

EXPLANATORY MEMORANDUM TO
THE INVESTIGATORY POWERS (DISCLOSURE OF STATISTICAL
INFORMATION) REGULATIONS 2018

2018 No. 349

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Home Office and is laid before Parliament by Command of Her Majesty.
- 1.2 This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

- 2.1 These Regulations set out the circumstances in which a telecommunications operator or postal operator may make a disclosure consisting of statistical information in relation to warrants under the Investigatory Powers Act 2016 ('the Act').

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 This instrument is made in reliance on section 13 of the Interpretation Act 1978. It is necessary to make the Regulations for the purpose of giving full effect to sections 58(8)(a) and 133(6)(a) at the time those provisions come into force. Those provisions are not capable of having effect absent regulations being made.
- 3.2 While the instrument comes into force on the day that section 58(8) comes into force, the intention is for sections 58(8) and 133(6) to come into force on the same day. That day is not yet certain but the timeframe for commencement is such that there is no possibility of the 21-day rule being breached.

Other matters of interest to the House of Commons

- 3.3 Disregarding minor or consequential changes, the territorial application of this instrument includes Scotland and Northern Ireland. As this instrument is subject to negative resolution procedure and has not been prayed against, consideration as to whether there are other matters of interest to the House of Commons does not arise at this stage.

4. Legislative Context

- 4.1 Section 57 of the Act provides that postal operators and telecommunications operators must not make a disclosure relating to a warrant under Part 2 of the Act (i.e. a targeted interception warrant, targeted examination warrant or mutual assistance warrant). Similarly, section 132 of the Act provides that a telecommunications operator must not make a disclosure in relation to a warrant under Part 5 of the Act (i.e. a targeted equipment interference warrant or a targeted examination warrant. Sections 156(2) and 197 provide that the duty not to make a disclosure in relation to a warrant also applies to bulk interception warrants and bulk equipment interference warrants.

4.2 Sections 58 and 133 set out circumstances in which disclosure is not prohibited. They include where a disclosure is made in accordance with a requirement imposed by regulations and consists of statistical information of a description specified in regulations.

5. Extent and Territorial Application

5.1 The extent of this instrument is the whole of the United Kingdom.

5.2 The territorial application of this instrument is the whole of the United Kingdom.

6. European Convention on Human Rights

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

7. Policy background

What is being done and why

7.1 Section 57 and 132 of the Act places a duty on postal operators and telecommunications operators not to make unauthorised disclosures in relation to: the existence or contents of an interception or equipment interference warrant; details of the issue of the warrant or of any renewal or modification of the warrant; the existence or contents of any requirement to provide assistance in given effect to the warrant; the steps taken in pursuance of the warrant or of any such requirement; and any of the material obtained under the warrant in a form which identifies it as having been obtained under a warrant. These provisions are crucial in protecting the operational effectiveness of the use of these important investigatory powers.

7.2 The Act also specifies a number of exceptions to the general rule of not making a disclosure. One such exception is where a disclosure is made by a telecommunications operator or postal operator in accordance with a requirement imposed by regulations made by the Secretary of State, and that the disclosure consists of statistical information of a description specified in the regulations.

7.3 While it is crucial to protect the details of operational matters, the Government remains committed to transparency about the use of investigatory powers. These Regulations are an important part of that, enabling additional transparency by allowing telecommunications and postal operators to disclose the total number of interception and equipment interference warrants in relation to which the operator has provided assistance; the total number of users in relation to whom the operator has provided assistance in giving effect to an interception warrant; and total number of factors identifying communications in relation to which the operator has provided assistance in giving effect to an interception warrant.

7.4 Where any such disclosure is made, the Regulations sets out that disclosure must be of the range within which the total falls: either a range of 500 (0-499, etc.), or a range of 1000 (0-999, etc.). Any such disclosure must be reported within a particular six month reporting period. These provisions ensure that the correct balance is struck between providing additional transparency and the need to maintain operational effectiveness by ensuring that such disclosures do not reveal sensitive operational capabilities or investigations.

7.5 The regulations are permissive. Neither the Regulations nor the Act mandate operators to make a disclosure, but rather set out the circumstances in which such a disclosure of statistic information may be permitted.

8. Consultation outcome

8.1 An informal consultation was carried out on the Regulations with telecommunications operators, based in the UK and overseas. A small number of constructive comments were received, which did not require changes to the regulations themselves.

9. Guidance

9.1 The Regulations set out requirements in relation to a relevant disclosure, but those requirements only apply if a telecommunications operator or postal operator decides to disclose statistical information of a description specified in the Regulations. The Regulations clearly detail the circumstances in which a relevant disclosure may be made and additional guidance is therefore not necessary in relation to these Regulations.

10. Impact

10.1 The impact on business, charities or voluntary bodies.

10.2 There is no impact on the public sector.

10.3 An Impact Assessment has not been prepared for this instrument as no impact on business is foreseen.

11. Regulating small business

11.1 There is no impact on activities that are undertaken by small businesses.

11.2 While the Regulations might apply to small businesses, they do not mandate operators to disclose statistical information, but rather set out the circumstances in which such a disclosure may be made.

12. Monitoring & review

12.1 Section 260 of the Investigatory Powers Act 2016 requires the Secretary of State to report on the operation of the Act, after a period of 5 years and 6 months from Royal Assent. The report must be published and laid before Parliament. In preparing the report the Secretary of State must take into account any report on the operation of the Act produced by a Select Committee of either House.

13. Contact

13.1 Home Office Public Enquiries; public.enquiries@homeoffice.gsi.gov.uk; 0207 035 4848