

Draft Regulations laid before Parliament under paragraph 2(2) of Schedule 2 to the European Communities Act 1972, for approval by resolution of each House of Parliament.

DRAFT STATUTORY INSTRUMENTS

2011 No.

**ELECTRONIC COMMUNICATIONS
POSTAL SERVICES**

**The Regulation of Investigatory Powers (Monetary Penalty
Notices and Consents for Interceptions) Regulations 2011**

Made - - - - *****
Coming into force - - *in accordance with*
regulation 1(2)

The Secretary of State is designated⁽¹⁾ for the purposes of section 2(2) of the European Communities Act 1972⁽²⁾ in respect of matters relating to electronic communications and postal services and makes these Regulations in exercise of the powers conferred by section 2(2) of that Act.

A draft of this instrument has been laid before, and approved by a resolution of, each House of Parliament in accordance with paragraph 2(2) of Schedule 2 to the European Communities Act 1972.

Citation, commencement and interpretation

1.—(1) These Regulations may be cited as the Regulation of Investigatory Powers (Monetary Penalty Notices and Consents for Interceptions) Regulations 2011.

(2) These Regulations come into force 21 days after the day on which they are made.

(3) In these Regulations “the 2000 Act” means the Regulation of Investigatory Powers Act 2000⁽³⁾.

Monetary penalty notices for certain unlawful interceptions of communications

2.—(1) After section 1(1) of the 2000 Act (unlawful interception of communications) insert—

“(1A) The Interception of Communications Commissioner may serve a monetary penalty notice on a person if the Commissioner—

(a) considers that the person—

(1) S.I. 1998/1750 and 2001/3495.

(2) 1972 c. 68.

(3) 2000 c. 23.

- (i) has without lawful authority intercepted, at any place in the United Kingdom, any communication in the course of its transmission by means of a public telecommunication system, and
 - (ii) was not, at the time of the interception, making an attempt to act in accordance with an interception warrant which might, in the opinion of the Commissioner, explain the interception concerned, and
- (b) does not consider that the person has committed an offence under subsection (1).
- (1B) Schedule A1 (which makes further provision about monetary penalty notices) has effect.”
- (2) In section 71(2) of the 2000 Act (issue and revision by the Secretary of State of codes of practice) after “subordinate legislation” insert “and subject to subsection (10)”.
- (3) After section 71(9) of the 2000 Act insert—
- “(10) A code of practice under this section may not relate to any matter which is to be dealt with by guidance of the Interception of Communications Commissioner by virtue of paragraph 7 of Schedule A1.”
- (4) Before Schedule 1 to the 2000 Act insert the Schedule set out in the Schedule to these Regulations.

Consent requirement for lawful interception of communications

3. In section 3(1) of the 2000 Act (lawful interception without an interception warrant where actual or believed consent) the words “, or which that person has reasonable grounds for believing,” are repealed.

Home Office
Date

Name
Parliamentary Under Secretary of State

SCHEDULE

Regulation 2(4)

Monetary penalty notices

“SCHEDULE A1

MONETARY PENALTY NOTICES IN RELATION
TO CERTAIN UNLAWFUL INTERCEPTIONS

PART 1

MONETARY PENALTY NOTICES

General

1.—(1) A monetary penalty notice is a notice requiring the person on whom it is served to pay to the Interception of Communications Commissioner (“the Commissioner”) a monetary penalty of an amount determined by the Commissioner and specified in the notice.

(2) The amount determined by the Commissioner must not exceed £50,000.

(3) The monetary penalty must be paid to the Commissioner within such period as is specified in the notice.

(4) The period concerned must not be less than 28 days beginning with the day after the day on which the notice is served.

(5) The notice must, in particular—

- (a) state the name and address of the person on whom it is to be served,
- (b) provide details of the notice of intent served on that person,
- (c) state whether the Commissioner has received written representations in accordance with that notice,
- (d) state the grounds on which the Commissioner serves the monetary penalty notice,
- (e) state the grounds on which the Commissioner decided the amount of the monetary penalty,
- (f) state the details of how the monetary penalty is to be paid,
- (g) provide details of the rights of appeal of the person concerned under paragraph 5 in respect of the monetary penalty notice,
- (h) provide details of the Commissioner’s rights of enforcement under paragraph 6 in respect of the monetary penalty notice.

(6) Any sum received by the Commissioner by virtue of a monetary penalty notice must be paid into the Consolidated Fund.

Enforcement obligations

2.—(1) The Commissioner may include one or more than one enforcement obligation in a monetary penalty notice if the Commissioner considers that the interception to which the notice relates is continuing.

(2) Each of the following is an enforcement obligation—

- (a) a requirement on the person on whom the notice is served to cease the interception concerned on such day, or within such period, as is specified in the notice,

(b) (where appropriate for achieving such a cessation) a requirement on the person to take within such period as is specified in the notice, or to refrain from taking after the end of such period as is so specified, such steps as are so specified.

(3) No enforcement obligation is to have effect before the end of the period of 7 days beginning with the day after the day on which the notice is served.

(4) Where an enforcement obligation is included in a monetary penalty notice under this paragraph, the notice must state what the obligation is and the grounds for including it.

Consultation requirements before service of notices

3.—(1) The Commissioner must proceed in accordance with sub-paragraphs to (7) before serving a monetary penalty notice on a person.

(2) The Commissioner must serve a notice of intent on the person.

(3) A notice of intent is a notice that the Commissioner proposes to serve a monetary penalty notice on the person.

(4) A notice of intent must, in particular—

- (a) state the name and address of the person concerned,
- (b) state the grounds on which the Commissioner proposes to serve the monetary penalty notice,
- (c) provide an indication of the amount of the monetary penalty that the Commissioner proposes to impose and the Commissioner's grounds for deciding that amount,
- (d) state whether the monetary penalty notice is to include any enforcement obligation and, if so, what the obligation is and the grounds for including it,
- (e) state the date on which the Commissioner proposes to serve the monetary penalty notice,
- (f) inform the person concerned that the person may make written representations in relation to the Commissioner's proposal within a period specified in the notice, and
- (g) inform the person concerned that the person may, within a period specified in the notice, request an oral hearing before the Commissioner in order to make representations of the kind mentioned in sub-paragraph (6)(b).

(5) No period specified as mentioned in sub-paragraph (4)(f) or (g) may be less than 21 days beginning with the day after the day on which the notice is served.

(6) Where the person concerned has requested an oral hearing within the period specified for the purpose in the notice—

- (a) the Commissioner must arrange such a hearing, and
- (b) the person may make representations at the hearing about—
 - (i) any matter falling within section 1(1A)(a)(ii), or
 - (ii) any other matter relating to the Commissioner's proposal which, by virtue of section 17, the person would be unable to raise on an appeal under paragraph 5.

(7) The Commissioner must consider any representations which have been made by the person concerned in accordance with the notice or sub-paragraph (6).

(8) Subject to sub-paragraph (9), the Commissioner may not vary a notice of intent.

(9) The Commissioner may vary a notice of intent by extending the period mentioned in sub-paragraph (4)(f) or (g).

(10) Sub-paragraph (8) does not prevent the Commissioner from issuing a new notice of intent instead of varying such a notice.

(11) The Commissioner may cancel a notice of intent.

(12) A variation or cancellation of a notice of intent is effected by serving on the person on whom the notice was served a notice setting out the variation or cancellation.

(13) Subject to sub-paragraph (14), the Commissioner must not serve a monetary penalty notice on a person in respect of an interception if any notice of intent in respect of that interception was served on the person more than 3 months earlier.

(14) The Commissioner may serve a monetary penalty notice on a person where the service of the notice would otherwise be prevented by virtue of sub-paragraph (13) if the Commissioner—

(a) considers it reasonable to do so, and

(b) includes the reasons for doing so in the monetary penalty notice.

(15) If the Commissioner decides not to serve a monetary penalty notice on a person as a result of any representations which have been made by the person in accordance with a notice of intent or sub-paragraph (6), the Commissioner must inform the person of that fact.

Variation or cancellation of notices

4.—(1) The Commissioner may, subject as follows, vary or cancel a monetary penalty notice.

(2) The Commissioner may not vary a monetary penalty notice in a way that is detrimental to the person on whom it was served (whether by increasing the amount of the monetary penalty, by reducing the period specified in the notice as the period within which the penalty must be paid, by imposing a new enforcement obligation or making an existing enforcement obligation effective earlier or otherwise more onerous, or otherwise).

(3) The Commissioner must—

(a) in the case of a variation which reduces the amount of a monetary penalty, repay any excess already paid in accordance with the notice, and

(b) in the case of a cancellation, repay any amount already paid in accordance with the notice.

(4) A variation or cancellation of a monetary penalty notice is effected by serving on the person on whom the monetary penalty notice was served a notice setting out the variation or cancellation.

(5) The Commissioner may not serve another monetary penalty notice on a person in respect of an interception if the Commissioner has cancelled a previous notice served on the person in respect of the same interception.

(6) If the Commissioner refuses a request by a person to vary or cancel a monetary penalty notice which has been served on the person, the Commissioner must inform the person of that fact.

Appeals against notices

5.—(1) A person on whom a monetary penalty notice is served may appeal to the First-tier Tribunal against—

(a) the monetary penalty notice or any provision of it, or

(b) any refusal of a request by the person to issue a notice of variation or cancellation in relation to the monetary penalty notice.

(2) Where there is an appeal under sub-paragraph (1)(a) in relation to a monetary penalty notice or any provision of it, any requirement in the notice or (as the case may be) provision concerned which does not relate to the imposition of an enforcement obligation need not be complied with until the appeal is withdrawn or finally determined.

(3) Sub-paragraphs (4) to (6) apply in relation to an appeal under sub-paragraph (1)(a).

- (4) The First-tier Tribunal must allow the appeal or substitute such other monetary penalty notice as could have been served by the Commissioner if the Tribunal considers—
- (a) that the notice concerned is not in accordance with the law, or
 - (b) to the extent that the notice involved an exercise of discretion by the Commissioner, that the Commissioner ought to have exercised the discretion differently.
- (5) In any other case, the First-tier Tribunal must dismiss the appeal.
- (6) The First-tier Tribunal may review any determination of fact on which the notice concerned was based.
- (7) Sub-paragraphs (8) to (10) apply in relation to an appeal under sub-paragraph (1)(b).
- (8) The First-tier Tribunal must direct the Commissioner to issue, on such terms as the Tribunal considers appropriate, a notice of variation or cancellation in relation to the monetary penalty notice if the Tribunal considers that the monetary penalty notice ought to be varied or cancelled on those terms.
- (9) In any other case, the First-tier Tribunal must dismiss the appeal.
- (10) The First-tier Tribunal may review any determination of fact on which the refusal to issue the notice of variation or cancellation was based.

Enforcement of notices

- 6.—(1) Sub-paragraphs (2) and (3) apply in relation to any penalty payable to the Commissioner by virtue of a monetary penalty notice.
- (2) In England and Wales or Northern Ireland, the penalty is recoverable—
- (a) if a county court so orders, as if it were payable under an order of that court,
 - (b) if the High Court so orders, as if it were payable under an order of that court.
- (3) In Scotland, the penalty is recoverable as if it were payable under an extract registered decree arbitral bearing a warrant for execution issued by the sheriff for any sheriffdom in Scotland.
- (4) The person on whom a monetary penalty notice containing an enforcement obligation is served must comply with the obligation; and that duty is enforceable by civil proceedings by the Commissioner for an injunction, or for specific performance of a statutory duty under section 45 of the Court of Session Act 1988(4), or for any other appropriate relief.

Guidance

- 7.—(1) The Commissioner must prepare and issue guidance on how the Commissioner proposes to exercise the Commissioner's functions under section 1(1A) and (1B) and this Schedule.
- (2) The guidance must, in particular, deal with—
- (a) the manner in which the Commissioner is to deal with claims of a description specified in the guidance which may give rise to grounds for serving a monetary penalty notice,
 - (b) the circumstances in which the Commissioner would consider it appropriate to serve a monetary penalty notice,
 - (c) how the Commissioner will determine the amount of the penalty, and
 - (d) the circumstances in which the Commissioner would consider it appropriate to impose an enforcement obligation.
- (3) The Commissioner may alter or replace the guidance.

(4) 1988 c.36.

(4) If the guidance is altered or replaced, the Commissioner must issue the altered or replacement guidance.

(5) The Commissioner must arrange for the publication, in such form and manner as the Commissioner considers appropriate, of any guidance issued under this paragraph.

Interpretation: Part 1

8. In this Part—

“address” means—

- (a) in the case of a registered company, the address of its registered office, and
- (b) in the case of a person (other than a registered company) carrying on a business, the address of the person’s principal place of business in the United Kingdom;

“business” includes any trade or profession;

“the Commissioner” has the meaning given by paragraph 1(1);

“enforcement obligation” has the meaning given by paragraph 2(2);

“monetary penalty notice” means a monetary penalty notice under section 1(1A);

“notice” means notice in writing;

“notice of intent” means a notice under paragraph 3(2) to (5);

“registered company” means a company registered under the enactments relating to companies for the time being in force in the United Kingdom.

PART 2

INFORMATION PROVISIONS

Information notices

9.—(1) The Commissioner may by notice (“an information notice”) request any person on whom the Commissioner is considering whether to serve a Part 1 notice of intent or a Part 1 monetary penalty notice to provide such information as the Commissioner reasonably requires for the purpose of deciding whether to serve the Part 1 notice concerned.

(2) Where the Commissioner requests that documents be produced, the Commissioner may take copies of, or extracts from, any document so produced.

(3) An information notice must—

- (a) specify or describe the information to be provided,
- (b) specify the manner in which, and the period within which, the information is to be provided,
- (c) state that the Commissioner considers that the information is information which the Commissioner reasonably requires for the purpose of deciding whether to serve a Part 1 notice of intent or (as the case may be) a Part 1 monetary penalty notice,
- (d) state the Commissioner’s grounds for this view, and
- (e) provide details of the rights of appeal under paragraph 10 in respect of the information notice.

(4) For the purposes of sub-paragraph (3)(b)—

- (a) specifying the manner in which the information is to be provided may include specifying the form in which it is to be provided, and
 - (b) the specified period within which the information is to be provided must not be less than 28 days beginning with the day after the day on which the information notice is served.
- (5) Subject to sub-paragraph (6), the Commissioner may not vary an information notice.
- (6) The Commissioner may vary an information notice by extending the period within which the information is to be provided if the person on whom the notice is served appeals under paragraph 10 in relation to the notice.
- (7) Sub-paragraph (5) does not prevent the Commissioner from issuing a new information notice instead of varying such a notice.
- (8) The Commissioner may cancel an information notice.
- (9) A variation or cancellation of an information notice is effected by serving on the person on whom the notice was served a notice setting out the variation or cancellation.

Appeals against notices

- 10.**—(1) A person on whom an information notice is served may appeal to the First-tier Tribunal against—
- (a) the information notice or any provision of it, or
 - (b) any refusal of a request by the person to issue a notice of variation or cancellation in relation to the information notice.
- (2) Subject to paragraph 9(6), an appeal under this paragraph does not affect the need to comply with the information notice while the appeal is not finally determined.
- (3) Sub-paragraphs (4) to (6) apply in relation to an appeal under sub-paragraph (1)(a).
- (4) The First-tier Tribunal must allow the appeal or substitute such other information notice as could have been served by the Commissioner if the Tribunal considers—
- (a) that the notice concerned is not in accordance with the law, or
 - (b) to the extent that the notice involved an exercise of discretion by the Commissioner, that the Commissioner ought to have exercised the discretion differently.
- (5) In any other case, the First-tier Tribunal must dismiss the appeal.
- (6) The First-tier Tribunal may review any determination of fact on which the notice concerned was based.
- (7) Sub-paragraphs (8) to (10) apply in relation to an appeal under sub-paragraph (1)(b).
- (8) The First-tier Tribunal must direct the Commissioner to issue, on such terms as the Tribunal considers appropriate, a notice of variation or cancellation in relation to the information notice if the Tribunal considers that the information notice ought to be varied or cancelled on those terms.
- (9) In any other case, the First-tier Tribunal must dismiss the appeal.
- (10) The First-tier Tribunal may review any determination of fact on which the refusal to issue the notice of variation or cancellation was based.

Enforcement of notices

- 11.**—(1) The Commissioner may serve a Part 2 monetary penalty notice on a person if the person—
- (a) without reasonable excuse refuses or fails to comply with an information notice, or

(b) knowingly or recklessly gives any information which is false in a material particular in response to an information notice.

(2) Subject to sub-paragraphs (3) to (7), Part 1 of this Schedule applies in relation to a Part 2 monetary penalty notice and the penalty that relates to that notice as it applies in relation to a Part 1 monetary penalty notice and the penalty that relates to that notice.

(3) The amount of the monetary penalty determined by the Commissioner and specified in the Part 2 monetary penalty notice may be—

- (a) a fixed amount,
- (b) an amount calculated by reference to a daily rate, or
- (c) a fixed amount and an amount calculated by reference to a daily rate,

provided that the total amount payable does not exceed £10,000.

(4) In the case of an amount calculated by reference to a daily rate—

- (a) no account is to be taken of the day on which the Part 2 monetary penalty notice is served or any day before that day, and
- (b) the Part 2 monetary penalty notice must specify—
 - (i) the day on which the amount first starts to accumulate and the circumstances in which it is to cease to accumulate, and
 - (ii) the period or periods within which the amount, or any part or parts so far accumulated, must be paid to the Commissioner (provided that no such period ends less than 28 days beginning with the day after the day on which the notice is served).

(5) The provisions in Part 1 of this Schedule so far as relating to enforcement obligations do not apply in relation to a Part 2 monetary penalty notice.

(6) Paragraph 3 applies by virtue of sub-paragraph (2) above as if—

- (a) paragraph 3(6)(b)(i), the word “or” at the end of that sub-paragraph (i) and the word “other” in paragraph 3(6)(b)(ii) were omitted, and
- (b) in paragraph 3(13) the references to an interception were references to conduct falling within paragraph 11(1)(a) or (b).

(7) Paragraph 4(5) applies by virtue of sub-paragraph (2) above as if the references to an interception were references to conduct falling within paragraph 11(1)(a) or (b).

Technical assistance for the Commissioner

12.—(1) OFCOM must comply with any reasonable request made by the Commissioner, in connection with the Commissioner’s functions under section 1(1A) and (1B) and this Schedule, for advice on technical and similar matters relating to electronic communications.

(2) For this purpose, the Commissioner may disclose to OFCOM any information obtained by the Commissioner under this Schedule.

(3) In this paragraph “OFCOM” means the Office of Communications established by section 1 of the Office of Communications Act 2002(5).

Interpretation: Part 2

13. In this Part—

“the Commissioner” has the meaning given by paragraph 1(1);

“enforcement obligation” has the meaning given by paragraph 2(2);

(5) 2002 c.11.

“information” includes documents; and any reference to providing or giving information includes a reference to producing a document;

“information notice” has the meaning given by paragraph 9(1);

“notice” means notice in writing;

“Part 1 monetary penalty notice” means a monetary penalty notice under section 1(1A);

“Part 2 monetary penalty notice” means a monetary penalty notice under paragraph 11; “Part 1 notice of intent” means a notice under paragraph 3(2) to (5) (but excluding those provisions as applied by paragraph 11).”

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations, made under section 2(2) of the European Communities Act 1972, amend the Regulation of Investigatory Powers Act (“the Act”) in order fully to implement provisions of Directive [2002/58/EC](#) on privacy and electronic communications (OJ L 201, 31.7.2002, p.37) and of Directive [95/46/EC](#) on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ L 281, 23.11.1995 p.31) insofar as those provisions are applied by Directive [2002/58/EC](#).

Section 1(1) of the Act makes it a criminal offence for a person intentionally and without lawful authority to intercept, at any place within the United Kingdom, any communication in the course of its transmission by means of a public postal service or telecommunications system. Regulation 2 of these Regulations gives a new power to the Interception of Communications Commissioner (“the Commissioner”) to serve a monetary penalty notice on a person whom he considers has intercepted without lawful authority, at any place in the United Kingdom, any communication in the course of its transmission by means of a public telecommunications system. The Commissioner may not serve a monetary penalty notice if he considers that the person has committed an offence under section 1(1) of the Act, or if he considers that the interception could be explained by the person’s attempt to act in accordance with an interception warrant. Pursuant to section 1(5) of the Act, conduct that takes place in accordance with an interception warrant has lawful authority.

Sections 3 and 4 of the Act authorise certain kinds of interception without the need for an interception warrant. Section 3(1) of the Act authorises interception of a communication where there are reasonable grounds for believing that both the sender and the recipient of the communication have consented to its interception. Regulation 3 of these Regulations repeals the reference to reasonable grounds for belief, with the effect that the interception will be authorised only where both the sender and recipient have consented to it.

Regulation 2 of these Regulations also inserts into the Act a new Schedule A1 which makes further provision about monetary penalty notices. Part 1 of the Schedule deals with monetary penalty notices. In particular:

- (i) Paragraph 1 sets the maximum penalty (£50,000), the period within which payment may be requested by the Commissioner and the information that is to be included in the monetary penalty notice;

- (ii) Paragraph 2 allows the Commissioner to include one or more enforcement obligations in a monetary penalty notice. These may require the person on whom the notice is served to cease the interception within a specified time;
- (iii) Paragraph 3 requires the Commissioner to serve a notice of intent on a person before he serves a monetary penalty notice. It further sets out the information that is to be included in such a notice and the Commissioner's obligations to deal with representations received in response;
- (iv) Paragraph 4 gives the Commissioner powers to vary or cancel a monetary penalty notice;
- (v) Paragraph 5 establishes the right for a person on whom a monetary penalty notice is served to appeal to the First Tier Tribunal, and sets out the powers of that Tribunal on appeal. The appeal right includes the right to appeal against any refusal by the Commissioner to vary or cancel the monetary penalty notice. Paragraph 5 further sets out the effect that an appeal has on obligations arising under the monetary penalty notice;
- (vi) Paragraph 6 gives the Commissioner powers to recover the penalty or enforce an enforcement obligation through the civil proceedings;
- (vii) Paragraph 7 requires the Commissioner to prepare and issue guidance on these new functions. Part 2 to the Schedule deals with information provisions. In particular:
 - (viii) Paragraph 9 allows the Commissioner to request information from a person in order to assist the Commissioner in deciding whether to serve a notice of intent on that person. It sets out the information that is to be included in the notice and gives the Commissioner the power to cancel the notice or vary time for compliance where an appeal has been lodged;
 - (ix) Paragraph 10 establishes the right for a person on whom an information notice is served to appeal to the First Tier Tribunal, and sets out the powers of the Tribunal on appeal;
 - (x) Paragraph 11 allows the Commissioner to serve a monetary penalty notice on a person who has without reasonable excuse failed to comply with an information notice or who has knowingly or recklessly given false information in response to such a notice. Paragraph 11 gives a maximum penalty (£10,000) and sets out manner in which the penalty may be calculated;
 - (xi) Paragraph 12 requires OFCOM to comply with any reasonable request made by the Commissioner for advice on technical and similar matters relating to electronic communications, where the request arises in connection with the Commissioner's new functions.