

Substitution of section 154 of the Investigatory Powers Act 2016

2. For section 154 of the Investigatory Powers Act 2016, substitute—

“154 Additional safeguards for confidential journalistic material etc

(1) Subsection (2) applies if, in a case where intercepted content or secondary data obtained under a bulk interception warrant is to be selected for examination—

- (a) the purpose, or one of the purposes, of using those criteria to be used for the selection of the intercepted content or secondary data for examination (“the relevant criteria”) is to identify any confidential journalistic material or to identify or confirm a source of journalistic information, or
- (b) the use of the relevant criteria is highly likely to identify such material or identify or confirm such a source.

(2) The intercepted content or secondary data may be selected for examination using the relevant criteria only if the use of those criteria has been approved by—

- (a) the Investigatory Powers Commissioner; or
- (b) in a case where a senior official acting on behalf of the Secretary of State considers there is an urgent need to do so, the senior official.

(3) The Investigatory Powers Commissioner or a senior official may give an approval under subsection (2) only if the Commissioner or official considers that—

- (a) the public interest in obtaining the information that would be obtained by the selection of the intercepted content or secondary data for examination outweighs the public interest in the confidentiality of confidential journalistic material or sources of journalistic information, and
- (b) there are no less intrusive means by which the information may reasonably be obtained.

(4) Subsection (5) applies where—

- (a) intercepted content or secondary data obtained under a bulk interception warrant (“the relevant material”) is retained, following its examination, for purposes other than the destruction of the relevant material, and
- (b) the person to whom the warrant is addressed considers that the relevant material contains confidential journalistic material or material that would identify or confirm a source of journalistic information.

(5) The person to whom the warrant is addressed must inform the Investigatory Powers Commissioner of the retention of the relevant material as soon as reasonably practicable.

(6) Unless the Investigatory Powers Commissioner considers that subsection (8) applies to the relevant material, the Commissioner must direct that the relevant material is destroyed.

(7) If the Investigatory Powers Commissioner considers that subsection (8) applies to the relevant material, the Commissioner may impose such conditions as to the use or retention of the relevant material as the Commissioner considers necessary for the purpose of protecting the public interest in the confidentiality of confidential journalistic material or sources of journalistic information.

(8) This subsection applies to material containing—

- (a) confidential journalistic material, or
- (b) material identifying or confirming a source of journalistic information,

if the public interest in retaining the material outweighs the public interest in the confidentiality of confidential journalistic material or sources of journalistic information.

(9) The Investigatory Powers Commissioner—

- (a) may require an affected party to make representations about how the Commissioner should exercise any function under subsections (6) and (7), and
 - (b) must have regard to any such representations made by an affected party (whether or not as a result of a requirement imposed under paragraph (a)).
- (10) “Affected party” has the meaning given by section 153(14).

(For provision about the grounds for retaining material obtained under a warrant, see section 150.)

154A Section 154: procedure where use of criteria approved by senior official

(1) This section applies where intercepted content or secondary data is selected for examination using criteria the use of which was approved by a senior official under section 154(2).

(2) The Secretary of State must, as soon as reasonably practicable, inform the Investigatory Powers Commissioner that the approval has been given.

(3) The Investigatory Powers Commissioner must, as soon as reasonably practicable—

- (a) consider whether the relevant condition is met as regards the use of the criteria for the selection of the intercepted content or secondary data for examination, and
- (b) notify the Secretary of State of their decision.

(4) For this purpose, “the relevant condition” is that—

- (a) the public interest in obtaining the information that would be obtained by the selection of the intercepted content or secondary data for examination outweighs the public interest in the confidentiality of confidential journalistic material or sources of journalistic information, and
- (b) there are no less intrusive means by which the information may reasonably be obtained.

(5) On the giving of a notification of a decision that the relevant condition is not met, the senior official’s approval ceases to have effect.

(6) Nothing in subsection (5) affects the lawfulness of—

- (a) anything done by virtue of the approval before it ceases to have effect, or
- (b) if anything is in the process of being done by virtue of the approval when it ceases to have effect—
 - (i) anything done before that thing could be stopped, or
 - (ii) anything done which it is not reasonably practicable to stop.”.

Amendment to section 229 of the Investigatory Powers Act 2016

3.—(1) Section 229(a) of the Investigatory Powers Act 2016 is amended as follows.

(2) After subsection (8)(f), insert—

- “(fa)deciding whether—
- (i) to approve the use of criteria under section 154(2)(a),
 - (ii) subsection 154(8) applies for the purposes of subsection 154(6) and (7),
 - (iii) the relevant condition is met for the purposes of subsection 154A(3)(a).”.

Date

Minister of State
Home Office

(a) Section 229 was amended by section 7(1) and (2) of the Covert Human Intelligence Sources (Criminal Conduct) Act 2021 (c. 4); S.I. 2018/1123 and by S.I. 2020/1009.

EXPLANATORY NOTE

(This note is not part of the Order)

This Order replaces section 154 of the Investigatory Powers Act 2016 (c. 25) (“the IPA”) with a new section 154 and a new section 154A, following a judgment from the European Court of Human Rights that certain aspects of the Regulation of Investigatory Powers Act 2000 (c. 23) (“RIPA”) were in breach of Article 10 of the European Convention on Human Rights (freedom of expression). RIPA was the predecessor legislation to the IPA.

In the case of *Big Brother Watch and Others v the United Kingdom* (Application numbers 58170/13, 62322/14 and 24960/15) delivered on 25th May 2021, the European Court of Human Rights held that RIPA and the associated code of practice did not protect sufficiently Article 10 rights relating to confidential journalistic material (“CJM”) or sources of journalistic material (“SJM”).

The IPA has now replaced the relevant parts of RIPA and makes express provision for bulk interception. Existing section 154 of the IPA requires that where a security and intelligence agency wishes to retain a communication which they know contains CJM intercepted under a bulk interception warrant, that agency must inform the Investigatory Powers Commissioner (“the Commissioner”).

Article 2 inserts new sections 154 and 154A which include additional protections in relation to CJM and SJM.

New section 154(1) and (2) requires the approval of the Commissioner before criteria are used for certain purposes to select for examination material acquired under a bulk interception warrant. Where there is an urgent need for an approval of such criteria, a senior official acting on behalf of the Secretary of State may give such approval instead of the Commissioner.

New section 154(3) provides that the Commissioner or senior official may only give approval for the use of criteria if a public interest test is met.

New section 154(4) specifies that subsection (5) will apply to material obtained under a bulk interception warrant which contains CJM or SJM, where that material is retained by the agency concerned. New subsection (5) requires that the agency inform the Commissioner about that retention.

New section 154(6) provides that, unless the Commissioner considers that the public interest in retaining the material outweighs the public interest in its confidentiality, the Commissioner must direct that such material be destroyed.

New section 154(7) provides that, if the Commissioner considers that the public interest in retaining the material outweighs the public interest in its confidentiality, the Commissioner may impose conditions as to its use or retention.

New section 154(8) specifies the public interest test the Commissioner must consider.

New section 154(9) gives the Commissioner the power to require the Secretary of State or the intelligence agency concerned to make representations about how the Commissioner should exercise their functions under subsections (6) and (7). The Commissioner must have regard to any representations received from those persons.

New section 154A provides for the situation in which material is selected for examination following the giving of approval by a senior official under s154(2). In such circumstances, new section 154A(2) requires the Secretary of State to inform the Investigatory Powers Commissioner of that approval.

New section 154A(3) requires the Investigatory Powers Commissioner to decide whether to approve the senior official’s decision and to notify the Secretary of State as soon as reasonably practicable. The Investigatory Powers Commissioner may approve the senior official’s decision if

they consider it to be in the public interest to do so and there is no less intrusive means of obtaining the information. New section 154A(5) provides that where the senior official's decision is not approved by the Investigatory Powers Commissioner, that decision ceases to have effect.

New section 154A(6) provides that, where the decision of a senior official ceases to have effect because of the Investigatory Powers Commissioner's decision not to approve it, things done in reliance on the senior official's approval remain lawful. Similarly, anything done in reliance on a senior official approval which the Commissioner refuses to approve will remain lawful if it is not reasonably practicable to stop that thing.

Article 3 makes a consequential amendment to section 229 in relation to the exercise of the Investigatory Powers Commissioner's functions under new sections 154 and 154A.

A full impact assessment has not been produced for this instrument as no, or no significant, impact on the private or voluntary sector or community bodies is foreseen.

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