

EXPLANATORY MEMORANDUM TO
THE COMMUNICATIONS DATA ACQUISITION REGULATIONS 2019
2019 No. 939

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Home Office and is laid before Parliament by Command of Her Majesty.
- 1.2 This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

- 2.1 The Statutory Instrument will ensure all public authorities that are able to acquire communications data under the Investigatory Powers Act 2016 (the IP Act), including police forces, but excluding local authorities, can continue to share Designated Senior Officers (DSOs) to authorise communications data requests under sections 61 and 61A of the Act.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 This Statutory Instrument will come into force on the day after the day on which it is laid, in breach of the 21 day rule. The purpose of the “21 day rule” is to ensure that those affected by the Statutory Instrument have an opportunity to prepare for the changes it makes. In this case, however, no new operational changes are being proposed, but instead the Instrument ensures a consistency of approach so that all public authorities, except local authorities, can continue to share designated senior officer functions after they have transitioned to the Investigatory Powers Act 2016. If the 21 day rule were to be applied, public authorities, police forces in particular, would need to implement expensive interim measures in the absence of being able to share their DSOs. Indeed, in the first week of June, it is expected that all forces in the East Midlands, North East, South West and the Police Service of Northern Ireland will have transitioned to the IP Act. Beyond that week, it becomes more likely that further forces will be affected, imposing a significant financial and resource burden on them.
- 3.2 The communications data regime within the IP Act was amended via the Data Acquisition and Retention Regulations 2018. These regulations used a power in section 2(2) of the European Communities Act 1972, which provides that amendments can be made to primary legislation in response to the requirements of EU law. Given these new regulations, that this document is in reference to, will make minor amendments to that same communications data regime, which of itself is consequential to changes made to enact the requirement of EU law, it is appropriate to use again section 2(2) of the European Communities Act. Regulations under section 2(2) may be made under the affirmative or negative procedure. As these regulations make minor adjustments that will apply only to the limited number of cases where authorisations are granted internally, and as these adjustments effectively return the

relevant provisions of the IP Act to have the same effect as originally approved by Parliament, the negative procedure is appropriate.

Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)

- 3.3 As the instrument is subject to the negative resolution procedure there are no matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business at this stage.

4. Extent and Territorial Application

- 4.1 The extent of this instrument is to the whole of the United Kingdom.
4.2 The territorial application of this instrument is the whole of the United Kingdom.

5. European Convention on Human Rights

- 5.1 The Rt. Hon Ben Wallace MP has made the following statement regarding Human Rights:

“In my view the provisions of the Communications Data Acquisition Regulations 2019 are compatible with the Convention rights.”

6. Legislative Context

- 6.1 The Regulation of Investigatory Powers Act 2000 (RIPA) and the Act allow public authorities, including police forces, to acquire communications data from telecommunications operators.
- 6.2 In 2018 Parliament passed the Data Acquisition and Retention Regulations. These regulations principally amended the IP Act to provide for independent authorisation of most communications data requests and to restrict the crime purpose for acquiring communications data to serious crime. This was to ensure the Act was compliant with EU law following the judgment of the Court of Justice of the European Union (CJEU) in December 2016 in joined cases C-203/15 and C-698-15 (Tele2/Watson).
- 6.3 Under the IP Act, following amendments made by the 2018 Regulations, the vast majority of requests for communications data will be authorised independently by the Investigatory Powers Commissioner (IPC) under section 60A of the Act. The IPC will delegate those functions to a body of staff known as the Office for Communications Data Authorisations (OCDA).
- 6.4 Public authorities are in the process of transitioning permanently from the RIPA regime to the regime under the IP Act for such requests.
- 6.5 There are some circumstances where communications data requests can continue to be authorised internally by a “Designated Senior Officer”. These are set out in sections 61 and 61A of the IP Act, including applications for national security purposes (including any application made by a UK intelligence agency) and applications in urgent cases, for example where there is a threat to life. “Designated Senior Officer” is defined in section 70 as an individual within a public authority holding at least the office, rank or position specified in column 3 of the table of public authorities set out in Schedule 4 to the IP Act.

- 6.6 Section 76 of the IP Act requires that a Single Point of Contact (SPoC) is consulted before an application for communications data is made or authorised. A SPoC is an individual trained to facilitate the lawful acquisition of communications data.
- 6.7 Before being amended by the 2018 Regulations, sections 78 and 80 of the IP Act would have permitted a relevant public authority to share functions related to acquiring communications data. This consisted of sharing Single Points of Contact (SPoCs) and Designated Senior Officers (DSOs) through collaboration agreements.
- 6.8 The 2018 Regulations amended the provisions relating to collaboration agreements to remove the ability to collaborate in respect of Designated Senior Officer functions. Collaboration for SPoC functions was not amended.

7. Policy background

What is being done and why?

- 7.1 When acquiring data under RIPA the police are able to collaborate by virtue of section 22A in the Police Act 1996 Collaboration ensures efficient and effective acquisition of data, particularly in fast moving circumstances or out of hours. The ability to collaborate was extended to all public authorities under the IP Act. For public authorities which do not acquire communications data regularly, collaboration allows for them pool expertise or draw on expertise from authorities that acquire data regularly, thus improving the effectiveness of the system.
- 7.2 The sharing of DSOs was deliberately removed from the IP Act on the expectation that the provisions were no longer needed as OCDA was expected to operate a 24/7 capability and, in the circumstances that authorisation was considered internally in urgent cases, there would not be time to consult another public authority for a decision. This position was agreed with national policing leads at the time. However, the decision has since been taken that although OCDA will operate 7 days a week, it will not be a 24 hour body.
- 7.3 As public authorities have begun to transition from RIPA to the IPA it has become apparent that they, particularly police forces, have an ongoing requirement to share DSO functions where they are permitted to authorise applications internally, under sections 61 and 61A of the IP Act (including national security and urgent cases). In urgent cases in particular any delays in authorisation of requests can have significant consequences.
- 7.4 Some police forces, for example, routinely share DSO functions for authorisations under RIPA and operate an on-call rota to ensure that urgent cases, such as a missing child or other threat to life situation, can be dealt with immediately. Similarly, Regional Organised Crime Units (ROCU) consist of officers seconded to special units representing several police forces in a region. It will not always be possible to ensure that a DSO from a particular force is authorising a request. A collaboration agreement ensures that this does not cause operational problems. In addition, it has become apparent that, as OCDA takes over the vast majority of CD applications, the number of DSOs may be reduced, making the ability to the share them all the more important. Furthermore, there is an ongoing trend within policing towards greater collaboration and sharing of services across a range of functions.
- 7.5 Accordingly, this instrument restores the ability of public authorities to share DSO functions for all requests where the public authority is permitted to authorise a request

internally under section 61 and section 61A IP Act, for example in national security cases or where there is a threat to life. It does not affect the requirement for requests for communications data to be independently authorised in the vast majority of cases. It simply ensures that there is maximum flexibility in those cases where EU law already permits the internal authorisation of communications data requests.

7.6 The acquisition of communications data, and therefore the use of the exemptions to independent authorisation, is overseen by the Investigatory Powers Commissioner.

8. European Union (Withdrawal) Act/Withdrawal of the United Kingdom from the European Union

8.1 This instrument does not relate to withdrawal from the European Union / trigger the statement requirements under the European Union (Withdrawal) Act.

9. Consolidation

9.1 It is not possible or appropriate to consolidate changes to the IP Act at this stage.

10. Consultation outcome

10.1 The government has consulted with the public authorities affected by this instrument, including those in the devolved administrations where the acquisition of communications data is a reserved matter.

10.2 An official public consultation was not considered necessary given that this instrument simply ensures that public authorities can continue to work together when appropriate to do so and reverts the provisions to a position that Parliament has recently approved. The Government continues to work closely with public authorities, including police forces, across the UK to ensure a smooth and successful transition to the IP Act.

11. Guidance

11.1 The Communications Data Code of Practice was brought into force by the Data Retention and Acquisition Regulations 2018: Code of Practice. The Home Office intends to issue a revised code to take account of the minor changes made by this Statutory Instrument. These changes will be subject to public consultation and affirmative approval in both Houses.

12. Impact

12.1 There is no impact on business, charities or voluntary bodies because these Regulations relate to public authorities and their ability to share DSOs to access communications data under the Investigatory Powers Act.

12.2 The impact on the public sector is set out in full in the policy consideration section above. In short, public authorities, including the police, will continue to be able to share DSO functions using collaboration agreements as they transition to the IPA.

12.3 An Impact Assessment has not been prepared for this instrument because the amendments will ensure consistency in how public authorities authorise CD requests and so the impact should be minimal as they begin to rely on powers in the IPA instead of powers in RIPA.

13. Regulating small business

- 13.1 As these regulations purely relate to processes public authorities undertake they do not apply to activities that are undertaken by small businesses.

14. Monitoring & review

- 14.1 Section 260 of the IP Act requires the Secretary of State to report on the operation of the Act, after a period of 5 years and 6 months from Royal Assent. The report must be published and laid before Parliament. In preparing the report, the Secretary of State must take into account any report on the operation of the Act produced by a select committee of either House.
- 14.2 The IP Act provides for an Investigatory Powers Commissioner whose remit includes providing comprehensive oversight of the use of the powers contained within the Act.

15. Contact

- 15.1 Caitlin Fawkes at the Home Office: Caitlin.Fawkes@homeoffice.gov.uk / 02070354426 can be contacted with any queries regarding the instrument.
- 15.2 Jonathan Emmett, Deputy Director for the Investigatory Powers Unit at the Home Office can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 The Rt. Hon Ben Wallace MP at the Home Office can confirm that this Explanatory Memorandum meets the required standard.