sufficient to provide assurance that its retention was necessary or justified, given the intrusion into people’s privacy²². In a later report HMIC found a new policy on the use of the database was introduced which was more suitable²³. I raised the issue of the database with the Deputy Commissioner in November 2013 where he reassured the Assembly that the number of records on the database had been reduced from 27,500 records in January 2012 to 2,871²⁴.

The number had been culled thanks to the new weeding criteria used. They have refused to share these criteria with me. I have asked the Mayor if he is allowed to see the criteria, but he has yet to answer my question directly.

It seems this database has two types of records: ‘nominal’ and ‘intelligence’. A nominal record holds data that may indicate a person is of interest to the police. An intelligence record may hold information about for example, an event, a threat, an area, interest or an organisation. I have been led to understand that they have culled nominal records.

If they have only culled the nominal records and their weeding policy does not apply to intelligence records then they are still retaining information they shouldn’t. It also ignores the fact that intelligence records – while they may not be about a specific individual – can tell you a lot about someone, possibly more than a nominal one. For example, the intelligence records relating to John Catt would detail his appearance, his attendance at different political protests and his behaviour at each one. Once you build this information up you can get a detailed picture of someone’s political views and behaviour over many years.



The Commissioner, Sir Bernard Hogan-Howe, giving evidence to the Home Affairs Select Committee.

When I met the National Coordinator for Domestic Extremism earlier this year I was told that one of the reasons for recording information about me was that the events I speak at are unlikely to attract crowds that are violent. Their reasoning was that other speakers might draw a more troublesome crowd and that was intelligence the police should have. However, this justification illustrates an unhealthy culture within the police which thinks that surveillance on innocent people who do not cause trouble can somehow be justified. Surely it is a waste of police time and resources tracking people they know not to be of interest? It is an unethical invasion of privacy and an example of the police losing sight of what they are there to do.

Recommendation 10

The Met should adopt the key principle: "Minimise data: collect only what is needed, and keep it no longer than necessary. Central systems should be simple and minimal and hold sensitive data only when both proportionate and necessary.

Recommendation 11

The Met should review all databases and delete or substantially redesign any that are illegal under human rights or data protection law, and review all databases to ensure they are "effective, proportionate and necessary, with a proper legal basis for any privacy intrusions."

Conclusion

The Met must police by consent, and their success in gathering intelligence and dealing with criminal activity relies upon all our co-operation. We have a professional police service that should be accountable and, as far as it can be, transparent. This democratic accountability in London is threatened by a combination of our 'hands off' Mayor and the police abusing their power by spying on the people who are trying to hold them to account.

This report highlights some of the serious cases where the police have abused their powers of surveillance. Londoners deserve a Mayor who challenges the Met and champions their civil liberties. Unfortunately the current Mayor refuses to take on that role. I believe the recommendations within this report will help improve the ethics in this area of policing.

Recommendations

Recommendation 1

The terms of deployment for undercover officers should make clear that officers are expressly forbidden from entering into intimate or sexual relationships as part of their job whilst under their undercover persona.

Recommendation 2

The Mayor should lobby the government to amend section 26 (8) of RIPA to remove the legal permission of such relationships.

Recommendation 3

Police officers engaging in sexual relationships while working undercover is unacceptable and should be treated as a matter of gross misconduct and they should face disciplinary action.

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investigations are targeted at inappropriate media leaks and not whistleblowers exposing genuine wrongdoing in the police.

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