

EXPLANATORY MEMORANDUM TO
THE REGULATION OF INVESTIGATORY POWERS (COMMUNICATIONS DATA)
(ADDITIONAL FUNCTIONS AND AMENDMENT) ORDER 2006

2006 No. 1878

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 European Convention of Human 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 Gambling Commission) or will have (in the case of the Rail Accident Investigation Branch). It also ensures that long established authorities with functions of public nature (as in the case of the Royal Mail) 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) and (3) and section 78(5) of the Regulation of Investigatory Powers Act 2000 (RIPA). This Order requires approval by resolution of each House of Parliament and will not come into effect until two weeks after it is made.

4.2 Chapter II of Part I of RIPA (Acquisition and Disclosure of Communications Data) provides a statutory framework regulating the acquisition of communications data by public authorities, and its disclosure to public authorities, consistent with the Human Rights Act 1998. With 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" in section 25(1) of RIPA provide 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.

4.5 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.

4.6 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

4.7 This Order provides for additional purposes for which it may be necessary to obtain communications data under section 22(2) of Part I of RIPA.

4.8 Article 2(a) of this Order has the effect of specifying a new purpose to assist public authorities whose primary function it is to investigate alleged miscarriages of justice, those being the Criminal Cases Review Commission and the Scottish Criminal Cases Review Commission.

4.9 Article 2(b) of this Order has the effect of specifying a new purpose to assist the police to identify a deceased person or a person otherwise unable to identify themselves, to investigate the reason for that person's death or condition, or trace any next of kin or similar responsible person where no crime is suspected.

4.10 Article 4 of this Order amends article 6 of the Regulation of Investigatory Powers (Communications Data) Order 2003¹ ("the 2003 Order") to redefine the restriction on the granting of authorisations or the giving of notices under section 23 of RIPA to take into account the effect of the additional purposes in Article 2 of this Order.

4.11 Article 5 of this Order substitutes article 10 of the 2003 Order, which concerned a restriction on individuals holding positions with the Commissioners for Inland Revenue with an entry which has the same effect but takes account of the coming into force of the Commissioners for Revenue and Customs Act 2005.

4.12 Article 6(2) of this Order has the effect of inserting into Schedule 1 of 2003 Order the additional purpose at Article 2(b) of the 2006 Order in the entries for the territorial Police Forces and the British Transport Police.

4.13 Article 6(3) of this Order substitutes an entry for the Commissioners of Her Majesty's Revenue and Customs in place of those for the Commissioners of Customs and Excise and the Commissioners of Inland Revenue contained in the 2003 Order.

4.14 Article 6(4) of this Order has the effect of inserting into Part 1 of Schedule 1 of 2003 Order the additional purpose listed at Article 2(b) of the 2006 Order to the entry for the Serious Organised Crime Agency.

4.15 Article 7 of this Order amends Part I of Schedule 2 of the 2003 Order and has the effect of enabling the following public authorities to acquire all types of communications data within the regulatory framework:

- the Gangmasters Licensing Authority
- the Home Office (specifically the Immigration Service and the Prison Service)

¹ S.I. 2003 No. 3172

- the Department of Transport (specifically the Air Accident Investigation Branch, the Marine Accident Investigation Branch and the Rail Accident Investigation Branch)
- the Gambling Commission
- the Information Commissioner
- the Serious Fraud Office
- the Criminal Cases Review Commission
- the Scottish Criminal Cases Review Commission
- the Royal Mail Group plc;

4.16 Article 7(3) of this Order has the effect of amending the entry in the Regulation of Investigatory Powers (Communications Data) (Amendment) Order 2005² (“the 2005 Order”) for the Port of Dover Police and the Port of Liverpool Police to insert the additional purpose at Article 2(b) of the 2006 Order.

4.17 Article 8 of this Order amends Part 3 of Schedule 2 (individuals in additional public authorities that may acquire only communication data within falling with section 21(4)(b) and (c) of RIPA) of the 2003 Order.

4.18 Article 8 (2) of this Order amends the entry for the Department for Environment, Food and Rural Affairs substituting the Defra Investigation Service in place of the former Defra Investigation Branch, and inserting an entry for the Marine Fisheries Agency in place of one for the former Counter Fraud and Compliance Unit of the Rural Payments Agency.

4.19 Article 8(3) of this Order has the effect of inserting an entry for the Head of Investigations in the National Asylum Support Service of the Home Office.

4.20 Articles 8 (4) and 8(5) of this Order insert into Part 3 of Schedule 2 of the 2003 Order an entry for the Department of Agriculture and Rural Development (Northern Ireland) and an entry for the Pensions Regulator designating both as relevant public authorities for the purposes of Chapter II of Part I of RIPA able to acquire and seek disclosure of certain communications data within the regulatory framework.

4.21 Article 8(6) of this Order, as a consequence of Article 7 of this Order has the effect of deleting from Part 3 of Schedule 2 of the 2003 Order entries in respect of the Gaming Board for Great Britain, the Information Commissioner, the Serious Fraud Office and a Universal Service Provider within the meaning of the Postal Services Act 2000.

4.22 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 entitle to grant authorisations or give notices relating solely to communications data falling within section 21(4)(c) of RIPA (in column 3) and 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 and by reference to Article 2 of the 2006 Order.

5. Extent

5.1 This instrument applies to all of the United Kingdom.

² S.I. 2005 No. 1083

6. European Convention on Human Rights

6.1 Liam Byrne, Minister 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) (Additional Functions and Amendment) Order 2006 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 Gangmasters Licensing Authority, established by the Gangmasters (Licensing) Act 2004 to curb the exploitation of workers in the Agriculture, Horticulture, Shellfish Gathering and Associated Processing and Packaging Industries, has a necessary and proportionate requirement to obtain all categories of communications data to investigate labour providers and labour users operating illegally which includes organised gangs involved in trafficking of people trafficking and exploitation of illegal migrant workers.

7.3 Under the Gambling Act 2005, the Gambling Commission is taking on additional responsibilities to those of the former Gaming Board of Great Britain to regulate all gaming and lotteries, including remote (telephone and internet) gambling. Additional powers are required to enable the Gambling Commission to fulfil its full responsibilities and undertake effective enforcement action.

7.4 The Information Commissioner is the independent supervisory authority responsible for enforcing the provisions of the Data Protection Act 1998 (and the Freedom of Information Act 2000). It is a criminal offence under the 1998 Act to unlawfully obtain, disclose, sell or offer to sell personal information. The extended powers will assist the Commissioner to investigate offenders who unlawfully obtain personal information by purporting to be the data subject, for example posing as a tax paypayer in a telephone call to a Tax Office, or someone to whom the information may be disclosed, for example posing as a Tax Officer calling from a different Tax Office.

7.5 The Criminal Justice Act 1987 established the Serious Fraud Office (SFO) to deal with serious and complex fraud cases and has used the powers in Chapter II of Part I of RIPA to obtain communications data falling within sections 21(4)(b) and (c) of RIPA in support of its investigations. The SFO has identified a necessary and proportionate additional requirement to obtain communications data falling within section 21(4)(a) of RIPA to investigate offences effectively where communications services, such as International Simple Voice Resellers, are used to disguise either or both the origin and destination of telephone calls. In 2004/05 the SFO investigated complex fraud cases totalling approximately £34 billion.

7.6 Parliament approved in the 2003 Order that within the Home Office, an Inspector in the Immigration Service should be a prescribed post for obtaining communications data falling within under sections 21 (4)(b) and (c) of RIPA. In practice the exercise of this responsibility is restricted

to the Inspector in the Immigration and Nationality Directorate Intelligence Service (INDIS) which supports the operational enforcement of immigration controls.

7.7 The Immigration Service has demonstrated a necessary and proportionate requirement to be able to obtain communications data falling within section 21(4)(a) of RIPA to maintain its capability to meet the threats of organised immigration crime and attempts to undermine the integrity of border control. Increasingly sophisticated methods to facilitate illegal entry and organise the trafficking of people include use of communications services to plan, conceal and undertake illegal conduct.

7.8 The National Asylum Support Service (NASS) of the Home Office provides support, accommodation and financial help for asylum seekers whilst their claims for asylum (and appeals of asylum decisions) are being considered. Proportionate and restricted access to communications data is required to assist NASS to investigate individuals suspected of making fraudulent claims.

7.9 Her Majesty's Prison Service has a necessary and proportionate requirement to obtain communications data to investigate offences involving corrupt staff corruption and to prevent and detect the supply of illegal drugs in prison establishments. In particular, there has been considerable growth in the smuggling of mobile phones into prisons which are used to organise the supply of illegal drugs and other contraband into prisons and the commission of other offences outside of prisons.

7.10 Parliament approved in the 2003 that the Royal Mail Group plc should have power to acquire communications data falling within sections s21 (4)(b) and (c) of RIPA to fulfil its long standing role of investigating criminal offences against the Royal Mail. The Royal Mail has established a requirement for power to obtain data falling within section 21 (4)(a) of RIPA to investigate the unlawful interception and dishonest redirection of mail items to third party addresses and to disrupt criminal organisations involved in such activity. The Royal Mail is a public authority within the meaning of section 6(3) of the Human Rights Act 1998.

7.11 The Criminal Appeal Act 1995 and the Criminal Procedure (Scotland) Act 1995 provided for the Criminal Cases Review Commission and the Scottish Criminal Cases Review Commission respectively to investigate alleged miscarriages of justice. The Commissions estimate that they receive approximately 35-40 cases each year where a proportionate requirement to obtain communications data arises from issues identified by a claimant. The new statutory ground for the obtaining communications data in Article 2(a) of this Order will assist both Commissions to ensure that individuals' right to a fair trial under Article 6 of the European Convention on Human Rights have been respected.

7.12 The Pension Regulator was established under the Pensions Act 2004 to prevent and detect criminal offences relating to breaches of pensions' regulations or failure to disclose information. Proportionate use of powers to obtain communications data will assist the Pension Regulator to investigate individuals who unlawfully evade requirements to pay pension contributions and illegally transfer funds from genuine company pension arrangements into bogus schemes

7.13 The amendments to the entry relating to the Department for Environment, Food and Rural Affairs reflect internal reorganisation within the Department. The Marine Fisheries Agency has a necessary and proportionate requirement to obtain certain communication data to investigate criminal offences such as over fishing contrary to EC Regulations made under the Common Fisheries Policy. Some of these offences involve millions of pounds of benefit to those who commit the offences.

7.14 Parliament approved in the 2003 Order that the Defra Investigation Service (formerly the Defra Investigation Branch) has a necessary and proportionate requirement to obtain certain communications data. The Department of Agriculture and Rural Development (Northern Ireland) has a similar requirement to investigate fraudulent or suspicious claims, running into millions of pounds, made under the Disease Compensation scheme. Access to communications data will enable DARD(NI) to discharge its public health and crime detection functions.

7.15 The Air Accident Investigation Branch, the Marine Accident Investigation Branch and the Rail Accident Investigation Branch are all administratively part of the Department for Transport but function independently in the conduct of their investigations. Their primary purpose is to improve safety by determining the causes of accidents and make recommendations to prevent a recurrence – not to apportion blame or liability. Ascertaining whether the use of communications services, particularly the use of mobile communications by pilots or drivers, can be fundamental in determining the circumstances and causes of an accident. The Rail Accident Investigation Branch has assumed in October 2005 some of the functions of the Health & Safety Executive for which Parliament previously approved the use of RIPA to obtain communications data to carry out its public safety functions.

7.16 This summer the Government is undertaking a formal public consultation on a draft code of practice for the Acquisition and Disclosure of Communications Data which relates to the exercise and performance of the powers and duties in Chapter II of Part I of RIPA and sets out the procedures to be followed in the granting of authorisations and giving of notices to obtain communications data. After consideration of representations on about the draft Parliament will be invited to approve the code of practice by affirmative resolution.

7.17 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.

8. Regulatory 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 take account of the fact that requirements to disclose communication data place operational and financial burdens on communications service providers.

8.4 The purpose of the Order is to regulate the acquisition of communications data by, and disclosure of communications data to, the public authorities listed in it. RIPA requires 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 conduct under RIPA will always entail a level of necessary bureaucracy.

9. **Contact**

9.1 Nadine Hibbert of the Covert Investigation Policy Team at the Home Office, 2 Marsham Street, London SW1P 4DF (tel: 020 7035 1208; e-mail: nadine.hibbert@homeoffice.gsi.gov.uk) can answer any queries regarding the instrument.