

## **EXPLANATORY MEMORANDUM**

### **THE REGULATION OF INVESTIGATORY POWERS (AUTHORISATIONS EXTENDING TO SCOTLAND) ORDER 2007**

**2007 No. 934**

1.1 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 Order is to extend the existing powers of appropriate public authorities to conduct activities regulated by the Investigatory Powers Act 2000 [RIPA] to enable those public authorities to conduct those activities in Scotland. The Order also removes some public authorities from the list preventing them from undertaking such activities in Scotland

2.2 The Order provides these powers for new and existing public authorities, consistent with the functions they perform across the whole of the UK. It also provides for the withdrawal of powers from public authorities that either no longer have such requirements or that no longer exist.

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

3.1 This order is made in exercise of the powers conferred by section 46 of RIPA which gives Westminster Parliament the ability to make changes in relation to the UK wide public authorities that are granted RIPA powers

3.2 In Scotland surveillance and the use of covert human intelligence sources by public authorities is regulated by the Investigation of Investigatory Powers (Scotland) Act 2000.

3.3 UK wide public authorities can only authorise surveillance and the use of covert human intelligence sources where the all the conduct authorised is likely to take place in Scotland if the public authority is listed in Section 46(3) as having UK wide RIPA powers.

#### **4. Legislative background**

4.1 In accordance with 46 of RIPA this Order is subject to the negative resolution procedure in both Houses of Parliament and will not come into effect until 16<sup>th</sup> April 2007.

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 is 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 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 section 28 of RIPA only.

4.4 Section 46(4) of RIPA provides the Secretary of State with the power to make an Order to add public authorities to Section 46(3) of RIPA or to remove public authorities from that Section.

#### Commentary on the draft Order

4.5 This Order amends Section 46 (3) of RIPA. It also amends the Regulation of Investigatory Powers (Authorisations Extending to Scotland) Order 2000 (“the 2000 Order”)<sup>1</sup>.

4.6 This Order has the effect of adding the Food Standards Agency, the Gambling Commission, the Gangmasters Licensing Authority and the Office of Communications to Section 46 (3) of RIPA enabling them to conduct directed surveillance and use covert human intelligence sources across the UK within the regulatory framework.

4.7 This Order removes the Department of Health and the Personal Investment Authority from Section 46(3) of RIPA disabling them from conducting directed surveillance within the regulatory framework.

4.8 This Order has the effect of substituting the entry for the Department of the Environment, Transport and the Regions with entries for the Department for Environment, Food and Rural Affairs and the Department of Transport.

4.9 This Order has the effect of substituting the entry for the Department of Social Security with an entry for the Department for Work and Pensions.

4.10 This Order has the effect of substituting the entry for the Post Office with an entry for a universal service provider (within the meaning of the Postal Services Act 2000<sup>(2)</sup>) acting in connection with the provision of a universal postal service (within the meaning of that Act).

## **5. Extent**

5.1 This instrument applies to Scotland.

## **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:

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<sup>1</sup> S.I. 2003 No. 3171  
<sup>(2)</sup> 2000 c.26.

“In my view the provisions of the Regulation of Investigatory Powers (Authorisations Extending to Scotland) Order 2007 are compatible with the Convention Rights”

## **7. Policy Background**

7.1 Conduct of 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 The Department for Environment, Food and Rural Affairs, (DEFRA) regulates and set standards for agricultural produce. DEFRA Investigation Services investigate allegations of criminal offences against DEFRA legislation in England, Wales and Scotland. It investigates on behalf of agencies within DEFRA and the Forestry Commission. If an offence is to be investigated in Scotland and by agreement with the Scottish Executive liaison is made at an early stage with the relevant Procurator Fiscal.

7.3 The Driving Standards Agency, an Executive Agency of the Department for Transport, is responsible under the Road Traffic Act 1988 for setting the accepted public standard for all driving tests in the UK. The Driving Standards Agency has a requirement to conduct directed surveillance and to use covert human intelligence sources across the UK to investigate individuals suspected of taking multiple driving tests using bogus identities as well as to prevent and detect unregistered driving instructors committing the criminal offence of giving driving instruction. The integrity of the driving test system is necessary to ensure that the public is protected from untested and unqualified drivers and the increased risk of fatalities on UK roads.

7.4 The Department for Work and Pensions (DWP) use the Regulation of Investigatory Powers Act (RIPA) 2000 to undertake covert surveillance during investigations for the prevention or detection of crime against the Department. This includes both benefit fraud investigations and any internal criminal investigations

7.5 The Food Standards Agency is an independent Government department set up by the Food Standards Act 1999 to protect the public's health and consumer interests in relation to food safety and standards. The agency uses surveillance to ensure effective food enforcement and monitoring as food passes through the food chain from the farm to the consumer.

7.6 The Gambling Commission was set up under the Gambling Act 2005. It has taken over the role previously played by the Gaming Board for Great Britain in regulating casinos, bingo, gaming machines and lotteries. In addition it has responsibility for the regulation of betting and remote gambling, as well as helping to protect children and vulnerable people. The authority has a legitimate requirement to conduct directed surveillance and to use covert human intelligence sources to investigate illegal gambling across the UK.

7.7 The Gangmasters Licensing Authority established by the Gangmasters (Licensing) Act 2004, to curb the exploitation of workers in the Agriculture, Horticulture, Shellfish Gathering and Associated Processing and Packaging Industries, by regulating the labour supply industry within those sectors. The authority has a

legitimate requirement to conduct directed surveillance and to use covert human intelligence sources to investigate labour providers and labour users operating illegally; including organised gangs involved in trafficking of people and the exploitation of illegal migrant workers across the UK

7.8 The Postal Services Act introduced a new system of licensing and regulation for postal service operators/providers operating in the area of the market previously reserved largely as a monopoly for the Post Office. It regulates the carrying of a letter from one place to another. A universal service provider (within the meaning of the Postal Services Act 2000) acting in connection with the provision of a universal postal service (within the meaning of that Act) is licenced to provide such services. A universal postal service provider has a legitimate requirement to conduct directed surveillance and to use covert human intelligence sources throughout the UK to investigate offences connected to the provision of postal services including interference with the mail and the prohibition on sending certain articles by post.

7.9 The Office of Communications (Ofcom) was established by the Office of Communications Act 2002. It is the UK communications industries Regulator, with responsibility for managing the civil radio spectrum by enforcing the Wireless Telegraphy Act 1949. The authority has a legitimate requirement to conduct directed surveillance and to use covert human intelligence sources to investigate illegal radio use and interference to safety of life and business radio systems across the UK.

7.10 The Department of Health is no longer a public authority with RIPA powers as a result of the recommendation of the Chief Surveillance Commissioner in his 2003/2004 report, that all directed surveillance (involving fraud or corruption) should be undertaken on behalf of all health bodies in England and Wales by the NHS Counter Fraud and Security Management Service (NHS CFSMS). The Commissioner recommended that all NHS bodies should be removed from Part II of Schedule 1 of RIPA as minimal use was made of directed surveillance by NHS trusts and that many of them lacked the knowledge, resources, training and motivation to be able to carry it out competently.

7.12 The Personal Investment Authority no longer exists and its functions have now been taken over by the Serious Fraud Office.

7.13 RIPA in conjunction with the Codes of Practice relating to Covert Surveillance and Covert Human Intelligence Sources (CHIS) set out the procedures to be followed in the granting, renewal and cancellation of authorisations to conduct directed surveillance or use a CHIS. Both RIPA and the Codes of Practice have been approved by Parliament by affirmative resolution.

7.14 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. Regulatory Impact**

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

8.2 The purpose of the Order is to regulate the conduct of directed surveillance and the use of covert human intelligence sources by the UK wide public authorities listed in it. In order to protect individuals rights under Article 8 of the European Convention on Human Rights 1953, RIPA requires that officials who grant authorisations to conduct directed surveillance or to use covert human intelligence sources must properly consider the principles of necessity and proportionality and respect for Convention rights in each case and that they record these considerations at the time they are made. This means a decision to authorise conduct under RIPA will always entail a level of necessary bureaucracy.

## **9. Contact**

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