

**EXPLANATORY MEMORANDUM TO THE  
REGULATION OF INVESTIGATORY POWERS  
(COMMUNICATIONS DATA) (AMENDMENT) ORDER 2005**

1. This explanatory memorandum has been prepared by the Home Department and is laid before Parliament by Command of Her Majesty.

**2. Description**

2.1 The purpose of this draft Order is to ensure that the public authorities having necessary and proportionate requirements to acquire communications data can do so within a statutory framework which requires explicit consideration of Convention rights.

2.2 The draft Order provides powers for new public authorities, consistent with powers and functions they already have (in the case of the Independent Police Complaints Commission and Ofcom) or will have (in the case of the Civil Nuclear Constabulary). It also ensures that long established authorities with functions of a public nature (in the case of the Ports Police at Dover and Liverpool) can undertake their functions in a way that is consistent with the regulatory framework.

**3. Matters of special interest to the Joint Committee on Statutory Instruments**

3.1 None.

**4. Legislative background**

4.1 This Order is made in exercise of the powers conferred by paragraph (g) of the definition of "relevant public authority" in section 25(1), by section 25(2), (3) and (4), and section 78(5) of the Regulation of Investigatory Powers Act 2000 (RIPA). This Order requires approval by resolution of each House of Parliament. Most of the provisions of the Order will come into force one month after it is made. The exception to this is the provision relating to the new Civil Nuclear Constabulary, which will come into force either one month after the Order is made or when the relevant provisions of the Energy Act 2004<sup>1</sup> are come into force and investigatory powers are transferred to the new Constabulary (expected to be April 2005), whichever is the later.

4.2 Chapter II of Part I of RIPA (Acquisition and Disclosure of Communications Data) provides a statutory framework regulating the acquisition and disclosure of communications data by and to public authorities, consistent with the Human Rights Act 1998. Within Chapter II of Part I of RIPA the duties and responsibilities placed upon each party involved in the process are explained and a system of safeguards, reflecting the requirements of Article 8 of the European Convention on Human Rights, are included.

4.3 Section 25(1) of RIPA defines "relevant public authorities" for the purposes of Chapter II of Part I of that Act. Paragraph (g) of the definition of "relevant public authority"

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<sup>1</sup> Paragraph 8 of Schedule 14

in section 25(1) of RIPA provides that the Secretary of State may specify additional relevant public authorities.

4.4 Section 25(5) of RIPA requires that the Secretary of State shall not make an Order adding public authorities unless a draft has been laid before Parliament and approved by a resolution of each House. Section 25(2) of RIPA provides the Secretary of State with the power to designate authorising officers for the relevant public authorities, whilst section 25(3) provides the power to impose restrictions.

4.5 Section 25(4) of RIPA provides that the Secretary of State may by Order remove public authorities from those specified as relevant public authorities.

#### Commentary on the draft Order

4.6 This Order amends Part I of Schedule 2 (individuals in additional public authorities that may acquire all types of communication data within section 21(4) of RIPA) of the Regulation of Investigatory Powers (Communications Data) Order 2003<sup>2</sup> (“the 2003 Order”).

4.7 Article 2(2) substitutes an entry for the Scottish Drug Enforcement Agency (SDEA) in place of the former Scottish Crime Squad, and brings the entry for the SDEA into line with those for the National Crime Squad and National Criminal Intelligence Service.

4.8 Article 2(3) has the effect of substituting an entry for the Civil Nuclear Constabulary in place of an otherwise identical entry relating to the United Kingdom Atomic Energy Authority Constabulary. Article 1(3) of this Order provides that this amendment shall come into force one month after the Order is made or when paragraph 8 of Schedule 14 to the Energy Act 2004 comes into force, whichever is the later.

4.9 Article 2(4) deletes the entry for the Department of Trade and Industry in Part I Schedule 2 of the 2003 Order which prescribed authorising officers in the Radiocommunications Agency.

4.10 Article 2(5) of this Order specifies the following public authorities as relevant public authorities for the purposes of Chapter II of Part I of RIPA, able to acquire and seek disclosure of communications data within the regulatory framework:

- Independent Police Complaints Commission
- The Office of Communications
- The port police force established in Dover (the Port of Dover Police)
- The port police force established in Liverpool (the Port of Liverpool Police).

4.11 The Ports Police are public authorities within the meaning of section 6(3) of the Human Rights Act 1998.

4.12 The amended and additional entries prescribe the persons entitled to grant authorisations or give notices under sections 22(3) and 22(4) of RIPA (in column 2); prescribe, where relevant, persons entitled to grant authorisations or give notices relating solely to communications data falling within section 21(4)(c) of RIPA (in column 3); and

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<sup>2</sup> S.I. 2003 No. 3172

restrict the grounds for which authorisation may be granted or a notice given (in column 4). Those grounds are described by letters which refer to the paragraphs in section 22(2) of RIPA.

## **5. Extent**

5.1 This instrument applies to all of the United Kingdom.

## **6. European Convention on Human Rights**

6.1 Caroline Flint, Parliamentary Under Secretary of State for the Home Department, has made the following statement regarding Human Rights:

“In my view the provisions of the Regulation of Investigatory Powers (Communications Data)(Amendment) Order 2005 are compatible with the Convention Rights.”

## **7. Policy Background**

7.1 Communications data is information held by communication service providers relating to the communications made by the users of their services. This includes itemised call records, routing information and subscriber details. Communications data does not include the content of any communication.

7.2 The Scottish Drug Enforcement Agency (SDEA) is the organisation known by that name and established in 2001 under section 36(1)(a)(ii) of the Police (Scotland) Act 1967. It was formerly known as the Scottish Crime Squad described in section 9 of the Regulation of Investigatory Powers (Scotland) Act 2000. The amendment to the 2003 Order provides clearly that appropriately senior police and civil staff seconded to the SDEA may authorise the acquisition of communications data under RIPA on behalf of the SDEA.

7.3 The Energy Act 2004 provided for the creation of the Civil Nuclear Constabulary to protect licensed nuclear sites which are not used wholly or mainly for defence purposes and safeguard nuclear material in Great Britain and elsewhere. It will replace the United Kingdom Atomic Energy Authority Constabulary (UKAEAC) from April 2005.

7.4 Parliament approved that the UKAEAC had a necessary and proportionate requirement to acquire all types of communications data in the 2003 Order. This Order will enable the new constabulary to acquire and seek disclosure of communications data using RIPA powers in the same way that the UKAEAC does presently.

7.5 The Independent Police Complaints Commission (IPCC), established on 31 March 2004 under Part 2 of the Police Reform Act 2002, has overall responsibility for complaints against the police. The IPCC has investigators that conduct independent investigations into serious incidents or allegations of criminal conduct by persons serving with the police. Serious incidents are those involving death or serious injury.

7.6 This Order will give the IPCC the power to acquire communications data as part of its investigative capability into allegations of criminal misconduct by persons serving with the police. The Police Reform Act has given IPCC investigators all the powers and privileges of

a constable and conferred on the Secretary of State the power to provide by Order for the IPCC to conduct intrusive and directed surveillance and use covert human intelligence sources under RIPA. That power has been exercised<sup>3</sup>.

7.7 The Communications Act 2003 provided for the creation of the Office of Communications (Ofcom). Its functions include the investigation of wireless telegraphy offences which were formerly the responsibility of the now defunct Radiocommunications Agency of the Department of Trade and Industry.

7.8 Parliament approved that the Radiocommunications Agency had a necessary and proportionate requirement to acquire all types of communications data in the 2003 Order. This Order will enable Ofcom to acquire and seek disclosure of communications data using RIPA on the same grounds as the former Agency in order to investigate and detect pirate broadcasters whose transmissions interfere with legitimate broadcasters, emergency frequencies and mobile phone services.

7.9 The Port of Dover Police and the Port of Liverpool Police are responsible for law enforcement and for the security of passengers and staff at their respective ports. Although the Ports Police are funded by the Dover Harbour Board and the Mersey Docks and Harbour Company respectively, its officers are sworn as Constables before Magistrates and have full police powers on land owned by, or within one mile of land owned by the respective Harbour authorities. In Dover the constables are appointed under section 79 of the Harbours, Docks & Piers Clauses Act 1847<sup>4</sup> and in Liverpool under Article 3 of the Mersey Docks and Harbour (Police) Order 1975<sup>5</sup>. Each year some 16 million people pass through Dover and 700,000 through Liverpool. In 2003 over one thousand offences were reported and detected by the Port of Dover Police and over 700 illegal immigrants arrested on behalf of the immigration service. Over two hundred offences were reported at the Port of Liverpool. These include organised thefts of high value goods in transit through the port.

7.10 The Port of Dover Police and the Port of Liverpool Police have necessary and proportionate requirements to acquire and seek disclosure of communications data. Bringing both forces within the scope of RIPA will ensure a clearer basis for them to secure such communications data as is necessary to prevent and detect criminal offences in the docks' area, and to undertake their counter-terrorism and public safety functions.

7.11 A draft Code of Practice on Acquisition and Disclosure of Communications Data has been published setting out the procedures to be followed in the granting of authorisations and giving of notices to acquire communications data. A revised draft Code of Practice is being published for public consultation before being put to Parliament for approval by affirmative resolution.

7.12 The Interception of Communications Commissioner provides independent oversight of the exercise of powers and duties under Chapter II of Part I of RIPA, by virtue of section 57(2)(b) of RIPA. The Investigatory Powers Tribunal established by section 65 of RIPA is the appropriate forum for all complaints to be addressed.

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<sup>3</sup> S.I. 2004 No. 815 The Independent Police Complaints Commission (Investigatory Powers) Order 2004

<sup>4</sup> Although under the 1847 Act police officers are appointed special constables, the Port of Dover is a full-time professional police force.

<sup>5</sup> S.I. 1975 No. 1224

## **8. Impact**

8.1 A Regulatory Impact Assessment has not been prepared for this instrument. Other than communications service providers, it has no impact on business, charities or voluntary bodies.

8.2 To the extent that the acquisition of communications data impacts upon communications service providers Section 24 of RIPA allows arrangements for payments to be made in order to contribute to the costs incurred by them in complying with the notices issued under Chapter II of Part I of RIPA. This may include arrangements for payments to be made out of money provided by Parliament.

8.3 Arrangements are in place between communications service providers and public authorities that enable service providers to recover their costs in disclosing communications data. These arrangements have been reached independently of the Government and take account of the fact that requirements to disclose communication data place operational and financial burdens on communications service providers.

8.4 The impact on the public sector is that RIPA requires – rightly – that officials who grant authorisations or give notices for the acquisition or disclosure of communications data must properly consider the principles of necessity and proportionality and respect for Convention rights in each case and that these considerations are recorded at the time they are made. That means a decision to authorise such conduct under RIPA will always entail a level of necessary bureaucracy for public authorities.

## **9. Contact**

9.1 Simon Watkin of the Covert Investigation Policy Team at the Home Office, 50 Queen Anne's Gate, London SW1H 9AT (tel: 020 7273 2181; e-mail: [simon.watkin@homeoffice.gsi.gov.uk](mailto:simon.watkin@homeoffice.gsi.gov.uk)) can answer any queries regarding the instrument.