

## POLICY NOTE

### THE REGULATION OF INVESTIGATORY POWERS (AUTHORISATION OF COVERT HUMAN INTELLIGENCE SOURCES) (SCOTLAND) ORDER 2014

#### SSI 2014/339

1. The above instrument was made in exercise of the powers conferred by sections 7(4)(b), 8(1) and (2), 19(8) and 28(4) of the Regulation of Investigatory Powers (Scotland) Act 2000. The instrument is subject to the negative procedure.

#### Policy Objectives

2. The Regulation of Investigatory Powers (Scotland) Act (RIP(S)A) gives Scottish Ministers the powers to prescribe additional requirements in relation to the authorisation of covert human intelligence sources (CHIS) over and above those already provided for under RIP(S)A. There are two broad policy objectives contained in the Order:
  - in matters where a CHIS is likely to obtain matters subject to legal privilege (Part 2 of the Order), to introduce an additional requirement of obtaining approval from a Surveillance Commissioner before the authorisation can be granted, and to limit the granting of such authorisations to cases involving the prevention and detection of serious crime;
  - for cases where a CHIS is also a member of a relevant police force (i.e. an undercover operative) Parts 3 and 4 of the Order contain provision:
    - to require that the authorising officer be an Assistant Chief Constable or above,
    - to notify a Surveillance Commissioner that an authorisation is being made, and
    - to require the prior approval of a surveillance Commissioner if the authorisation is to extend beyond a period of 12 months.

#### Legal Confidentiality

3. The House of Lords, in considering an appeal from the Divisional Court in Northern Ireland, agreed with that Court's decision that 'directed surveillance' under the Regulation of Investigatory Powers Act 2000 (RIPA) of communications between lawyers and their clients breached Article 8 of the European Convention of Human Rights (the right to respect for private and family life). The Secretary of State did not challenge the decision of the Divisional Court that the procedures used to authorise directed surveillance (and CHIS) were disproportionate to the infringement of an individual's right to a private consultation with a lawyer. The process for authorising the conduct or use of a CHIS is in all relevant respects the same as the process for authorising directed surveillance.
4. The UK Government has since made legislation which specifies that both directed surveillance and the conduct or use of a CHIS should be authorised in line with the higher level procedures for authorising intrusive surveillance. This Order follows that approach in relation to authorisations of the conduct or use of a CHIS in Scotland under RIP(S)A. Authorisations for directed surveillance in similar circumstances are dealt with in a separate instrument.

### Enhanced arrangements for Undercover Operatives (UCOs)

5. An independent report published in February 2012 by Her Majesty's Inspectorate of Constabulary (England and Wales) examined police authorisation of UCOs (defined as 'relevant sources' in the Order) deployed against public order and domestic extremist subjects. Extensive media reporting focused on the collapse of a trial involving a UCO, the withholding of the UCO's true identity from the court, his access to legally privileged information on behalf of the police, and his conducting sexual relationships within the groups he was assigned to.
6. The HMIC report made a number of recommendations relating to additional safeguards to reduce the risk of long term police-authorised undercover operatives deployed for long periods being, or becoming, engaged in inappropriate activity.
7. As a consequence, this Order introduces new safeguards relating to authorisations in such cases, including the raising of the authorisation level within the Police Service to assistant chief constable in ordinary cases and raising that level to deputy chief constable and requiring approval of a Surveillance Commissioner if the authorisation exceeds 12 months.

### Additional provisions

8. The Order also contains minor amendments to reflect organisational changes within the Common Services Agency for the Scottish Health Service and the Scottish Environment Protection Agency. These are provided for at Part 5 of the Order.

### **Consultation**

9. A public consultation exercise commenced on 13 January 2014 and finished on 17 March 2014. The consultation focussed on two revised Codes of Practice to be issued under RIP(S)A, but included a copy of the Order for information. Seven responses were received, and of those five groups agreed that their responses could be made public:
  - the Law Society of Scotland
  - Her Majesty's Inspectors of Constabulary for Scotland
  - Police Scotland
  - The Scottish Human Rights Commission, and
  - The Information Commissioner
10. The practice of how the different covert tactics are authorised are well established and neither the Codes nor this Order sought to provide any public body with additional powers. The Order in effect seeks to impose tighter controls on existing arrangements and none of the respondents opposed the proposals.

### **Impact Assessments**

11. There are no equality impact issues and an EQIA has, therefore, not been completed. It is extremely unlikely that any particular group will be impacted by the provisions contained in the Order.

## **Financial Effects**

12. A Business and Regulatory Impact Assessment (BRIA) was considered. On the basis, however, that the measures do not impose additional costs or reduce existing costs on business or the third sector, do not impose additional costs on public sector organisations that deliver public services, and do not involve some kind of distribution where there is an exchange of transfer of costs or benefits from one group to another, a BRIA was not considered necessary.
13. Enhancing the existing arrangements, as described in the Order, will not impact financially on Police Scotland or on the Office of Surveillance Commissioners.

Scottish Government

Safer Communities Directorate

Police Division