

EXPLANATORY MEMORANDUM TO THE
REGULATION OF INVESTIGATORY POWERS
(DIRECTED SURVEILLANCE AND COVERT HUMAN INTELLIGENCE
SOURCES) (AMENDMENT) ORDER 2005

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

2. Description

2.1 The purpose of this draft Order is to ensure that the public authorities having necessary and proportionate requirements to conduct directed surveillance or use covert human intelligence sources can do so within a statutory framework which requires explicit consideration of Convention rights.

2.2 The draft Order provides powers for new public authorities, consistent with powers and functions they already have (in the case of Ofcom) or will have (in the case of the Civil Nuclear Constabulary). It also ensures that long established authorities with functions of a public nature (in the case of the ports police at Dover and Liverpool) can undertake their functions in a way that is consistent with the regulatory framework. It also provides for the withdrawal of powers from public authorities or from officials in public officials that no longer have such requirements.

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

3.1 None.

4. Legislative background

4.1 This draft Order is made in exercise of the powers conferred by section 30(1), (3), (5) and (6) and section 78(5) of the Regulation of Investigatory Powers Act 2000 (RIPA). This Order requires approval by resolution of each House of Parliament. Most of the provisions of the Order will come into force one month after it is made. The exception to this is the provision relating to the new Civil Nuclear Constabulary which will come into force either one month after the Order is made or when the relevant provisions of the Energy Act 2004¹ are come into force and investigatory powers are transferred to the new Constabulary (expected to be April 2005), whichever is the later.

4.2 Part II of RIPA (Surveillance and Covert Human Intelligence Sources) provides a statutory framework regulating the conduct of covert surveillance and use of covert human intelligence sources by public authorities consistent with the Human Rights Act 1998. Within Part II of RIPA the duties and responsibilities placed upon each party involved in the process are explained and a system of safeguards, reflecting the requirements of Article 8 of the European Convention on Human Rights, are included.

4.3 Part I of Schedule I of RIPA lists relevant public authorities for the purposes of section 28 (authorisation for carrying out directed surveillance) and section 29 (authorisation

¹ Paragraph 8 of Schedule 14

for the conduct and use of a covert human intelligence source) of RIPA. Part II of Schedule I of RIPA lists relevant public authorities for the purposes of 28 of RIPA only.

4.4 Section 30(1) of RIPA provides the Secretary of State with the power to prescribe authorising officers for the relevant public authorities, whilst section 30(3) provides the power to impose restrictions. Section 30(5) of RIPA provides the Secretary of State with the power to add public authorities to Schedule 1 to RIPA or to remove public authorities from that Schedule.

Commentary on the draft Order

4.5 This draft Order amends Parts I and II of Schedule I to RIPA. It also amends Part I of the Schedule to the Regulation of Investigatory Powers (Directed Surveillance and Covert Human Intelligence Sources) Order 2003².

4.6 Article 2(1) adds the Port Police at Dover and Liverpool to Part I of Schedule 1 to RIPA enabling them to conduct directed surveillance and use covert human intelligence sources within the regulatory framework. They are public authorities within the meaning of section 6(3) of the Human Rights Act 1998.

4.7 Article 2(2) removes any Health Authority established under section 8 of the National Health Service Act 1977 from Part II of Schedule 1 to RIPA disabling them from conducting directed surveillance within the regulatory framework.

4.8 Article 3 amends the Schedule to the Regulation of Investigatory Powers (Directed Surveillance and Covert Human Intelligence Sources) Order 2003 (“the 2003 Order”).

4.9 Article 3(2) inserts an entry in Part I of the Schedule to the 2003 Order relating to the ports police forces in Dover (the Port of Dover Police) and Liverpool (the Port of Liverpool Police).

4.10 Article 3(3) substitutes an entry in Part I of the Schedule to the 2003 Order relating to the Civil Nuclear Constabulary in place of one relating to the United Kingdom Atomic Energy Authority Constabulary.

4.11 Article 3(4) deletes from that Schedule entries which prescribed all authorising officers in the Radiocommunications Agency of the Department of Trade and Industry and Article 3(5) deletes certain authorising officers in the Department for Transport.

4.12 Article 3(6) inserts an entry in Part I of the Schedule to the 2003 Order relating to the Office of Communications.

4.13 Each of the entries being inserted into Part I of the Schedule to the 2003 Order prescribe the persons entitled to grant authorisations under sections 28 and 29 of RIPA (in column 2); prescribe, where relevant, persons entitled to grant authorisations in urgent cases (in column 3); and restricts the grounds for which authorisation can be given (in column 4). Those grounds are described by letters which refer to the paragraphs in sections 28(3) and 29(3) of RIPA.

² S.I. 2003 No. 3171

5. Extent

5.1 This instrument applies to England, Wales and Northern Ireland.

6. European Convention on Human Rights

6.1 Caroline Flint, Parliamentary Under Secretary of State for the Home Department, has made the following statement regarding Human Rights:

“In my view the provisions of the Regulation of Investigatory Powers (Directed Surveillance and Covert Human Intelligence Sources) (Amendment) Order 2005 are compatible with the Convention Rights.”

7. Policy Background

7.1 Directed surveillance does not include covert surveillance of anything taking place on any residential premises or in any private vehicle. That would constitute intrusive surveillance. This Order does not confer any powers on any public authority to conduct intrusive surveillance.

7.2 Health Authorities established under section 8 of the National Health Service Act 1977 sought and were given powers only to conduct directed surveillance under RIPA, but they were not used. Consequently no entry for Health Authorities was included in SI 2003/3171. Deleting Health Authorities from Part II of Schedule I of RIPA completes their removal from the legislation.

7.3 The Transport Security Directorate of the Department of Transport has concluded that its officials have no requirement to use their powers under RIPA to authorise directed surveillance or the conduct and use of covert human intelligence sources. The Directorate has functions to protect the travelling public, transport facilities and those employed in the transport industries against acts of terrorism or other illegal acts, and to retain public confidence in transport security, but does so without obtaining private information about individuals. This Order deletes the Directorate's officials from those able to grant RIPA authorisations.

7.4 The Energy Act 2004 provided for the creation of the Civil Nuclear Constabulary to protect licensed nuclear sites which are not used wholly or mainly for defence purposes and safeguard nuclear material in Great Britain and elsewhere. It will replace the United Kingdom Atomic Energy Authority Constabulary (UKAEAC) from April 2005.

7.5 Parliament has approved that the Civil Nuclear Constabulary may conduct directed surveillance and use covert human intelligence sources, by virtue of paragraph 8(2) of Schedule 14 to the Energy Act 2004 which inserted the Civil Nuclear Constabulary into Part I of Schedule 1 of RIPA. This Order will enable the new constabulary to use its RIPA powers in the same way that the UKAEAC does presently.

7.6 The Communications Act 2003 provided for the creation of the Office of Communications (Ofcom). Its functions include investigation of wireless telegraphy offences that were formerly the responsibility of the Radiocommunications Agency of the Department of Trade and Industry.

7.7 Parliament has approved Ofcom as a public authority that may conduct directed surveillance and use covert human intelligence sources, by virtue of paragraph 161 of Schedule 17 to the Communications Act 2003 which inserted the Office of Communications in Part I of Schedule 1 of RIPA. This Order will enable Ofcom to use the RIPA powers to investigate and detect pirate broadcasters whose transmissions interfere with legitimate broadcasters, emergency frequencies and mobile phone services.

7.8 The Port of Dover Police and the Port of Liverpool Police are responsible for law enforcement and for the security of passengers and staff at their respective ports. Although the Ports Police are funded by the Dover Harbour Board and the Mersey Docks and Harbour Company respectively, its officers are sworn as Constables before Magistrates and have full police powers on land owned by, or within one mile of land owned by the respective Harbour authorities. In Dover the constables are appointed under section 79 of the Harbours, Docks & Piers Clauses Act 1847³ and in Liverpool under Article 3 of the Mersey Docks and Harbour (Police) Order 1975⁴. Each year some 16 million people pass through Dover and 700,000 through Liverpool. In 2003 over one thousand of offences were reported and detected by the Port of Dover Police and over 700 illegal immigrants arrested on behalf of the immigration service. Over two hundred offences were reported at the Port of Liverpool. These include organised thefts of high value goods in transit through the port.

7.9 The Port of Dover Police and the Port of Liverpool Police conduct directed surveillance and use covert human intelligence sources in the spirit of RIPA. Bringing both forces formally within the scope of RIPA will ensure a clearer basis for them to secure evidence necessary to prevent and detect criminal offences in the docks' area, and to undertake their counter-terrorism and public safety functions.

7.10 Codes of Practice on Covert Surveillance and Covert Human Intelligence Sources, which have been approved by Parliament by affirmative resolution, set out the procedures to be followed in the grant, renewal and cancellation of authorisations under RIPA to conduct directed surveillance or use a covert human intelligence source.

7.11 The Chief Surveillance Commissioner provides independent oversight of the exercise of powers and duties under Part II of RIPA, by virtue of section 62 of RIPA. The Investigatory Powers Tribunal established by section 65 of RIPA is the appropriate forum for all complaints to be addressed.

8. Impact

8.1 A Regulatory Impact Assessment has not been prepared for this instrument as it has no impact on business, charities or voluntary bodies.

8.2 The impact on the public sector is that RIPA requires— rightly — that officials who grant authorisations to conduct directed surveillance or use covert human intelligence sources

³ Although under the 1847 Act police officers are appointed special constables, the Port of Dover is a full-time professional police force.

⁴ S.I. 1975 No. 1224

must properly consider the principles of necessity and proportionality and respect for Convention rights in each case and that these considerations are recorded at the time they are made. That means a decision to authorise conduct under RIPA will always entail a level of necessary bureaucracy for public authorities.

9. Contact

9.1 Simon Watkin of the Covert Investigation Policy Team at the Home Office, 50 Queen Anne's Gate, London SW1H 9AT (tel: 020 7273 2181; e-mail: simon.watkin@homeoffice.gsi.gov.uk) can answer any queries regarding the instrument.