

2014 No. 339

INVESTIGATORY POWERS

The Regulation of Investigatory Powers (Authorisation of Covert Human Intelligence Sources) (Scotland) Order 2014

Made - - - - - *27th November 2014*

Laid before the Scottish Parliament *2nd December 2014*

Coming into force - - - *2nd February 2015*

The Scottish Ministers make the following Order in exercise of the powers conferred by sections 7(4)(b), 8(1) and (2), 19(8) and 28(4) of the Regulation of Investigatory Powers (Scotland) Act 2000(a) and all other powers enabling them to do so.

PART 1

General

Citation and commencement

1. This Order may be cited as the Regulation of Investigatory Powers (Authorisation of Covert Human Intelligence Sources) (Scotland) Order 2014 and comes into force on 2nd February 2015.

Interpretation

2. In this Order—

“Commissioner” means an ordinary Surveillance Commissioner;

“communications subject to legal privilege” means—

- (a) communications between a professional legal adviser and that adviser’s client; or
- (b) communications made in connection with, or in contemplation of, legal proceedings and for the purposes of those proceedings,

which would, in legal proceedings, be protected from disclosure by virtue of any rule of law relating to the confidentiality of communications;

“long term authorisation” has the meaning given by article 8;

“private information” has the meaning given by section 1(9) of the Act;

“relevant source” means a source holding an office, rank or position with—

- (a) the Police Service of Scotland;

(a) 2000 asp 11. Section 8 has been amended by paragraph 15(3) of schedule 7 to the Police and Fire Reform (Scotland) Act 2012 (asp 8), article 4 of S.S.I. 2010/350 and article 2 of S.S.I. 2010/420.

- (b) a police force maintained under section 2 of the Police Act 1996^(a);
- (c) the metropolitan police force;
- (d) the City of London police force;
- (e) the Police Service of Northern Ireland;
- (f) the National Crime Agency;
- (g) the Ministry of Defence Police;
- (h) the British Transport Police Force;
- (i) the Royal Navy Police; or
- (j) the Royal Military Police;

“source” means a covert human intelligence source;

“the 2010 Order” means the Regulation of Investigatory Powers (Prescription of Offices, etc. and Specification of Public Authorities) (Scotland) Order 2010^(b);

“the Act” means the Regulation of Investigatory Powers (Scotland) Act 2000; and

“writing” includes electronic communications within the meaning given by section 15 of the Electronic Communications Act 2000^(c).

PART 2

Communications subject to legal privilege

Communications subject to legal privilege

3.—(1) This Part applies to the grant or renewal of an authorisation for the conduct or use of a source to—

- (a) obtain communications subject to legal privilege;
- (b) provide access to any communications subject to legal privilege to another person; or
- (c) disclose communications subject to legal privilege.

(2) Where a single authorisation authorises conduct mentioned in paragraph (1) and other conduct authorised by the Act, this Part applies only in relation to those parts of the combined authorisation which authorise conduct mentioned in paragraph (1).

Notification

4.—(1) Before a person grants or renews an authorisation for conduct to which this Part applies, that person must give notice to a Commissioner under this article.

(2) A notice under paragraph (1) must—

- (a) be given in writing;
- (b) state that the approval of a Commissioner is required before the authorisation may be granted or renewed;
- (c) specify the grounds on which the person giving the notice is satisfied that—
 - (i) the requirements of section 7(2) of the Act are satisfied; and
 - (ii) the authorisation is necessary for the purpose of preventing or detecting serious crime;

^(a) 1996 c.16.

^(b) S.S.I. 2010/350. This Order has been amended by paragraph 36 of Schedule 1 to the Police and Fire Reform (Scotland) Act 2012 (Consequential Modifications and Savings) Order 2013 (S.S.I. 2013/119).

^(c) 2000 c.7. Section 15 has been amended by paragraph 158 of Schedule 17 to the Communications Act 2003 (c.21).

- (d) specify the conduct that is, or is to be, authorised;
- (e) specify the identity, where known, of any person—
 - (i) to whom the activities of the source relate; and
 - (ii) with whom communications subject to legal privilege may take place;
- (f) specify any communications subject to legal privilege (to the extent known) to which the conduct that is, or is to be, authorised relates; and
- (g) specify whether the conduct that is, or is to be, authorised is likely to result in the obtaining of private information about any person who is not specifically identified in the notice for the purposes of the investigation or operation.

(3) In the case of a renewal of an authorisation, a notice under paragraph (1) must specify the information mentioned in paragraph (2) as it is understood at the time of the notice and must in addition specify—

- (a) whether the authorisation is being renewed for the first time or, if it has previously been renewed, each occasion on which it has been renewed;
- (b) any change in the information contained in the notice since the last notice under this article;
- (c) why it is considered necessary to renew the authorisation;
- (d) the content and value to the investigation or operation of the communications subject to legal privilege obtained from the conduct or the use of the source in the period since the grant of the authorisation or the last renewal;
- (e) the results of any review of the matters mentioned in section 19(7) of the Act; and
- (f) the period for which the authorisation is considered likely to continue to be necessary.

Approval required for grant or renewal of authorisations

5.—(1) If a Commissioner receives a notice under article 4(1), that Commissioner must, as soon as reasonably practicable, decide whether or not to approve the grant or renewal of the authorisation to which the notice relates.

(2) A Commissioner must—

- (a) approve the grant or renewal of the authorisation only if satisfied that there are reasonable grounds for believing that—
 - (i) the requirements of section 7(2) of the Act are satisfied; and
 - (ii) the authorisation is necessary for the purpose of preventing or detecting serious crime; and
- (b) give notice in writing of the Commissioner’s decision to the person who gave notice under article 4(1) as soon as reasonably practicable after making that decision.

(3) If a Commissioner decides not to approve the grant or renewal of an authorisation under paragraph (1), that Commissioner must give reasons in writing for that decision to the person who gave notice under article 4(1).

(4) An authorisation for conduct to which this Part applies must not be granted or renewed unless—

- (a) it has been approved in accordance with this article by a Commissioner; and
- (b) notice of that Commissioner’s approval has been given in accordance with paragraph (2)(b).

Duration

6. For the purposes of an authorisation for conduct to which this Part applies, paragraph (b) of section 19(3) of the Act has effect as if the period specified in that paragraph were three months.

PART 3

Authorisation in relation to relevant sources

Notification of authorisation for conduct or use of relevant sources

7.—(1) A person who grants or renews an authorisation for the conduct or use of a relevant source must give notice of that authorisation to a Commissioner under this article unless the authorisation is a long term authorisation.

(2) A notice under paragraph (1) must—

- (a) be given in writing;
- (b) be given within 7 days of the grant or renewal of the authorisation; and
- (c) specify—
 - (i) the grounds on which the person giving the notice is satisfied that the requirements of section 7(2) of the Act are satisfied; and
 - (ii) the conduct that is, or is to be, authorised.

Long term authorisations

8.—(1) In this Part, an authorisation for the conduct or use of a relevant source is a long term authorisation if the periods mentioned in paragraph (2)(a) and (b), when taken together, exceed 12 months.

(2) The periods are—

- (a) the period for which the relevant source will be authorised under the authorisation; and
- (b) subject to paragraph (4), any period or periods for which that source has previously been authorised as a source in relation to the same investigation or operation.

(3) If a relevant source has been authorised previously as a source for a period or periods totalling less than 12 months, any further authorisation, unless renewed, ceases to have effect at the end of a period of 12 months from the date of the further authorisation, less the total period of any previous authorisation (and section 19(3)(b) of the Act has effect as if the period specified there were modified accordingly).

(4) When calculating the previous authorisation periods mentioned in paragraph (2)(b) or (3), the following are not to be taken into account—

- (a) any period for which the relevant source has been authorised as a source if that authorisation was granted orally or by a person whose entitlement to authorise is confined to urgent cases;
- (b) any authorisation of that source which ceased to have effect more than 3 years before the intended commencement date of the authorisation being notified under this Part; and
- (c) any period for which that source was authorised prior to 2nd February 2015 under an authorisation which is not in effect on that date.

(5) If an authorisation for the conduct or use of a relevant source is an authorisation to which Part 2 applies, the references in paragraphs (1) and (3) to 12 months are to be read as if they were references to 3 months.

Notification of long term authorisations

9.—(1) Before a person grants or renews a long term authorisation, that person must give notice to a Commissioner under this article.

(2) A notice under paragraph (1) must—

- (a) be given in writing;

- (b) state that the approval of a Commissioner is required before the authorisation may be granted or renewed; and
- (c) specify—
 - (i) the grounds on which the person giving the notice is satisfied that the requirements of section 7(2) of the Act are satisfied; and
 - (ii) the conduct that is, or is to be, authorised.

(3) In the case of a renewal of an authorisation, a notice under paragraph (1) must specify the information mentioned in paragraph (2) as it is understood at the time of the notice and must in addition specify—

- (a) whether the authorisation is being renewed for the first time or, if it has previously been renewed, each occasion on which it has been renewed;
- (b) why it is considered necessary to renew the authorisation;
- (c) the results of any review of the matters mentioned in section 19(7) of the Act; and
- (d) the period for which the authorisation is considered likely to continue to be necessary.

Approval required for grant or renewal of long term authorisations

10.—(1) If a Commissioner receives a notice under article 9(1), that Commissioner must, as soon as reasonably practicable, decide whether or not to approve the grant or renewal of the authorisation to which the notice relates.

(2) A Commissioner must—

- (a) approve the grant or renewal of the authorisation only if satisfied that there are reasonable grounds for believing that the requirements of section 7(2) of the Act are satisfied; and
- (b) give notice in writing of the Commissioner's decision to the person who gave notice under article 9(1) as soon as reasonably practicable after making that decision.

(3) If a Commissioner decides not to approve the grant or renewal of a long term authorisation, that Commissioner must give reasons in writing for that decision to the person who gave notice under article 9(1).

(4) A long term authorisation must not be granted or renewed unless—

- (a) it has been approved in accordance with this article by a Commissioner; and
- (b) notice of that Commissioner's approval has been given in accordance with paragraph (2)(b).

Appeals against decisions by Commissioners

11.—(1) Any person seeking approval for the grant or renewal of a long term authorisation may appeal to the Chief Surveillance Commissioner against any refusal of a Commissioner to approve any such authorisation.

(2) An appeal under this article must be made no later than 7 days from the date on which notice of the refusal is given under article 10(2)(b).

(3) The Chief Surveillance Commissioner must allow an appeal under this article if satisfied that there are reasonable grounds for believing that the requirements of section 7(2) of the Act are satisfied in relation to the proposed authorisation.

PART 4

Prescribed offices, ranks and positions in relation to relevant public authorities

Prescribed offices, ranks and positions in relation to the Police Service of Scotland

12.—(1) The 2010 Order^(a) is amended as follows.

(2) In article 1 (citation, commencement and interpretation), for paragraph (2) substitute—

“(2) In this Order—

“the 2000 Act” means the Regulation of Investigatory Powers (Scotland) Act 2000;

“the CHIS Order” means the Regulation of Investigatory Powers (Authorisation of Covert Human Intelligence Sources) (Scotland) Order 2014;

“long term authorisation” has the meaning given by article 1A;

“Police Service” means the Police Service of Scotland;

“relevant source” means a source holding a rank, office or position with—

(a) the Police Service;

(b) a police force maintained under section 2 of the Police Act 1996^(b);

(c) the metropolitan police force;

(d) the City of London police force;

(e) the Police Service of Northern Ireland;

(f) the National Crime Agency;

(g) the Ministry of Defence Police;

(h) the British Transport Police Force;

(i) the Royal Navy Police; or

(j) the Royal Military Police; and

“source” means a covert human intelligence source.”.

(3) After article 1 insert—

“Long term authorisation

1A.—(1) In this Order, an authorisation for the conduct or use of a relevant source is a long term authorisation if the periods mentioned in paragraph (2)(a) and (b), when taken together, exceed 12 months.

(2) The periods are—

(a) the period for which the relevant source will be authorised under the authorisation (having regard to article 8(3) of the CHIS Order); and

(b) subject to paragraph (3), any period or periods for which that source has previously been authorised as a source in relation to the same investigation or operation.

(3) When calculating the previous authorisation periods mentioned in paragraph (2)(b), the following are not to be taken into account—

(a) any period for which the relevant source has been authorised as a source if that authorisation was granted orally or by a person whose entitlement to authorise is confined to urgent cases;

(a) S.S.I. 2010/350. This Order has been amended by paragraph 36 of Schedule 1 to the Police and Fire Reform (Scotland) Act 2012 (Consequential Modifications and Savings) Order 2013 (S.S.I. 2013/119).

(b) 1996 c.16.

- (b) any authorisation of that source which ceased to have effect more than 3 years before the intended commencement date of the authorisation mentioned in paragraph (1); and
- (c) any period for which that source was authorised prior to 2nd February 2015 under an authorisation which is not in effect on that date.

(4) If an authorisation for the conduct or use of a relevant source is an authorisation to which Part 2 of the CHIS Order applies, the reference in paragraph (1) to 12 months should be read as if it were a reference to 3 months.”.

(4) After article 2 insert—

“Prescribed ranks in the Police Service

2A.—(1) The ranks listed in column 2 of Schedule 1A to this Order (being ranks in the Police Service) are prescribed for the purposes of section 8(1) of the 2000 Act in relation to authorisations of the types mentioned in the corresponding entries in column 1 of that Schedule.

(2) Where a rank is listed in column 2 of Schedule 1A to this Order in relation to authorisations of a type mentioned in column 1 of that Schedule, all more senior ranks in the Police Service are also prescribed in relation to authorisations of that type.

(3) The ranks listed in column 3 of Schedule 1A to this Order (being ranks in the Police Service) are prescribed for the purposes of section 8(1) of the 2000 Act in relation to authorisations of the types mentioned in the corresponding entries in column 1 of that Schedule, but only in the circumstances described in paragraph (4).

(4) An individual holding a rank which is listed in column 3 of Schedule 1A to this Order may only grant an authorisation where it is not reasonably practicable, having regard to the urgency of the case, for the application to be considered by an individual who holds a rank mentioned in the corresponding entry in column 2 of that Schedule.

(5) In Schedule 1A—

“section 6 authorisation” means an authorisation for the carrying out of directed surveillance under section 6 of the 2000 Act; and

“section 7 authorisation” means an authorisation for the conduct or use of a source under section 7 of the 2000 Act which is not a long term authorisation.”.

(5) In Schedule 1—

- (a) in column 1, omit “The Police Service of Scotland”;
- (b) in column 2, omit “Superintendent”; and
- (c) in column 3, omit “Inspector”.

(6) After Schedule 1 insert—

“SCHEDULE 1A

Article 2A

Prescribed ranks in the Police Service for the purposes of sections 6, 7 and 8 of the 2000 Act

<i>Column 1</i>	<i>Column 2</i>	<i>Column 3</i>
<i>Type of authorisation</i>	<i>Prescribed rank</i>	<i>Urgent cases</i>
Section 6 authorisation	Superintendent	Inspector
Section 7 authorisation involving the conduct or use of a relevant source	Assistant chief constable	
Section 7 authorisation not involving the conduct or use of a relevant source	Superintendent	Inspector
Long term authorisation	Deputy chief constable”	

PART 5

Authorisations by other relevant public authorities

Prescribed offices, ranks and positions in other relevant public authorities

13.—(1) Schedule 1 to the 2010 Order is amended as follows.

(2) In column 2 of the entry for the Common Services Agency for the Scottish Health Service, for “Head of Investigations” substitute “Head of Counter Fraud Services”.

(3) In the entry for the Scottish Environmental Protection Agency—

- (a) in column 1, for “Environmental” substitute “Environment”; and
- (b) in column 2, for “Director” substitute “Chief Executive; Executive Director; Chief Officer”.

PART 6

Transitional provision

Transitional provision

14. This Order does not affect the continued operation of authorisations granted or renewed under section 7 of the Act before 2nd February 2015.

MICHAEL MATHESON
A member of the Scottish Government

St Andrew’s House,
Edinburgh
27th November 2014

EXPLANATORY NOTE

(This note is not part of the Order)

This Order alters the authorisation arrangements for the conduct or use of a covert human intelligence source (a “source”) under the Regulation of Investigatory Powers (Scotland) Act 2000 (“the 2000 Act”) in cases where material subject to legal professional privilege may be obtained or disclosed and in cases where the source in question is a constable or a member of a specified policing body. Separate arrangements are made for each class of case.

Part 1 contains general provision.

Part 2 imposes additional requirements to be satisfied in cases where a source may obtain, provide access to or disclose communications subject to legal privilege. Article 3 defines what is meant by “legal privilege” and article 4 establishes a process for notifying and seeking the approval of an ordinary Surveillance Commissioner prior to the authorisation of the conduct or use of a source in those circumstances, including the form such a notice should take. Article 5 requires a Commissioner who receives such a notice to consider whether certain requirements are satisfied and, if they are, to give approval for the grant or renewal of the authorisation in question. An authorisation to which Part 2 applies may not be granted or renewed without such approval.

Article 6 modifies the effect of section 19(3)(b) of the 2000 Act so that authorisations to which Part 2 of the Order applies cease to have effect after 3 months, unless renewed.

Part 3 imposes additional requirements to be satisfied in cases where the source whose conduct or use is to be authorised is a person holding an office, rank or position with the Police Service of Scotland or any other specified policing body (a “relevant source”).

Article 7 provides that an ordinary Surveillance Commissioner must be notified of the authorisation of the conduct or use of a relevant source, save where it is a long term authorisation of such a source, and sets out what is to be contained in that notice.

Articles 8 to 11 make provision about the long term authorisation of the conduct or use of a relevant source. Article 8 provides that a long term authorisation for these purposes is an authorisation which, when taken with other relevant authorisations or renewals, exceeds a period of 12 months. This article establishes rules for determining which authorisations and renewals are to be taken into account when calculating whether an authorisation is long term. The 12 month period is reduced to 3 months in cases involving the grant or renewal of authorisations for the conduct or use of a source to obtain, provide access to or disclose matters subject to legal privilege.

Article 9 establishes a process for notifying an ordinary Surveillance Commissioner before granting or renewing a long term authorisation, including the form such a notice should take. Article 10 requires a Commissioner who receives such a notice to consider whether certain requirements are satisfied and, if they are, to give approval for the grant or renewal of the authorisation. A long term authorisation may not be granted or renewed without such approval.

A person who has been refused approval to grant or renew a long term authorisation may, by virtue of article 11, appeal to the Chief Surveillance Commissioner.

Part 4 amends the Regulation of Investigatory Powers (Prescription of Offices, etc. and Specification of Public Authorities) (Scotland) Order 2010 (“the 2010 Order”) in relation to both ordinary and long term authorisations of relevant sources. The level for ordinary authorisations of relevant sources is raised to the rank of assistant chief constable or higher in the Police Service of Scotland. The level for long term authorisations is raised to deputy chief constable or chief constable. The ranks for all other types of authorisation by the Police Service remain unchanged.

Part 5 makes unrelated minor amendments to the 2010 Order to alter the office holders in the Common Services Agency for the Scottish Health Service and the Scottish Environment Protection Agency who may grant authorisations under the 2000 Act. Part 5 also corrects a typographical error in Schedule 1 to the 2010 Order.

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