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## **Murky Waters: Some Observations on Government Surveillance and the Current State of Statistical Confidentiality in the UK Statistical System<sup>1</sup>**

by

William Seltzer  
Fordham University  
([seltzer@fordham.edu](mailto:seltzer@fordham.edu))

Shortly after the USA Patriot Act was adopted and became law in the United States in October 2001 in response to the terrorist attacks of 9/11, Margo Anderson and I wrote a paper, “NCES and the Patriot Act” (Seltzer and Anderson, 2002), that described how one section of that complex Act set aside the statistical confidentiality protections that hitherto had protected responses to statistical inquiries of the National Center for Education Statistics (NCES). The NCES is that part of the decentralized US federal statistical system located in the Department of Education and charged with gathering, compiling, and disseminating a wide variety of data pertaining to education at all levels. For a broader discussion of statistical confidentiality in the United States, see Anderson and Seltzer (2007). Anderson and Seltzer (2008) and Bigo (2008), two position papers prepared for the September 2008 Idenitnet workshop, are also directly relevant to developments and issues raised in this background note.

In 2007, the United Kingdom adopted an important new piece of statistical legislation, the Statistics and Registration Service Act, which was designed to strengthen the integrity and political neutrality of the UK statistical system. (For more information about this legislation, see the article by Tim Holt, a former UK chief statistician, in the December 2007 issue of *Significance*, a publication of the Royal Statistical Society (Holt, 2007). A copy of the Act itself may be found at [http://www.opsi.gov.uk/acts/acts2007/pdf/ukpga\\_20070018\\_en.pdf](http://www.opsi.gov.uk/acts/acts2007/pdf/ukpga_20070018_en.pdf)).

While the Act accomplishes many important ends for government statistics in the UK, it is sorely deficient in addressing concerns related to the use for surveillance and other non-statistical purposes of identifiable information pertaining to persons or business entities provided to the UK governmental statistical agencies under pledges of confidentiality.

Based on this concern, I wrote the following letter to *Significance*, which was published in its March issue:

Tim Holt’s article (*Significance*, December 2007) describes some of the background and features of the 2007 Statistics and Registration Service Act. He

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also raises four concerns related to this legislation. There is a fifth concern that statisticians need to be aware of: the failure of the Act to adequately safeguard against the diversion of individually identifiable personal and business data collected for statistical purposes to serve surveillance, intelligence, regulatory or similar governmental administrative purposes. With respect to protecting statistical confidentiality, the Act is worse than the USA Patriot Act, which only exposed data providers to one US statistical agency with the potential for confidentiality violations, while the UK Statistics and Registration Service Act exposes all data providers to all UK statistical agencies to the potential for such violations.

At first blush Section 39 of the Act, which deals with "Confidentiality of personal information," seems to be quite broad. Thus Subsection (1) states, "... personal information held by the Board in relation to the exercise of any of its functions must not be disclosed ..." However, Subsection (4) states that Subsection (1) does not apply to disclosures, which among other things, are "required or permitted by any enactment," "required by a Community obligation", are "made in pursuance of an order of a court," are "made for the purposes of a criminal investigation or criminal proceedings (whether or not in the United Kingdom)," or are "made, in the interests of national security, to an Intelligence Service." These exceptions effectively permit the Community, Parliament, the courts, and the executive, including the latter's police and intelligence services, to abrogate the confidentiality protections of Section 39 of the Act without constraint.

I hope that UK statisticians, the Statistical Board, and data providers will work to have these broad legal exceptions eliminated or at least constrained. In the meantime, I trust that the Board and UK government statisticians, at all levels, will feel themselves bound by the widely-recognized ethical obligation (see, for example, the United Nations Fundamental Principles of Official Statistics) to protect the responding public from possible harm arising from the diversion of responses to government statistical enquiries to non-statistical ends. (Seltzer, 2008, p. 44)

To date there has been no further discussion of this issue in *Significance* or in the other journals of the Royal Statistical Society that I am aware of.

In large part to stimulate further interest and research by those in the UK, including those associated with the IdentiNet initiative, I have done a bit more exploratory research on how the current situation seems to have evolved in the UK.

First, it should be noted that when the legislation that became the 2007 Statistics and Registration Service Act was first introduced in Parliament in November 2006 by the Chancellor of the Exchequer the list of exceptions to the confidentiality protection clause did not refer to disclosures "made, in the interests of national security, to an Intelligence Service," although it did include all the other exceptions listed in my letter to *Significance*.

Between November 2006 and March 2007, the statistical confidentiality clause of the legislation was the subject of conflicting proposed amendments as it moved on its way through the Commons. On the one hand, a few individual MPs sought to emphasize the importance of strong confidentiality protections under the proposed legislation by proposing amendments that would have reduced the number of exceptions permitted and more clearly focused any permitted exceptions to only statistical uses. On the other hand, the Government successfully sought to broaden the exceptions by adding the “national security” exception.

An examination of some of the arguments advanced in Parliament by each side to this debate is helpful in understanding several of the issues involved. For example, on 13 March 2007, Liberal Democratic MP Julia Goldsworthy introduced amendments to the bill that sought to limit disclosures of personal data to “approved researchers; ... other authorities for uses consistent with the functions of the Board and the National Statistician ...; with the consent of the person to whom it relates; ... under a community obligation for statistical purposes; ... to service providers under the provisions of section 38; ... and only where the information is being made available for statistical purposes.”<sup>2</sup> In arguing in support of these amendments, she stated in part,

We believe in the principle that individuals and companies must have absolute confidence that any information they provide when national statistics are collected will not be used in a way that is disadvantageous to them. Consequently, all those who receive and manipulate the data must be governed by the same set of rules.

The Royal Statistical Society has raised concerns that, as drafted, the Bill fails to provide effective protection to confidential information or to ensure that anyone who discloses or uses such information unlawfully is subject to clear penalties. Moreover, Len Cook, the former National Statistician, has said that there is no consistent protection of individual records at the moment. For example, household survey records are not protected by existing legislation such as the Census Act 1920 or the Statistics of Trade Act 1947. In many areas, the confidentiality of personal information is protected only by custom and practice. The amendments would rectify that.

Amendment No. 40 makes it explicit that personal information should be used only “in relation to the exercise of any of the functions of the Board”.

The amendment therefore specifies how the information must be used, and how it must not. Amendment No. 41 deals with how personal data are disclosed by the National Statistician under clause 36(1). It ties in with other clauses to achieve consistency throughout.

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<sup>2</sup> This and subsequent excerpts of this debate were extracted from *UK House of Commons Debates*, Session 2006-07. In one case, this extraction involved the reordering of a question and response for clarity because the way the debate was structured. Information about the legislative history of this measure may be found in *UK House of Commons Business Papers*, Session 2006-07.

In principle, we think that there are great advantages to sharing as much data as possible, but people need to be confident that the information will not be abused. The amendments pay attention to the experience in Canada, whose chief statistician gave evidence to the Treasury Committee. He explained that the Canadian Statistics Act gave Statistics Canada unrestricted access to all administrative records held at any level of Government and any organisation. However, he also said:

“Of course, the other side of that coin is extremely strong confidentiality guarantees, which are spelled out and which allow no exceptions. Not even the intelligence community, not even the police, not even the courts in the course of a prosecution can have access under the Statistics Act.”

In a similar vein, Conservative MP Mark Hoban argued in this debate that

Clause 36 sets out the parameters for the disclosure of personal information supplied to the board. It does so by creating the general presumption that such information cannot be disclosed, and then by setting out, in subsection (4), the circumstances where it can. The first such exemption, in subsection (4)(a), is where there is a legislative requirement that permits or enables personal information to be provided to others. Our amendment No. 24 would limit the data that could be accessed by other Departments to information that had been made available for statistical purposes. Therefore, data supplied through surveys for statistics put together by the ONS board could be used by others only for the same purposes.

One of the reasons behind the Bill is to promote the integrity of statistical data. If people believe that information can be shared generally with Government Departments, they may choose not to complete statistical returns. That will undermine the completeness of the data set, and the quality of the statistics produced by the ONS board.

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My concern, however, is that clause 36(4)(a) will open up the scope for wider sharing of confidential personal information to other parts of the Government and go beyond the exemptions set out in the protocol on data protection and confidentiality. It would be helpful if the Minister explained whether there is any intention to share data beyond the categories set out in the protocol. It is important that we follow, where we can, the precedents set in clauses 40 and 41, to give people who complete surveys confidence that their data will remain confidential except in limited circumstances, principally related to statistical purposes. If we do not provide that safeguard, there will be erosion of people's trust that the data they supply will remain confidential, which in the long term could undermine the completeness and quality of official statistics.

In response to the question, “Are not such data covered by clause 36(1), which gives a blanket block on release, subject to some of the other provisions of the clause? Surely an individual’s information would be protected,” MP Hoban replied,

The hon. Gentleman raises an interesting point, but the devil is in the detail. Subsection (4) lists the exemptions to the general prohibition and my concern is that paragraph (a) in that subsection is sufficiently widely drafted that people will not have confidence that their data will be used only for statistical purposes. Our amendment No. 24 would narrow the scope of the provisions and replicate the existing restrictions under clauses 40 and 41.

In speaking on the same day on behalf of the amendment that added “national security” to the list of permitted exemptions to the statistical confidentiality clause, Labor MP John Healey, then Financial Secretary in the Blair Government, stated that,

Amendments Nos. 60 and 61 permit disclosure of personal data by the board to the Security Service [so-called MI-5, responsible for protecting the UK against covertly organised threats to national security], the Secret Intelligence Service [so-called MI-6, operating world-wide to collect secret foreign intelligence in support of the British Government's policies and objectives] and GCHQ [Government Communications Headquarters, the central UK office responsible signals intelligence] in the interests of national security. In effect, that replicates the current position, which is understood and accepted to be that where the intelligence services can make a principled case for access to information—in cases where there is no specific statutory bar on disclosure of the information—restrictions on disclosure could be overridden in the public interest. The current position could not continue without our amendments, because the Bill does what it is designed to do; it tightens the provisions for data sharing, allowing the board in future to consider disclosure only in the specific circumstances set out in the exceptions under clause 36(4).

If clause 36 remained as currently drafted, the board could face a criminal prosecution if it made a disclosure in the interests of national security. Amendment No. 60 will ensure that the statistics board is not restricted in making a disclosure to the security services in the future, should that be regarded as necessary for the purposes of the national security.

I recognise that the amendment may raise questions and I apologise to the House for its being tabled on Report, rather than being part of the Bill’s consideration in Committee. We have spent a considerable time ensuring that we adopt the right and proportionate approach.

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Let me make a couple of other points that I hope the hon. Gentleman and other hon. Members will find helpful. There is a process that means that the ONS currently, and across the board in future, will be in a position to decide not to disclose information. I hope that the points that I will make will help to settle any

wider concerns that there may be. First, the amendment will allow, and not compel, disclosure by the board. There would be a discretionary gateway under which the board would be free to disclose information, if it was satisfied the disclosure fell within the terms of the Bill. Secondly, in practice, as would happen now if ONS were to receive such a request, the intelligence services would have to make the case for disclosure and the board would have to consider the matter on a case-by-case basis. Thirdly, it would be for the board to decide whether a particular disclosure was permissible under the Bill. I can therefore assure the House that the provision would not give the intelligence services the ability to go on a general fishing trip. The onus would be on the intelligence services to demonstrate their case. We expect that, in practice, they would need to submit a business case to the board to support each disclosure request, just as they, and criminal investigators or police authorities, would do now if they wanted such information.

Furthermore, I can assure the House that the amendment is considered compatible with the Human Rights Act 1998. Although it may engage article 8—the right to privacy article—of the European convention on human rights, because it provides the discretion to disclose information to the intelligence services, any interference can be considered justified under paragraph 2 of that article. Any disclosure that occurred could be justified as being in accordance with the law and necessary in a democratic society for a legitimate aim.

MP Hoban, in referring to the Government’s amendments adding “national security” to the list of permitted exemptions to the statistical confidentiality provisions of the proposed legislation, stated,

I understand that the intention behind the amendments is to continue the current practice whereby the intelligence service has access to information from the ONS. I have some questions for the hon. Gentleman about the continuation of that access and whether we need amendments Nos. 60 and 61.

Given that clause 36(4)(e) permits the sharing of personal data when there is a court order and that (4)(f) enables the statistician to release data for the purposes of criminal investigation, are those powers not sufficient to enable the sharing of the data required by the intelligence services without the amendments that the Government propose? Secondly, within the constraints of the debate, will the Minister tell us what type of data is currently being accessed by the intelligence services? I realise that the issue is sensitive, but it would be helpful to know what he intends the provisions to cover. Is there any intention to broaden the type of personal information currently shared?

What protocols cover information passed to the intelligence services, and will they remain after the Bill gains Royal Assent? There must already be a process governing the sharing of data between the ONS and the intelligence services. Can the National Statistician veto the supply of information to the intelligence

services? Will she be able to do so when the Bill has been enacted? One gets the impression that she can do so under the existing protocol. It is important that the Minister clarify, where possible, why the amendments are needed.

The thrust behind amendment No. 24 and the concerns raised about amendments Nos. 60 and 61 are to ensure that we have adequate controls on the confidentiality of data and that any changes made under the Bill do not weaken it, thus leading to survey respondents and others doubting the continuing confidentiality of that information.

Responding to MP Hoban's concerns, Secretary Healy remarked,

The hon. Member for Fareham (Mr. Hoban) asked whether paragraphs (e) and (f) of clause 36(4) cover the needs in such circumstances. The intelligence services have pointed out that the criminal investigations exception, for instance, does not permit the sharing of information by the board in circumstances in which there may be a need to identify potential suspects following a tip-off that does not in itself provide sufficient grounds to launch a criminal investigation. Given that there is already an exemption for criminal investigations or proceedings in clause 36(4)(f) and the fact that ONS can at present make disclosures for the purposes of national security if a good enough case is made, it is difficult to argue that national security disclosures should not be permitted.

The debate on the statistical confidentiality amendments on 13 March appears to have taken slightly more than half an hour and when it was over, the amendments attempting to strengthen the confidentiality protections were withdrawn, MP Goldsworthy stating that

it was our intention not to try to block any existing exceptions, but to try to rationalise them, where there is no consistent practice. I beg to ask leave to withdraw the amendment,

and the Government amendment was agreed to. The text of that part of the bill that pertained to statistical confidentiality that left the Commons and went to the House of Lords remained unchanged throughout an extensive debate between the Commons and the Lords about other aspects of the legislation lasting several months.

Clearly, more extensive research by those more familiar with UK legislative practice and the UK statistical system policies and practice than the present author is needed. Hopefully one focus of such research should be to provide answers to various questions posed by MP Hoban, including (a) what type of data is currently being accessed by the intelligence services? and (b) what protocols cover information passed to the intelligence services, and will they remain after the Bill gains Royal Assent? Furthermore, Secretary Healy assured Parliament that the provision of confidential statistical information to the intelligence services by the Office of National Statistics was a long-standing practice in the UK. Is this really the case? If so, it runs counter to the UK's strong support at the

United Nations for the Fundamental Principles of Official Statistics, principle 6 of which states, “Individual data collected by statistical agencies for statistical compilation, whether they refer to natural or legal persons, are to be strictly confidential and used exclusively for statistical purposes” (UN Statistical Commission, 1994), responses over the years to various Parliamentary questions related to census confidentiality under the 1920 Census Act and the Census (Confidentiality) Act 1991, and the personal statements over the years by many former UK chief statisticians that would appear to be inconsistent with the alleged long standing practice of disclosures to the intelligence services. Certainly, as a matter of historical accuracy and public policy this is a subject for further inquiry.

## References

Anderson, Margo, and William Seltzer (2007). “Challenges to the Confidentiality of U.S. Federal Statistics, 1910-1965.” *Journal of Official Statistics*, Vol. 23, No. 1 (March), pp. 1-34.

Anderson, Margo (with William Seltzer) (2008). “Documenting Identity.” Position Paper for the 26-27 September 2008 IdentiNet Workshop, “Themes and Tasks in the History of Identification” Oxford University, available at [http://www.history.ox.ac.uk/identinet/documents/PositionPaperAndersonSeltzer\\_001.doc](http://www.history.ox.ac.uk/identinet/documents/PositionPaperAndersonSeltzer_001.doc)

Bigo, Didier (2008). “Identification and Intelligence: the reframing of criminal justice and the trend of monitoring the future as the worst case scenario. EU and Transatlantic dimensions.” Position Paper for the 26-27 September 2008 IdentiNet Workshop, “Themes and Tasks in the History of Identification” Oxford University, available at <http://www.history.ox.ac.uk/identinet/documents/PositionPaperBigo.pdf>

Holt, Tim (2007). “The Statistics and Registration Service Act.” *Significance*, Vol. 4, Issue 4 (December): 182-183.

Seltzer, William (2008). Letter to the Editor, “Protecting our sources.” *Significance*, Vol. 5, Issue 1 (March): 44.

Seltzer, William, and Margo Anderson (2002). “NCES and the Patriot Act: An Early Appraisal of Facts and Issues.” Paper prepared for presentation at the annual Joint Statistical Meetings, New York, August 10-15, 2002, available at <http://www.uwm.edu/~margo/govstat/integrity.htm>.

*UK House of Commons Business Papers*, Session 2006-07, Public Bills, “Statistics and Registration Service Bill,” available at [http://www.publications.parliament.uk/pa/pabills/200607/statistics\\_and\\_registration\\_service.htm](http://www.publications.parliament.uk/pa/pabills/200607/statistics_and_registration_service.htm)

*UK House of Commons Debates*, Session 2006-07, Vol. 458, 13 Mar 2007, “Clause 36 - Confidentiality of Personal Information,” cols. 202-211, available at <http://www.publications.parliament.uk/pa/cm200607/cmhansrd/cm070313/debtext/70313-0011.htm> and <http://www.publications.parliament.uk/pa/cm200607/cmhansrd/cm070313/debtext/70313-0012.htm>

United Nations Statistics Commission (1994). “Fundamental Principles of Official Statistics.” Report of the Special Session of the Statistical Commission, New York, April 11-15. E/1994/29, available at <http://unstats.un.org/unsd/methods/statorg/FP-English.htm> or <http://www.uwm.edu/~margo/govstat/integrity.htm>.