

ANTI-TERRORISM, CRIME AND SECURITY ACT 2001

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 11: Retention of Communications Data

Overview

257. **Part 11** sets up a structure within which the Secretary of State can issue a code of practice relating to the retention of communications data by communications service providers, such as telephone and internet companies. Communications data is data relating to telephone, Internet and postal communications which does not include the substance of the communications itself.
258. The Telecommunications (Data Protection and Privacy) Regulations 1999 regulate the retention of such data by communication service providers providing that such data can only be retained for certain specific purposes. Otherwise it must be erased or made anonymous. Communications data can be a useful tool for law enforcement agencies and if held by a communications service provider is accessible by a public authority under Chapter II of Part I of the Regulation of Investigatory Powers Act 2000. However, whilst the Regulations permit the retention of communications data on national security and crime prevention grounds, they do not give any general guidance as to when these might apply. Accordingly, before these provisions were introduced communications service providers did not have a clear lawful basis for retaining communications data beyond the period for which it was required for their own business purposes.
259. **Part 11** establishes a structure to regulate the continued retention of such data on national security and crime related to national security grounds so that it may then be accessed by public authorities under the Regulation of Investigatory Powers Act 2000. Under section 102 the Secretary of State can issue a voluntary code of practice which will provide a basis for retention of communications data. Section 104 provides that if the voluntary scheme proves ineffective the Secretary of State may by affirmative order be authorised to impose mandatory retention directions on communications service providers. Section 105 provides that the power to invoke the mandatory scheme in section 104 will itself lapse unless renewed by affirmative order.

Section 102 Codes and agreements about the retention of communications data

260. *Subsection (1)* sets out that a voluntary code of practice will be drawn up and issued by the Secretary of State. The code will be applicable to communications providers and will apply to communications data that they have generated or is otherwise in their possession.
261. *Subsection (2)* explains that the Secretary of State may enter into further agreements with specific communications providers, with the consent of both parties. These will specify in greater detail than the generic code the type of data that is retained, and

the conditions of retention and retrieval. The aim of these individual agreements is to provide greater clarity as to each provider's retention practices for public authorities who are eligible under the Regulation of Investigatory Powers Act 2000 to access communications data.

262. *Subsection (3)* sets out that the code and any agreements may contain provisions necessary to safeguard national security, or to prevent or detect crime and to prosecute offenders where this is directly or indirectly related to national security. . Data retained in accordance with the code will therefore be held for national security and law enforcement purposes, without prejudice to the communication provider's own business purposes.
263. *Subsection (4)* makes it clear that the code is voluntary: there are no penalties for non-compliance.
264. *Subsection (5)* allows the code or any agreement drawn up under this section to be used in legal proceedings brought against a communications provider by a person whose communications data they hold. Adherence to the terms of the code or agreement may be used as evidence that the retention of data is justified for national security or law enforcement purposes. This provision is intended to prevent a communications provider facing civil liability for retaining data in accordance with the code when they have no further need of it for business purposes.

Section 103 Procedure for codes of practice

265. *Subsections (1), (2), (3) and (4)* explain that the code of practice will be drawn up in two stages: firstly consultation with the Information Commissioner and communications providers to whom the code applies, leading to the publication of a draft, and secondly public consultation during which comments may be taken from any quarter.
266. *Subsections (5), (6) and (7)* require the Secretary of State to use an affirmative statutory instrument to bring the code into force, so ensuring that Parliament have the chance to consider and approve the code. The code may contain transitional provisions, covering for example data collected before the code is finalised or no longer judged necessary for the purposes of this Act under subsequent revisions of the code.
267. *Subsections (8), (9) and (10)* provide for the code to be revised and re-issued following consultation with the Information Commissioner and those communications providers who would be affected by the revisions. The order bringing a revised code into force would also need to be approved by both Houses of Parliament.

Section 104 Directions about retention of communications data

268. This section permits the Secretary of State to issue compulsory directions if he is not satisfied that the operation of the voluntary code of practice is effective. Directions may only be given if the Secretary of State is authorised to do so by affirmative order and for the purposes of safeguarding national security and the prevention and detection of crime or the prosecution of defenders which may relate directly or indirectly to national security.
269. *Subsection (1)* provides that the Secretary of State may by order authorise the giving of directions under this section.
270. *Subsection (2)* explains that the mandatory directions may apply to any of three categories: either all communications providers, a particular type of communications providers, or one or several specific communications providers.
271. *Subsection (3)* explains that the statutory order authorising the giving of directions must specify the maximum period for which any communications provider can be directed to retain any particular type of data.

272. *Subsection (4)* obliges the Secretary of State to consult with those who may be affected by the mandatory directions, or their representatives, before giving them. If the requirement is only being placed on particular communications providers (as in subsection 2(c) above), the Secretary of State must consult with them directly.
273. *Subsection (5)* explains that any direction must be explicitly brought to the attention of those to whom it applies.
274. *Subsection (6)* puts a duty on the communications provider to comply with any direction given under this section that applies to him.
275. *Subsection (7)* sets out the consequences of non-compliance with any direction. The Secretary of State may bring civil proceedings against the communications provider, seeking an injunction, or other appropriate relief.
276. *Subsection (8)* requires that the Secretary of State lay a draft of any order made under subsection (1) before Parliament and seek the approval of both the House of Commons and the House of Lords for that order.

Section 105 Lapsing of powers in section 104

277. This section provides for the renewal every two years of the Secretary of State's power under section 104(1) to authorise the issue of compulsory directions. The power will lapse unless it is either exercised or renewed.
278. *Subsection (1)* provides that the power to authorise the issue of compulsory directions ceases to have effect unless an order is made under section 104 before the end of the initial period.
279. *Subsections (2), (3) and (4)* define the initial period as two years beginning from the day on which the Act is passed and provide for it to be extended by order more than once, so long as the order extending the period is made within the two years. The extension may only be for two years at a time.
280. *Subsection (5)* requires that an order extending the initial period must be approved by affirmative resolution.

Section 106 Arrangements for payments

281. This section allows for payment arrangements to be made in order to compensate communications providers for the costs of adhering to the provisions of the code of practice or any agreements. It is consistent with similar provisions in the Regulation of Investigatory Powers Act 2000 (sections 24 and 52 of that Act).
282. *Subsection (1)* puts a duty on the Secretary of State to set up arrangements for paying an appropriate contribution of the costs incurred by communications providers acting in accordance with the code of practice or any agreements.
283. *Subsection (2)* clarifies that the Secretary of State may make arrangements for payments to be made out of money provided by Parliament.

Section 107 Interpretation of Part 11

284. This section provides a definition of the terms used in the Part.
285. *Subsection (1)* lists definitions of a number of terms. The terminology is consistent with that used in the Regulation of Investigatory Powers Act 2000.
286. *Subsection (2)* specifies that the provisions of any code of practice, agreements or directions under this Part are applicable to all data obtained or held by the communications provider, including that which came into their possession before the code, agreements or directions took effect.