

EXPLANATORY MEMORANDUM TO
THE MAGISTRATES' COURTS (REGULATION OF INVESTIGATORY POWERS
RULES 2012

2012 No. 2563 (L.9)

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

2. Purpose of the instrument

2.1 These rules provide for the procedure governing applications to magistrates' courts for approval of authorisations or notices for the use of certain covert investigatory techniques, where the application is not made in a criminal case. The procedure governing such applications where the application is made in a criminal case is set out in Part 6 of the Criminal Procedure Rules 2012 (S.I. 2012/1726), and these rules mirror that provision for civil cases.

2.2 The Statutory Instrument sets out the court process.

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

3.1 The Committee will note that the preamble to these Rules confirms that the Lord Chief Justice, prior to making the Rules, consulted the Magistrates' Courts Rule Committee. The Magistrates' Courts Rules Committee was abolished by the Public Bodies (Abolition of Crown Court Rule Committee and Magistrates' Courts Rule Committee) Order 2012 (S.I. 2012/2398), which took effect before the Rules were made, but after the Lord Chief Justice had consulted the Magistrates' Courts Rule Committee in accordance with section 144 of the Magistrates' Courts Act 1980. While it was not, therefore, a precondition of the making of the rules that the Lord Chief Justice consult that Committee, it was considered appropriate to include a reference to the consultation in the preamble.

3.1 The Committee will also note that these Rules mirror the provision made for these applications in criminal cases by the Criminal Procedure Rules 2012 (rules 6.1(4), 6.2 to 6.5 and 6.27 to 6.28), which were laid before Parliament on 12 July and recently considered by the Committee.

4. Legislative Context

4.1 The Protection of Freedoms Act 2012 (sections 37 and 38) amended the Regulation of Investigatory Powers Act 2000 (RIPA) to require the approval of a justice of the peace for certain covert investigatory techniques. Sections 23A and 23B of RIPA (inserted by section 37 of the 2012 Act) provide for applications for approval of

authorisations or notices to obtain “communications data”; and sections 32A and 32B of RIPA (inserted by section 38 of the 2012 Act) provide for applications for approval of notices for the use of “directed surveillance” and the conduct and use of “covert human intelligence sources”.

4.2 The procedure for such applications where the application is made in or for the purposes of a criminal case is provided for by the Criminal Procedure Rules 2012. Those rules, however, cannot cover applications for approval which are in or for the purposes of a civil case. Procedure for civil matters before magistrates’ courts is governed by Magistrates’ Courts Rules made under section 144 of the Magistrates’ Courts Act 1980, hence the need for a separate instrument.

5. Territorial Extent and Application

5.1 This instrument applies to England and Wales.

6. European Convention on Human Rights

6.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy background

- What is being done and why

7.1 Following criticism of the way in which certain investigatory powers were being exercised in some cases by local authorities, provision was included in the Protection of Freedoms Act 2012 to add an element of judicial control by requiring an application to be made to a justice of the peace (JP) for approval before certain powers can be exercised. The provision was inserted into RIPA, and comes into effect on 1 November 2012.

7.2 RIPA as amended now requires local authorities to obtain the approval of a JP for the use of any one of the three covert investigatory techniques available to them under RIPA namely Directed Surveillance, the deployment of a Covert Human Intelligence Source (CHIS) and accessing communications data. Such approval is also required if an authorisation to use such techniques is being renewed. In each case, the role of the JP is to ensure that the correct procedures have been followed and the relevant factors have been taken into account.

7.3 Directed Surveillance is often conducted by local authorities, for example, to investigate a benefit fraud or to collect evidence of anti-social behaviour. Typical methods include secretly following people, secretly taking photographs of them and using hidden cameras to record their movements. The use of a CHIS in a local authority context might, for example, take the form of an informant using his relationship with his employer to disclose information on a continuing basis about benefit fraudsters working in a factory.

7.4 The JP to whom an application for approval is made has three choices when deciding whether to approve an authorisation or notice. He or she can:

- REFUSE to approve it (the local authority might be able to come back to court with a revised application, but would not need to secure a fresh authorisation or notice)
- APPROVE it - so that the local authority can go ahead and investigate
- REFUSE to approve the authorisation or notice and QUASH it – so that the local authority would have to start again and secure a fresh authorisation or notice if it still wanted to investigate. (Rule 8 (1) and (2) provide that at least 2 business days must have passed since a refusal before the authorisation can be quashed, so as to give the authority the opportunity to make representations as to why the authorisation or notice should not be quashed).

7.5 These Rules do not relate to the process for securing an authorisation or notice, nor to the grounds for approving, refusing to approve or quashing it. They cover the procedure for applying for approval in civil proceedings, and mirror rules 6.1(4), 6.2 to 6.5 and 6.27 to 6.28 of the Criminal Procedure Rules 2012 (which cover the procedure for applying for approval in relation to criminal matters), which came into force on 1st October. While it is anticipated that the great majority of applications will be in criminal proceedings, it is possible that a local authority might consider it necessary to make use of the investigatory powers in question for civil cases (an example being that a civil anti-social behaviour order might result from an investigation), and that either option should be open to the local authority. Rules for the procedure for applications for approval in civil cases are therefore required, and as explained above, while it was considered that the detail of the procedure did not need to differ as between applications in criminal cases and in civil cases, the division of rule-making powers means that the civil rules have to be made separately.

- Consolidation

7.6 These rules are free-standing, and that there are no plans to consolidate them with any other rules.

8. Consultation outcome

8.1 This instrument is technical and a public consultation is unnecessary. It has however, had the benefit of consultation with the Magistrates' Rules Committee (which was content with the rules and took no points on them) . The Home Office, which leads on the Protection of Freedoms Act 2012, has also been consulted and is content. raised, and recognition that this affords the same safeguards that apply to the Home Secretary.

9. Guidance

9.1 Guidance has been drafted by the Home Office for Local Authorities, and also for JPs. Judicial College will draft tailored guidance as appropriate, and HMCTS guidance on the procedure will be issued to court staff, in due course.

10. Impact

10.1 These rules have no impact on business, charities or voluntary bodies

10.2 These rules have no impact of themselves on the public sector

10.3 An Impact Assessment has not been prepared for this instrument

11. Regulating small business

11.1 This instrument has no impact on small business.

12. Monitoring & review

12.1 The Home Office have the lead on this policy and will keep it under review

13. Contact

Jasmine Norton at the Ministry Of Justice can answer any queries regarding this instrument.

Jasmine Norton: Tel: 0203 334 2684 or e-mail: Jasmine.Norton@hmcts.gsi.gov.uk

The Official Secrets Act 1989 (Prescription) Order 1990 (S.I. 1990/200)

Article 2

Article 2 of S.I. 1990/200 provides that the bodies set out in the first column of Schedule 1 to the Order and the classes of members or employees of those bodies which are set out in the second column of that Schedule are prescribed for the purposes of **section 12(1)(f)** of the 1989 Act. The bodies and the classes of members or employees of those bodies listed in Schedule 1, as amended by

- the Official Secrets Act 1989 (Prescription) (Amendment) Order 1993 (S.I. 1993/847);
- the Official Secrets Act 1989 (Prescription) (Amendment) Order 2003 (S.I. 2003/1918);
- the Official Secrets Act 1989 (Prescription) (Amendment) Order 2007 (S.I. 2007/2148);
- and
- the Budget Responsibility and National Audit Act 2011 (Consequential Amendments) Order 2012 (S.I. 2012/725)

are as follows:

British Nuclear Fuels plc	The employees of the Company
The Board of the above	The members of the Board
The United Kingdom Atomic Energy Authority	The members, officers and employees of the Authority
Urenco Limited	The employees of the Company
The Board of the above	The members of the Board
Urenco (Capenhurst) Limited	The employees of the Company
The Board of the above	The members of the Board
Enrichment Technology Company Limited	The employees of the Company
The Board of the above	The members of the Board
Enrichment Technology UK Limited	The employees of the Company
The Board of the above	The members of the Board
Urenco Enrichment Company Limited	The employees of the Company
The Board of the above	The members of the Board
The Nuclear Decommissioning Authority	The members and employees of the Authority
Any subsidiary of the Nuclear Decommissioning Authority	The employees of the subsidiary
The Board of any subsidiary of the Nuclear Decommissioning Authority	The members of the Board
The Independent Police Complaints Commission	The members and employees of the Commission
The National Audit Office	The members and employees of the Office

2. The entry relating to Urenco (Capenhurst) Limited was inserted by S.I. 1993/847. Entries relating to Enrichment Technology Company Limited, Enrichment Technology UK Limited and Urenco Enrichment Company Limited were inserted by S.I. 2003/1918. Entries relating to the Nuclear Decommissioning Authority, any subsidiary or Board of any subsidiary and the Independent Police Complaints Commission were inserted by S.I. 2007/2148. The entry relating to the National Audit Office was inserted by S.I. 2012/725.

Article 3

3. Article 3 of S.I. 1990/200 provides that the offices which are set out in the first column of Schedule 2 to the Order and the classes of employees of the holders of those offices which are set out in the second column of that Schedule are prescribed for the purposes of **section 12(1)(g)** of the 1989 Act. The offices and classes of employees (where appropriate) listed in Schedule 2, as amended by

- the Scotland Act 1998 (Consequential Modifications) (No.1) Order 1999 (S.I. 1999/1042);
- the Scottish Public Services Ombudsman Act 2002 (Consequential Provisions and Modifications) Order 2004 (S.I. 2004/1823);
- the Public Services Ombudsman (Wales) Act 2005 (Transitional Provisions and Consequential Amendments) Order 2006 (S.I. 2006/362); and
- the Budget Responsibility and National Audit Act 2011 (Consequential Amendments) Order 2012 (S.I. 2012/725)

are as follows:

Comptroller and Auditor General	
Member of staff of the National Audit Office that was established by section 3 of the National Audit Act 1983	
Comptroller and Auditor General for Northern Ireland	
Member of staff of the Northern Ireland Audit Office	
Auditor General for Scotland	
Parliamentary Commissioner for Administration	The officers of the Commissioner who are not otherwise Crown servants
Officer of the Health Service Commissioner for England....being an officer who is authorised by the Parliamentary Commissioner for Administration to perform any of his functions and who is not otherwise a Crown servant	The officers of the Commissioners who are not otherwise Crown servants
Northern Ireland Parliamentary Commissioner for Administration	The officers of the Commissioner who are not otherwise Crown servants

Scottish Public Services Ombudsman	The officers of the Ombudsman who are not otherwise Crown servants
A private secretary to the Sovereign	

4. Entries relating to Auditor General for Scotland and Scottish Public Services Ombudsman were inserted by S.I. 1999/1042 and S.I. 2004/1823 respectively. The entry in relation to Officer of the Health Service Commissioner was amended by S.I. 2004/1823 and S.I. 2006/362. The entry relating to National Audit Office was amended by S.I. 2012/725.

Article 4

5. Article 4 of S.I. 1990/200 provides that the bodies which are set out in the first column of Schedule 3 to the Order are prescribed for the purposes of one or both of **sections 7(5) and 8(9)** of the 1989 Act as set out in the second column of that Schedule (so as to enable them, in the case of section 7(5), to give official authorisation for, or to impose official restrictions on, disclosures or, in the case of section 8(9), to give official directions for the return or disposal of documents). The bodies listed in Schedule 3 (as substituted by S.I. 2003/1918) and the sections of the 1989 Act for the purposes of which they are prescribed are:

The Civil Aviation Authority	Sections 7(5) and 8(9)
The Investigatory Powers Tribunal established under section 65 of the Regulation of Investigatory Powers Act 2000	Section 7(5)