

EXPLANATORY MEMORANDUM TO
THE REGULATION OF INVESTIGATORY POWERS
(ACQUISITION AND DISCLOSURE OF COMMUNICATIONS DATA: CODE OF
PRACTICE) ORDER 2007

2007 No. 2197

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

This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Description

2.1 The purpose of this instrument is to lay before Parliament a draft code of practice relating to the exercise and performance of the powers and duties that are conferred or imposed by or under Chapter 2 of Part 1 of the Regulation of Investigatory Powers Act 2000 ('the Act').

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

3.1 Subsections (1), (3), (4) and (5) of section 71 of the Act correspond in all material respects with section 102(1) and subsections (1), (4) and (5) of section 103 of the Anti-terrorism, Crime and Security Act 2001 to which the Committee referred in its Thirtieth Report (session 2002-03). In the light of the points raised by the Committee in its Report, the Department acknowledges that there is an ambiguity in section 71 of the Act, and that further explanation may be required.

3.2 The procedure which the Department has adopted in the belief that it complies with the provisions of section 71 is as follows. A draft code was prepared and published in January 2004. The code in that form was not laid before Parliament. A revised version of that code was prepared following consultation. The revised code is being laid at the same as this draft Order with a view to each House of Parliament approving the draft Order which will bring that version of the code into force. Once each House has approved the draft Order and the Order is made, the code will be issued under section 71.

3.3 The same procedure was adopted in respect of three codes of practice under the Act in 2002 – 2003 (The relevant Orders were the Regulation of Investigatory Powers (Interception: Code of Practice) Order 2002 (S.I. 2002/1693); the Regulation of Investigatory Powers (Covert Surveillance: Code of Practice) Order 2002 (S.I. 2003/1933); and the Regulation of Investigatory Powers (Covert Human Intelligence Sources: Code of Practice) Order 2002 (S.I. 2002/1932).

3.4 Consideration will be given to amending the relevant provisions to remove any ambiguity when a legislative opportunity arises.

4. Legislative background

4.1 This draft Order will be made in exercise of the powers conferred by section 71(4) of the Act and requires approval by resolution of each House of Parliament before it can be made.

4.2 Chapter 2 of Part 1 of the Act ('Chapter 2') provides a statutory framework for the acquisition of communications data by public authorities and its disclosure by communications service providers. There is an outstanding requirement for adoption of a statutory code of practice relating to the exercise of these powers, although a draft code has been in place, and thoroughly developed, since its publication in January 2004.

4.3 Section 22 of the Act provides that within relevant public authorities specified in the Act or by Order, only persons holding certain offices, ranks or positions may grant authorisations or give notices to obtain communications data, subject to restrictions on the types of communications data that can be accessed and the purposes for which data can be accessed.

4.4 The draft code of practice has been the subject of public consultation in accordance with section 71(3) of the Act and the Secretary of State has considered representations made to him. Suggestions made by respondents for amending and clarifying the draft code published for public consultation have been adopted in the revised code being laid before Parliament.

4.5 Exercise of the provisions in Chapter 2 is overseen by the Interception of Communications Commissioner, currently Sir Paul Kennedy, who has been fully consulted on the contents of the draft code of practice.

5. Extent

5.1 This instrument applies to all of the United Kingdom.

6. European Convention on Human Rights

6.1 Tony McNulty, Minister 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 (Acquisition and Disclosure of Communications Data: Code of Practice) Order 2007 are compatible with the Convention.”

7. Policy Background

7.1 Communications data is information held by communication service providers relating to the communications made by the users of their services. This includes itemised call records, routing information and subscriber details. Communications data does not include the content of any communication.

7.2 Communications data remains a vital investigative tool for the intelligence services in the work they undertake to safeguard national security and for law enforcement agencies engaged in the prevention and detection of criminal offences and the prosecution of offenders which may relate directly or indirectly to national security. Communications data can help retell events leading up to and including a terrorist attack or a crime. Equally this data can, and does, help prove individuals' alibis. Investigation of communications data can also help save lives, whether those of victims of kidnappings or vulnerable people and children who are missing from a place of safety.

7.3 The draft code of practice sets out guidance on how the provisions of Chapter 2 should be operated, provides examples of the types of communications data specified in section 21(4) of the Act, describes various roles that individuals in public authorities need to fulfil, and describes the form which authorisations and notices to obtain communications data must take.

7.4 The code also includes special rules where the acquisition and disclosure of data relating to the maker of an incomplete call to the emergency services is needed to provide emergency assistance. In line with the spirit of the wishes of Parliament when commencement of the provisions of Chapter 2 were debated, the draft code of practice includes rules on data protection safeguards and makes clear that should the Interception of Communications Commissioner establish that an individual has been adversely affected by any wilful or reckless failure by any person within a relevant public authority exercising or complying with the provisions of Chapter 2, he shall, subject to safeguarding national security, inform the affected individual of the statutory Tribunal and its role to consider complaints about the exercise of regulated investigatory powers.

8. Impact

8.1 A Regulatory Impact Assessment has not been prepared for this instrument. Other than communications service providers, it has no impact on business, charities or voluntary bodies.

8.2 To the extent that the disclosure of communications data impacts upon communications service providers, section 24 of the Act provides that it is the duty of the Secretary of State to ensure arrangements are in force for making available to communications service providers appropriate contributions towards costs incurred by them in complying with the notices under section 22(4) of the Act. Such arrangements are in force.

8.3 Reflecting current practice, the draft code of practice makes clear that similar arrangements are in place in relation to costs incurred by communications service providers as a consequence of making provision for the acquisition of communications data upon the grant of an authorisation under the Act.

8.4 Significant public funding is made available to communications service providers to ensure that they can provide, outside of their normal business practices, an effective and efficient response to public authorities' necessary, proportionate and lawful requirements for the disclosure and acquisition of communications data.

9. Contact

9.1 Simon Watkin of the Covert Investigation Policy Team at the Home Office, 2 Marsham Street, London SW1P 4DF (tel: 020 7035 1205; e-mail: simon.watkin@homeoffice.gsi.gov.uk) can answer any queries regarding the instrument.