

POLICY NOTE

THE REGULATION OF INVESTIGATORY POWERS (MODIFICATION OF AUTHORISATION PROVISIONS: LEGAL CONSULTATIONS) (SCOTLAND) ORDER 2015

SSI 2015/32

1. The above instrument was made in exercise of the powers conferred by section 27(1)(b) of the Regulation of Investigatory Powers (Scotland) Act 2000 (RIP(S)A). The instrument is subject to the affirmative procedure.

Policy Objectives

2. Section 27(1)(b) of RIP(S)A gives Scottish Ministers the powers to provide for any description of directed surveillance to be treated for the purposes of RIP(S)A as intrusive surveillance. There are three effects of this power:
 - intrusive surveillance may be authorised only where necessary for the prevention or detection of serious crime;
 - where surveillance is to be authorised by the Police Service of Scotland it raises the rank at which the surveillance may be authorised from superintendent to chief constable or any senior officer designated by the chief constable; and
 - it requires the prior approval of a Surveillance Commissioner before the surveillance can be undertaken.
3. The overall effect is to create a regime for a particular description of directed surveillance that requires consideration at a higher level and includes an element of prior independent oversight before the surveillance can be undertaken.
4. The Order provides for directed surveillance in relation to matters subject to legal privilege to be treated as if it were intrusive surveillance.

Legal Confidentiality

5. 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 on 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.
6. 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 the authorisation of directed surveillance in Scotland under RIP(S)A. Authorisation of the conduct and use of covert human intelligence sources in similar circumstances is dealt with in a separate instrument.

Consultation

7. 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
8. 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

9. 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

10. 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.
11. 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

December 2014