

PARLIAMENTARY DEBATES

HOUSE OF COMMONS
OFFICIAL REPORT

Fifth Delegated Legislation Committee

DRAFT INVESTIGATORY POWERS (CODES OF
PRACTICE AND MISCELLANEOUS
AMENDMENTS) ORDER 2018

Monday 16 July 2018

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The Committee consisted of the following Members:

Chair: MR ADRIAN BAILEY

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| † Afolami, Bim (<i>Hitchin and Harpenden</i>) (Con) | † Perkins, Toby (<i>Chesterfield</i>) (Lab) |
| Burden, Richard (<i>Birmingham, Northfield</i>) (Lab) | † Ross, Douglas (<i>Moray</i>) (Con) |
| † Dakin, Nic (<i>Scunthorpe</i>) (Lab) | † Smith, Eleanor (<i>Wolverhampton South West</i>) (Lab) |
| † Doughty, Stephen (<i>Cardiff South and Penarth</i>) (Lab/Co-op) | † Thomas-Symonds, Nick (<i>Torfaen</i>) (Lab) |
| † Jones, Graham P. (<i>Hyndburn</i>) (Lab) | † Tomlinson, Michael (<i>Mid Dorset and North Poole</i>) (Con) |
| † Jones, Mr Marcus (<i>Nuneaton</i>) (Con) | † Wallace, Mr Ben (<i>Minister for Security and Economic Crime</i>) |
| † Keegan, Gillian (<i>Chichester</i>) (Con) | † Whittingdale, Mr John (<i>Maldon</i>) (Con) |
| † Maclean, Rachel (<i>Redditch</i>) (Con) | |
| † Maynard, Paul (<i>Lord Commissioner of Her Majesty's Treasury</i>) | Laura-Jane Tiley, <i>Committee Clerk</i> |
| † Newlands, Gavin (<i>Paisley and Renfrewshire North</i>) (SNP) | † attended the Committee |

Fifth Delegated Legislation Committee

Monday 16 July 2018

[MR ADRIAN BAILEY *in the Chair*]

Draft Investigatory Powers (Codes of Practice and Miscellaneous Amendments) Order 2018

6 pm

The Minister for Security and Economic Crime (Mr Ben Wallace): I beg to move,

That the Committee has considered the draft Investigatory Powers (Codes of Practice and Miscellaneous Amendments) Order 2018.

It is a pleasure to serve under your chairmanship, Mr Bailey.

The Regulation of Investigatory Powers Act 2000—RIPA—provides the regulatory framework to govern the use and authorisation of a number of investigatory techniques, ensuring that their use by public authorities is compliant with the right to privacy under article 8 of the European convention on human rights. The provisions of RIPA and related legislation, including the Investigatory Powers Act 2016, play a most important role in the work of our law enforcement and intelligence agencies, as well as other public bodies with enforcement or regulatory functions. The techniques authorised under these Acts are crucial in enabling investigators to obtain intelligence and evidence that can prevent terrorist attacks, disrupt the activities of serious organised crime groups, establish culpability so that offenders can be brought to justice and effectively enforce a long list of laws and regulations.

The framework that RIPA established ensures that there are strong and transparent safeguards appropriate to the intrusive nature of these investigatory powers, ensuring that they are used lawfully and proportionately. The Investigatory Powers Act fundamentally overhauled the safeguards around a number of powers and the oversight of all investigatory powers. All these safeguards, the clear requirements set out in the codes of practice and the independent oversight provided by the Investigatory Powers Commissioner establish clear limits around the use of these powers, and ultimately provide reassurance to the public that the powers are being used in ways that serve the best interests of us all.

The order introduces three revised codes of practice as well as making some amendments and updates to the public authorities authorised to use surveillance powers under RIPA. The order also makes a minor technical amendment to provisions on the use of combined warrants under the Investigatory Powers Act 2016. The revised codes of practice provide guidance on specific investigatory powers that are regulated by RIPA, as well as by the Police Act 1997 and the Intelligence Services Act 1994. These are covert surveillance, property interference, covert human intelligence sources and the investigation of protected electronic information.

The CHIS and covert surveillance codes of practice, originally issued in 2002 and last updated in 2014, and the investigation of protected electronic information

code have been updated to ensure that the guidance remains relevant and keeps pace with change. These updates are necessitated mainly by the changes made by the Investigatory Powers Act. This includes reflecting the creation of the new Investigatory Powers Commissioner, the changes made by the introduction of equipment interference as a technique separate to the existing property interference powers, and the need to mirror the strengthened safeguards for the handling of confidential and privileged material introduced by the Investigatory Powers Act.

A number of other updates and clarifications to the guidance reflect and improve current operational practice. These include expanded guidance on procedures to be followed where investigators use the internet for covert investigatory purposes, where covert surveillance is undertaken by means of drones and provisions intended to reinforce the safety of covert human intelligence sources.

Alongside the codes of practice, we are updating the lists of the public authorities and officers able to authorise the use of directed surveillance and covert human intelligence sources. These lists are in themselves a safeguard against the inappropriate or indiscriminate use of the investigatory powers, as they ensure that their use is limited to specified public authorities and can only be authorised by specified officers within those authorities, who have sufficient authority and expertise. These updates ensure that public authorities can continue to authorise the use of investigatory powers following changes to their organisational structures, and remove any authorities that no longer require the powers.

Finally, we are taking this opportunity to make a minor correction to the arrangements under the Investigatory Powers Act for authorising a combined warrant. This corrects a technical error, which meant that Parliament's clear original intention that warrants should last for six months was limited to the clearly far too short period of two working days. This can never have been the intention, and so we are taking the opportunity to correct the error. This is a timely improvement that will be of assistance to our intelligence services as they set about their tasks of identifying and disrupting threats to our national security.

All the changes made by this order, both to the codes of practice and the authorisation framework for the powers, ensure that the highest standards continue to be required of those using the powers, and that they are underpinned by ever stronger safeguards against their misuse.

I commend the order to the Committee.

6.5 pm

Nick Thomas-Symonds (Torfaen) (Lab): It is a pleasure to serve under your chairmanship, Mr Bailey. I say at the outset that it is not the intention of the Opposition to oppose this statutory instrument.

First, I should refer to the general approach taken to the Investigatory Powers Act 2016, during whose passage the Government accepted a significant number of amendments. That was an entirely appropriate way in which to proceed, and I pay tribute to my predecessors in the shadow home affairs team, who obviously worked for the Opposition on that Bill, and also to my predecessor as Member of Parliament for Torfaen, now Lord Murphy, who chaired the Joint Committee that looked at the Bill

and recommended a substantial number of amendments that were accepted by the Government. It is with that approach in mind that I look at the order.

As the Minister set out, the order brings into force three revised codes of practice relating to covert surveillance and property interference, to covert human intelligence sources and to the investigation of protected electronic information. These revised codes will, of course, replace the previous version. I agree with the Minister that it is obviously important that the codes of practice keep pace with change. The codes of practice in themselves are important safeguards as we try to balance the obvious needs of security with liberty and appropriate safeguards for that.

The second part of the order relates to public authorities and updates the public authorities listed in schedule 1 to the Regulation of Investigatory Powers Act in order to authorise direct surveillance and indeed use or conduct of covert human intelligence sources. It also sets out those within public authorities who may authorise these activities, and the purposes for authorisation. Again, those would seem to the Opposition to be entirely sensible measures.

On the third part of the order and the combined warrants, there was, as the Minister has set out, an unintended effect on warrant duration, which the order entirely appropriately seeks to correct. The double lock system of Secretary of State authorisation and judicial commissioner approval is a very important part of the overall framework, and very important in terms of the safeguards that are set out.

On that basis, the Opposition do not intend to oppose the order.

6.8 pm

Gavin Newlands (Paisley and Renfrewshire North) (SNP): It is a pleasure to see you in the Chair, Mr Bailey.

I should say at the outset that it is not my intention to divide the Committee. However, during the rather arduous scrutiny of the Investigatory Powers Bill a couple of years ago, my hon. and learned Friend the Member for Edinburgh South West (Joanna Cherry), and, to be fair, the right hon. and learned Member for Holborn and St Pancras (Keir Starmer), scrutinised the Bill in some detail and raised concerns time and again about the retention of data being far too widely drawn in the Bill, with far too few safeguards. We said during the passage of the Bill that these powers would not survive legal challenge. The Government thought differently and ploughed on regardless.

It is a shame that the Government's failings on investigatory powers have been admitted only after the matter was taken to the European Court of Justice. It is to be welcomed, however, that there will be a cut in the number of cases, through increased protections, in which communications data can be accessed by the authority. We have to remember that the Court ruled that EU law precludes EU countries from passing law that

"provides for general and indiscriminate retention of all traffic and location data of all subscribers and registered users relating to all means of electronic communication"

in order to help fight crime. The Court also said that EU law does permit national law makers to, "as a preventive measure," require traffic and location data to be retained on a targeted basis, but only where the objective of the data retention rules is to fight "serious crime".

The Scottish National party has always accepted that security powers are extremely important and must always be shown to be necessary, proportionate and in accordance with the law. In our view, the Government have a way to go in making other aspects of the investigative powers proportionate and lawful. As this instrument mainly tightens provisions, we will not oppose it.

6.10 pm

Mr John Whittingdale (Maldon) (Con): I do not want to detain the Committee; I just have one question for the Minister and one area in which I seek reassurance. My question refers to the explanatory note, which says that one of the purposes of this instrument is to

"reflect changes to strengthen protection for juvenile covert human intelligence sources".

To me, that sounds like under-age spies. Could the Minister say in what circumstances we might be using juvenile covert human intelligence sources, unless my interpretation is wrong?

Like many in my party—including the Minister, I am sure—I regard the restriction on civil liberties represented by investigatory powers or electronic surveillance as necessary when it comes to national security matters and organised crime. As we have seen in the past, however, the list of agencies with access to those powers is considerable. It is difficult to imagine why the General Pharmaceutical Council, for example, might need them. The double lock provision offers some reassurance, but I would like the Minister to assure me that agencies not obviously in the frontline of the battle against terrorism or organised crime, such as some of those listed, are likely to use these powers only on extremely limited occasions.

6.12 pm

Mr Wallace: I am grateful to all parties here for their support, in principle, for these guidelines. As I said at the beginning, they are designed to reflect changes—for example, in the areas around oversight. The three commissioners have been folded into the judicial commissioners—the Investigatory Powers Commissioner—and that needs to be reflected. They are also designed to reflect changes in technique since RIPA was introduced. Equipment interference used often to be included under property interference, but is now a technical capability—how the law enforcement agencies and intelligence services can access information within an electronic device. To some extent and in some examples they would use equipment interference, so that is only right and proper.

On the increasing safeguards, I specifically changed the guidance to increase the onus on journalistic protections, to ensure that that is properly reflected. There are now whole sections of the guidance that relate to what a police officer or a user using these powers has to follow. I think that was important.

On the subject of juvenile CHIS, it is regrettable that there are young people, below the age of 18 and even 16, who are engaged in criminality, sometimes with gangs; we see it more in county lines, as well. On some very rare occasions, with the authority of the parent, guardian, social worker or other person, we can authorise young people to be part of a process where they can share information, or indeed be tasked. It is not some sort of Alex Rider, secret agent or 007 scenario—my children and I enjoy those books on long car journeys—but a sad reflection of how criminality is working.

[Mr Wallace]

We wanted to change the operational impact. At the moment, under RIPA, there is authorisation for one month at a time. We said that that was leading to a stop-start situation and we needed a four-month period—with oversight, obviously. We wanted to slightly broaden who could give the authority, because the guardian or other individual might be engaged in the abuse or the problems that the young people might be tasked with. That is simply a reflection of our trying to ensure that we provide a broader number of people who can safeguard it and extend the time so that we can have an operational impact.

I am happy to write to my right hon. Friend the Member for Maldon about the extension in who can use some of the powers—he referred to the General Pharmaceutical Council—and explain why that is necessary.

The hon. Member for Paisley and Renfrewshire North and I might have a slightly different opinion of the ruling that he mentioned. Yes, the European Court of Justice ruled that the Data Retention and Investigatory Powers Act 2014 did not provide for enough independent authorisation. That is why we conceded that in court—I will grant him that. However, the broader stuff on our regime being indiscriminate, and on required notification, was not agreed with, and the UK Government's case was upheld by the Court. The regime was proportionate and necessary, and recognised the reality of how some of this has to be dealt with.

I can give all colleagues confidence that the judicial commissioners are formidable, independent individuals. Lord Justice Fulford and his judicial commissioners are all senior or retired judges. I promise the Committee that they will not be a pushover. I have met them a considerable number of times; as members of the judiciary, they are not shy about asking when they think something is wrong.

We should be proud of where we have ended up. I would not like to see any further erosion of the balance that we have, which is a gentle one. I think Liberty is before the court at the moment trying to prevent us even from having communications data; we would not then even be able to find out about someone's telephone when they were arrested. That would, in my view, be unacceptable and put the public at huge risk. It is time for some people to put aside their purity and realise that this is a balance between our constituents' rights to life and to privacy. I think we have got the balance just about right. That is why I am very grateful for all parties' support for tonight's measures.

The guidelines are there to be used by the people using the powers. If they follow them and the judicial oversight, we will be in a better place—one where our rights are protected, but our law enforcement and intelligence services can get on and do the job of keeping us safe.

Question put and agreed to.

6.17 pm

Committee rose.

