



The Human  
Rights, Big Data  
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Project



מרכז המחקר להגנת הסייבר  
CYBER SECURITY RESEARCH CENTER



האוניברסיטה העברית בירושלים  
THE HEBREW UNIVERSITY OF JERUSALEM



## Surveillance Activities Conducted by State Intelligence Agencies: Judicial Review

[The Investigatory Powers Act 2016](#) provides that when deciding whether warrants should be approved, a Judicial Commissioner is required to review the Secretary of State's conclusions as to whether the warrant is necessary and whether the conduct to be authorized under the warrant is proportionate. In doing so, the Judicial Commissioner must apply the same principles as would be applied by a court to an application for judicial review. These requirements form what is widely referred to as the “double lock.”

The workshop held on 14 March 2018 focused on what these tests are likely to require in practice and how the [Investigatory Powers Commissioner's Office](#) (IPCO) is preparing for this important role. The workshop was held several days following IPCO's publication of [Advisory Notice 1/18](#) on the Approval of Warrants, Authorizations and Notices by Judicial commissioners (JC).

IPCO is tasked both with the authorization of warrants and with the general supervisory oversight of public authorities that engage in online surveillance under the IPA. The participants discussed this dual role, which may raise concerns of conflict of interests, since the authorizing body is tasked with “grading its own homework” when exercising its general supervisory powers. On the other hand, this duality enables JCs to follow up on their decisions and to develop specialized skills. The participants also discussed the lack of an adversarial procedure and considered several alternatives by which NGOs and civil society organizations could be involved in advising IPCO.

The judicial review standards were considered by the panel in light of Advisory Notice 1/18. The complexities involved with certain types of warrants might call for the publication of specific advisory notes by IPCO for public commentary. In light of recent and pending case law, the role



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of the ECJ and EU law were also discussed. Does the JC have a duty to address EU law related questions?

The participants considered the nature of the necessity and proportionality standards within the judicial review applied by the JCs. Can the limited resources of the applying authority be taken into account the JCs' proportionality review? Does combined warrants call for a global proportionality review, or for an aggregate proportionality review of each of the requested surveillance techniques separately?

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