

BIG BROTHER WATCH

**Big Brother Watch Briefing on The Health
Protection (Coronavirus, Restrictions)
(All Tiers and Self-Isolation) (England)
(Amendment) Regulations 2021 for the
House of Lords**

February 2021

About Big Brother Watch

Big Brother Watch is a civil liberties and privacy campaigning organisation, fighting for a free future. We're determined to reclaim our privacy and defend freedoms at this time of enormous technological change.

We're a fiercely independent, non-partisan and non-profit group who work to roll back the surveillance state and protect rights in parliament, the media or the courts if we have to. We publish unique investigations and pursue powerful public campaigns. We work relentlessly to inform, amplify and empower the public voice so we can collectively reclaim our privacy, defend our civil liberties and protect freedoms for the future.

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INTRODUCTION

We welcome the opportunity to provide this briefing to the House of Lords ahead of the debate on The Health Protection (Coronavirus, Restrictions) (All Tiers and Self-Isolation) (England) (Amendment) Regulations 2021 (S.I., 2021, No. 97) on 1st March 2021.

RECOMMENDATIONS

RECOMMENDATION 1: The Department of Health should urgently publish the MoU allowing police access to NHS Test and Trace data.

RECOMMENDATION 2: The Department of Health must immediately reverse plans to allow police access to NHS Test and Trace data and reassure the public of their medical confidentiality in order to maintain trust in contact tracing and uphold privacy rights.

EFFECT OF THE REGULATIONS

On 29th January, the Government enforced The Health Protection (Coronavirus, Restrictions) (All Tiers and Self-Isolation) (England) (Amendment) Regulations 2021 – without prior parliamentary debate or a vote due to “urgency”. The Amendment was trailed in the media as introducing the new ‘house party’ fine for indoor gatherings of over 15 people, but it contained another significant change to prior legislation too.

Regulation 4, paragraph 4 of the Amendment expands the ‘Power to use and disclose information’ (Regulation 14) in The Health Protection (Coronavirus, Restrictions) (Self-Isolation) (England) Regulations 2020, allowing information to be disclosed “for the purpose of the prevention, investigation, detection or prosecution of offences under these Regulations.” The effect of this change is to allow NHS Test and Trace to disclose the personal information of individuals who have been asked to self-isolate to police and local authorities. The information disclosed can include the individual’s name, address, telephone number, the date they were notified to self-isolate and the period for which they must self-isolate,¹ though the individual’s coronavirus status should be redacted.²

¹ The Health Protection (Coronavirus, Restrictions) (Self-Isolation) (England) Regulations 2020, Reg. 14, para. 2

² The Health Protection (Coronavirus, Restrictions) (All Tiers and Self-Isolation) (England) (Amendment) Regulations 2021

When this proposal was first introduced, via a Memorandum of Understanding (MoU) between the Department of Health and Social Care and the National Police Chiefs' Council (NPCC) in October, Health Minister Lord Bethell that police were accessing "isolation information" not "health information".³ This is clearly not the case. Whether or not an individual is required to self-isolate will necessarily reveal health information. Health data is highly sensitive and is a special category of data under the GDPR. Giving police access to this sensitive personal data is a violation of privacy and the public's trust in the Test and Trace system.

The MoU from October was not published, leaving it unclear whether the data sharing would go ahead or not. Co-ordinator of medConfidential Phil Booth submitted a freedom of information request to obtain a copy of the MoU, but it was refused on 15th December on the basis that it is "intended for future publication".⁴ During the House of Commons Second Delegated Legislation Committee's debate on these Regulations, both Shadow Health Minister Justin Madders MP and Conservative backbencher Mark Harper MP asked Health Minister Nadine Dorries when the MoU would be published. Mark Harper noted:

"It seems to be that if there is nothing to hide, if the rules for sharing information are as set out in the explanatory note in the regulations and as the Minister set out, and if there are good, clear reasons for doing these things, that would help allay people's genuine concerns.

"(...) it would be outrageous if the memorandum of understanding was not available to the House at the point at which it was asked to take a decision on the regulations."⁵

However, the MoU was not made available to Member of Parliament before they voted on the Regulations, and they are not available in advance of Peers being asked to vote on the same Regulations.

Lord Scriven similarly asked the Department of Health when the MoU would be published in response to these newly introduced Regulations. On 17th February, Lord Bethell, Health Minister, stated that the MoU is "currently being updated to reflect amendments to the Health Protection (Coronavirus, Restrictions) (Self-Isolation) (England) Regulations 2020 on 29 January and feedback from the Information Commissioners Office," adding "the MoU will be published as soon as practically possible."⁶

Almost four months after this data sharing was initially announced, no MoU has been published. It appears that plans to share health data with police have progressed in direct contradiction to health advice, in conflict with long-standing principles on medical confidentiality, and with an unjustifiable avoidance of scrutiny.

RECOMMENDATION 1: The Department of Health should urgently publish the MoU allowing police access to NHS Test and Trace data.

³ HL Covid-19: Information Sharing with Police Forces (20th October 2020), vol. 806, col. 1418: <https://hansard.parliament.uk/lords/2020-10-20/debates/A263ED69-1C9A-4072-AF34-AC9E3E722F8D/Covid-19InformationSharingWithPoliceForces>

⁴ MoU on sharing COVID-related information between DHSC and the police, FOI by Phil Booth – What Do They Know: https://www.whatdotheyknow.com/request/mou_on_sharing_covid_related_inf

⁵ HC Second Delegated Legislation Committee Deb, 8th February 2021, col. 9:

[https://hansard.parliament.uk/commons/2021-02-08/debates/d617dd44-e939-4d62-9fcc-f2f4d3654bb9/HEALTHPROTECTION\(CORONAVIRUSRESTRICTIONS\)\(ALLTIERS\)\(ENGLAND\)\(AMENDMENT\)REGULATIONS2021HEALTHPROTECTION\(CORONAVIRUSRESTRICTIONS\)\(ALLTIERSANDSELF-ISOLAT](https://hansard.parliament.uk/commons/2021-02-08/debates/d617dd44-e939-4d62-9fcc-f2f4d3654bb9/HEALTHPROTECTION(CORONAVIRUSRESTRICTIONS)(ALLTIERS)(ENGLAND)(AMENDMENT)REGULATIONS2021HEALTHPROTECTION(CORONAVIRUSRESTRICTIONS)(ALLTIERSANDSELF-ISOLAT)

⁶ Written answer: Lord Bethell to Lord Scriven, UIN HL13205, 17th February 2021: <https://questions-statements.parliament.uk/written-questions/detail/2021-02-09/hl13205>

RISK TO PUBLIC HEALTH

To open the gateway between health data and law enforcement without parliamentary debate or even publicity is draconian, undemocratic and misguided in equal measure. Medical privacy is the bedrock of a functioning public health system. Undermining patient confidentiality during a pandemic, when it has never been more important, is not only abusive of privacy and data rights but counter-productive for public health. Blurring the lines between the NHS and police is highly likely to deter people from getting tests or giving contact tracers accurate information about themselves or their contacts, for fear of police visits, penalties or surveillance. This could have a particularly negative impact on undocumented migrants and other groups who fear police reprisals.

The public reaction on Twitter showed alarm, distrust and confusion, with many people vowing to delete the NHS Covid 19 app – despite the fact that almost all of the app data is held locally on users’ phones and is not affected by this legislative change to the manual NHS Test and Trace service.

Without the assurance that their sensitive health data will be kept private, many people will be unwilling to either take a coronavirus test or engage with the Department of Health’s contact tracers – particularly given the threat of harsh punishments.

This approach resulted in significant backlash, including from the British Medical Association which said:

“We are already concerned that some people are deterred from being tested because they are anxious about loss of income should they need to self-isolate – and we are worried should police involvement add to this.”⁷

It was reported that even the office of England’s Chief Medical Officer, Chris Whitty, has expressed concern that this approach would lead to a reduction in engagement with the Test and Trace system.⁸ Furthermore, SAGE behavioural science advisor Professor Susan Michie said this move would “further cause distrust in the Government which is a massive problem in terms of adherence to restrictions.”⁹

PRIOR PARLIAMENTARY CRITICISM

Members of the House of Lords expressed their concern about this draconian approach to public health when these plans were first proposed in October. Lord Hunt noted that “sharing what is essentially health information with the police is a highly sensitive matter”, while Lord Scriven stated the Memorandum of Understanding between the had “undermined some people’s trust in Test and Trace.”¹⁰

This punitive approach to public health not only risks criminalising people who are unable to self-isolate for financial reasons, but also risks backfiring. Baroness Finlay argued:

⁷ Been Told to Self-Isolate by Test And Trace? Police Could Get Access to Your Data — Chris York, Huffington Post, 18th October 2020: https://www.huffingtonpost.co.uk/entry/test-and-trace-police-data_uk_5f8bfd2ec5b66ee9a5f0ce71

⁸ Coronavirus: Police granted access to details of people told to self-isolate by Test and Trace — Sky News, 18th October 2020: <https://news.sky.com/story/coronavirus-police-granted-access-to-details-of-people-told-to-self-isolate-by-test-and-trace-12106988>

⁹ Backlash as police get test and trace data: Michael Gove is forced to defend the move after officers were handed personal details amid privacy row - George Odling and Victoria Allen, Mail online, 18th October 2020: <https://www.dailymail.co.uk/news/article-8853311/amp/Backlash-police-test-trace-data.html>

¹⁰ HL Covid-19: Information Sharing with Police Forces (20th October 2020), vol. 806, col. 1417-8: <https://hansard.parliament.uk/lords/2020-10-20/debates/A263ED69-1C9A-4072-AF34-AC9E3E722F8D/Covid-19InformationSharingWithPoliceForces>

“Crippling fines and a police record will only disincentivise people to seek testing and disclose their contacts. The criteria behind the instruction to self-isolate are not transparent and there is no appeal mechanism for those who feel they have been inappropriately instructed. That runs counter to the principles of co-production and the findings from the CORSAIR study, which showed that practical support and financial reimbursement, with targeted messaging and clear policies, are likely to improve adherence.

“Punitive measures set up blame and division, not supportive collaboration.”¹¹

The Regulations were not debated in the Chamber of the House of Commons, rather they were debated by the Second Delegated Legislation Committee on 8th February, 10 days after they came into force. They will not be debated by the House of Lords until 30 days after they came into force. As noted, these Regulations significantly alter the presumption of medical confidentiality. This lack of meaningful scrutiny is unacceptable.

Justin Madders, Shadow Health Minister, noted the lack of scrutiny:

“I draw attention to that because health data is highly sensitive and therefore falls under a special category of data under the general data protection regulation rules. Concerns have been raised about that. Given that medical privacy is the bedrock of a functioning public health system, its disclosure should be subject to full parliamentary scrutiny before it is enacted.”¹²

Mark Harper MP, Conservative backbencher, agreed:

“In the present case, I do not understand what the urgency was when the need for the regulations was identified. Why was it not possible, a few days later, simply to have them debated by the House?”¹³

Yet again, the Government is using ever more extreme policing, fines and intrusion to paper over its failures to manage this public health situation. The Government should provide people with the proper provision of support to self-isolate when they need to rather than the threat of life-changing fines. Treating test and trace like an inquisition is a certain way to deter people from getting tests and giving their contact information.

RECOMMENDATION 2: The Department of Health must immediately reverse plans to allow police access to NHS Test and Trace data and reassure the public of their medical confidentiality in order to maintain trust in contact tracing and uphold privacy rights.

¹¹ HL Deb (22nd October 2020) vol. 806, col. 1668: [https://hansard.parliament.uk/lords/2020-10-22/debates/B8C9A4D7-D5E8-47D9-95AC-5909F2BC9CDO/HealthProtection\(CoronavirusRestrictions\)\(Self-Isolation\)\(England\)Regulations2020](https://hansard.parliament.uk/lords/2020-10-22/debates/B8C9A4D7-D5E8-47D9-95AC-5909F2BC9CDO/HealthProtection(CoronavirusRestrictions)(Self-Isolation)(England)Regulations2020)

¹² HC Second Delegated Legislation Committee Deb, 8th February 2021, col. 9: [https://hansard.parliament.uk/commons/2021-02-08/debates/d617dd44-e939-4d62-9fcc-f2f4d3654bb9/HEALTHPROTECTION\(CORONAVIRUSRESTRICTIONS\)\(ALLTIERS\)\(ENGLAND\)\(AMENDMENT\)REGULATIONS2021HEALTHPROTECTION\(CORONAVIRUSRESTRICTIONS\)\(ALLTIERSANDSELF-ISOLAT](https://hansard.parliament.uk/commons/2021-02-08/debates/d617dd44-e939-4d62-9fcc-f2f4d3654bb9/HEALTHPROTECTION(CORONAVIRUSRESTRICTIONS)(ALLTIERS)(ENGLAND)(AMENDMENT)REGULATIONS2021HEALTHPROTECTION(CORONAVIRUSRESTRICTIONS)(ALLTIERSANDSELF-ISOLAT)

¹³ HC Second Delegated Legislation Committee Deb, 8th February 2021, col. 13: [https://hansard.parliament.uk/commons/2021-02-08/debates/d617dd44-e939-4d62-9fcc-f2f4d3654bb9/HEALTHPROTECTION\(CORONAVIRUSRESTRICTIONS\)\(ALLTIERS\)\(ENGLAND\)\(AMENDMENT\)REGULATIONS2021HEALTHPROTECTION\(CORONAVIRUSRESTRICTIONS\)\(ALLTIERSANDSELF-ISOLAT](https://hansard.parliament.uk/commons/2021-02-08/debates/d617dd44-e939-4d62-9fcc-f2f4d3654bb9/HEALTHPROTECTION(CORONAVIRUSRESTRICTIONS)(ALLTIERS)(ENGLAND)(AMENDMENT)REGULATIONS2021HEALTHPROTECTION(CORONAVIRUSRESTRICTIONS)(ALLTIERSANDSELF-ISOLAT)