Home Office

Investigatory Powers Act 2016:

Response to Home Office Consultation on Investigatory Powers Act Codes of Practice

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Introduction

The Investigatory Powers Act concluded its Parliamentary passage on 16 November 2016 and received Royal Assent on 29 November 2016. The Act does three key things:

- First, it brings together powers already available to law enforcement and the security and intelligence agencies to obtain communications and data about communications. It provides these powers – and the safeguards that apply to them – in a clear and understandable way.

- Second, the Act radically overhauls the way these powers are authorised and overseen. It introduces a 'double-lock' for the most intrusive powers, including interception and all of the bulk capabilities, so that warrants cannot be issued until the decision to do so has been approved by a Judicial Commissioner. And it creates a powerful new Investigatory Powers Commissioner to oversee how these powers are used.

- Third, it ensures powers are fit for the digital age. The Act makes a new provision for the retention of internet connection records in order for law enforcement to identify the communications service to which a device has connected. This will restore capabilities that have been lost as a result of changes in the way people communicate.

The Codes

The Government intends to issue six codes of practice under the Investigatory Powers Act. These codes set out the processes and safeguards governing the use of investigatory powers by public authorities including the police and security and intelligence agencies. They give detail on how the relevant powers should be used, including examples of best practice. They are intended to provide additional clarity and to ensure the highest standards of professionalism and compliance with this important legislation.

These codes are primarily intended to guide those public authorities which are able to exercise powers under the Investigatory Powers Act 2016. They provide information on the processes associated with applying to use, and using, each of the powers, as well as the safeguards and oversight arrangements that will ensure the powers are used in the intended manner. The codes will also be informative to staff of communications service providers which may be served with warrants or given notices under the Act.

The codes of practice have statutory force and individuals exercising functions to which the codes relate must have regard to them. They are admissible in evidence in criminal and civil proceedings and may be taken into account by any court, tribunal or supervisory authority when determining a question arising in connection with those functions.

Five of the six draft codes of practice were included in this consultation. The sixth code of practice, concerning communications data, will be published for consultation at a later date. The Retention of Communications Data Code of Practice 2015, published under the Regulation of Investigatory Powers Act (RIPA), will remain in place until otherwise stated.

The five codes of practice included in this consultation relate to the powers described below.

Interception of Communications

Interception warrants authorise the interception of communications in the course of their transmission and the obtaining of secondary data from those communications. The Draft Interception Code of Practice relates to both targeted and bulk interception.

Targeted interception warrants can be sought by the security and intelligence agencies, the Ministry of Defence and a select group of law enforcement agencies.

Bulk interception warrants may only be obtained by the security and intelligence agencies and are used to obtain overseas-related communications (or secondary data), usually in large volumes, in order to find intelligence on known threats and to identify new ones. This data is subject to additional access controls to filter the material obtained and select a fraction of it for examination. This data may not be available by other means.

Equipment Interference

Equipment interference warrants provide for interfering with equipment for the purpose of obtaining communications, equipment data or other information. The Draft Equipment Interference Code of Practice relates to both targeted and bulk equipment interference. 'Equipment' could include traditional computers or computer-like devices such as tablets, smart phones, cables, wires and static storage devices. Equipment interference can be carried out either remotely or by physically interacting with equipment.

Targeted equipment interference warrants may be sought by the security and intelligence agencies, the Ministry of Defence and a range of law enforcement agencies.

Bulk equipment interference warrants may be sought only by the security and intelligence agencies and will permit the acquisition of overseas related communications, equipment data and other information subject to additional access controls. As with bulk interception, this data may not be available by other means and such warrants must be overseas related.

Bulk Communications Data Acquisition

Communications data includes data about communications but does not include the content of communications, and may be required by communications service providers themselves in order to process and/or transmit the communications. It might include the date and time of a phone call, or identify the sender and recipient of an email, but does not include the words spoken or text sent.

Bulk communications data acquisition describes the collection of this type of data in large volumes. Bulk acquisition warrants may only be sought by the security and intelligence agencies.

Access to this data is essential to enable the identification of communications data that relates to subjects of interest and to subsequently piece together the links between them. Where a security and intelligence agency has only a fragment of intelligence about a threat or an individual, communications data obtained in bulk may be the only way of identifying a subject of interest. Identifying the links between individuals or groups can also help the agencies to determine where they might request a warrant for more intrusive acquisition of data, such as interception.

Retention and Use of Bulk Personal Datasets by the Security and Intelligence Agencies

A bulk personal dataset is a dataset containing information about a number of individuals, most of whom are not of interest to the security and intelligence agencies. Analysis of bulk personal datasets is an essential way for the security and intelligence agencies to focus their efforts on individuals who threaten our national security.

Bulk personal datasets can help to eliminate the innocent from suspicion without using more intrusive investigative techniques, establish links between subjects of interest or better understand a subject of interest's behaviour, and verify information obtained through other sources (for example agents) during the course of an investigation or intelligence operation.

A list of people who have a passport is a good example of such a dataset – it includes personal information about a large number of individuals, the majority of which will relate to people who are not of security or intelligence interest.

National Security Notices

The Secretary of State can give a national security notice to a telecommunications operator requiring them to take steps in the interests of national security. They are a critical tool in protecting our national security.

The type of support that may be required includes the provision of services or facilities which would help the intelligence agencies in safeguarding the security of their personnel and operations, or in providing assistance with an emergency.

A notice may typically require a telecommunications operator to provide services to support secure communications by the security and intelligence agencies, for example by arranging for a communication to travel via a particular route in order to improve security. They may additionally cover the confidential provision of services to the agencies within the telecommunications operator, such as by maintaining a pool of trusted staff for management and maintenance of sensitive communications services.

Consultation

On 23 February 2017, the Home Office launched a public consultation on these codes of practice, fulfilling the requirements under Schedule 7 of the Investigatory Powers Act 2016. The consultation closed on 6 April 2017. The Home Office has now considered the representations made regarding the codes of practice.

Statutory consultation plays a critical role in the development of these codes of practice. We are grateful to those who took the time to consider the proposed codes of practice and respond to the consultation.

This document provides a summary of, and response to, the comments received during the consultation. It outlines the changes that the Government has made to the five codes of practice in response to the consultation, and the next steps that we will take.

Responses

We received a total of 1098 responses. 32 of these responses were from members of the public, academics, and representatives from legal bodies, media organisations, an oversight body, privacy groups, and technology companies (including communications service providers).

The remaining 1066 responses were from other members of the public responding to a request made by The Open Rights Group, who encouraged members of the public to submit identical responses to the consultation based on a template that they provided.

Table of respondents

The following table lists the responses that were received during the consultation.

Nature of response	Number of responses
Academic representatives	4
Legal representatives	2
Media organisations	6
Oversight body	1
Privacy groups	7
Technology companies	3
Open Rights Group members	1066
Other members of public	9

Principal comments and proposed changes

The responses to the consultation prompted a number of constructive changes to the draft codes of practice. These are designed to improve operational implementation of the codes, and provide a balanced response to the points raised in responses to the consultation.

The codes of practice have also been amended to improve presentation and help understanding, and some changes have been made in the interests of clarity and legal accuracy.

The following revisions have been made to the codes of practice as a consequence of the representations received during this consultation:

Legal Status of the Codes

We received a number of responses that sought clarity on the status of the codes, particularly where other guidance, such as the internal guidance of a particular agency, addresses the same points as those covered by the codes.

Response

Subject to the consideration and approval of Parliament, all of the codes of practice in question will be pieces of secondary legislation, and therefore will have a clear statutory footing.

However, in response to the suggestions we received, changes have been made across the codes to make clear that the duty to have regard to the codes exists regardless of any contrary guidance that might exist within a relevant authority.

Structure and General Approach

We received a number of suggestions about the structure of the codes and the general themes that they address. In particular, some comments suggested that the codes could be shortened by removing information that could be found directly in the Act itself.

We also received suggestions that multiple codes could be condensed in to a smaller number, or a single code of practice, to avoid duplication between codes.

Conversely, some comments called for much more information to be provided in a range of sections of the codes or the creation of entirely new codes to cover topics such as Technical Capability Notices which currently form parts of the existing draft codes.

Response

We carefully considered all of the points made in relation to the level of detail provided in the codes, and the structure that the information is provided within.

Whilst some comments correctly noted that some codes contain the same information, it is important that an individual reading a single code of practice can access all of the relevant information relevant to that power, even if the same information is relevant to other powers.

For the same reason, where a given power interacts with a particular part of the Act, such as Technical Capability Notices, it is useful for the reader of the code to have that information provided in context. Consequently, we have determined that it would not be beneficial to introduce further codes of practice that could isolate relevant information.

We are therefore of the view that the codes provide an appropriate level of detail, and that the removal of any information, or addition of further codes, could make the requirements of the Act less clear to the intended audience. As such, no changes have been made to the overall structure of the codes and no plans have been made to present Parliament with more, or fewer, draft codes for consideration.

Definitions

It was suggested that the definitions sections in the codes could be improved, and that revisions could be made to increase clarity, or that the definitions sections could be removed entirely, redirecting the reader to the relevant sections of the Investigatory Powers Act itself.

Response

We carefully considered all of the feedback that we received with regards to definitions. The definitions sections are necessarily complex, as they need to describe a range of intricate technical terms in the context of different, but related, regimes.

However, we acknowledge that improvements could be made to these sections. The relevant sections have therefore been amended. The amendments address a range of issues, but they mainly seek to improve clarity and provide greater consistency between codes.

We considered the suggestion that the codes of practice could simply refer to the definitions included in the Act. We determined that although the definitions sections in the codes do reflect the definitions in the Act, they also provide valuable details and examples that are not present in the legislation itself.

In particular, we considered that Parliament felt strongly that the codes should provide a greater level of detail, and that this detail will ultimately be helpful for those who use the powers and those who oversee their use.

Judicial Commissioner Approval and Oversight

A number of suggestions were made in relation to the provisions within the codes about Judicial Commissioner approval. In particular, comments sought clarity upon the process that would be followed should a Judicial Commissioner request additional information before making a decision.

Further comments suggested that it could be beneficial to clarify certain details with regards to errors. In particular, clarity was sought on how guidance on errors will be considered by relevant agencies and how public authorities should keep records on errors that have occurred.

Finally, responses were submitted that sought to clarify whether the Judicial Commissioners would have access to the same information provided to the issuing authority, when considering whether to approve their decision to issue a warrant.

Response

In response to these comments we have made a number of changes across all five codes. Firstly, we have set out more clearly the process that should be followed should a Judicial Commissioner request further information when considering whether to approve the decision to issue a warrant.

With regards to errors, we have made clear that relevant agencies must have regard to any guidance on errors issued by the Investigatory Powers Commissioner. Further, where relevant agencies have produced internal guidance, we have stated explicitly that they should be subject to review by the Investigatory Powers Commissioner.

We have also provided greater detail on the process that should be followed where an error has occurred, but the full facts of the incident are not yet clear, as well as clarifying that a relevant agency must, where reasonably practicable, take all steps as notified to them by the Investigatory Powers Commissioner to help identify the subject of a serious error. This information will ensure that the Investigatory Powers Commissioner is made aware of what action is being taken to establish an error promptly, where further investigation is still required, and makes clear the ability of the Investigatory Powers Commissioner to work with relevant agencies to identify subjects of errors.

With regards to the information provided to Judicial Commissioners, the codes have been amended to confirm that the Judicial Commissioners will have access to the same application for a warrant as the issuing authority.

European Convention on Human Rights Considerations

Suggestions were made that the codes of practice could more comprehensively reference relevant areas of the European Convention on Human Rights that should be taken in to consideration when determining whether the use of a given investigatory power is appropriate.

In particular, a number of requests were made to explicitly reference Article 10 of the convention, making clear that the right to freedom of expression should be considered at relevant junctures.

There were also comments questioning assumptions in chapter 4 of the Security and Intelligence Agencies' Retention and Use of Bulk Personal Datasets: Draft Code of Practice about the levels of expectation of privacy when data is published online with the purpose of communicating that information to a wide audience or when data is posted on social networks sites and accessible by a smaller circle of personal contacts.

Response

The codes of practice already contained information on how the powers within the Act interact with the European Convention on Human Rights. Primarily, this information focused on Article 8 of the Convention, the right to respect for private and family life, as this is the Article that is most likely to be relevant to the use of the powers within the Act, but they also refer generally to the provisions of the Convention.

However, in response to the comments received we have added references to Article 10 where appropriate, so that readers are clear that the right to freedom of expression should be considered specifically where relevant.

Chapter 4 of the Security and Intelligence Agencies' Retention and Use of Bulk Personal Datasets: Draft Code of Practice has been amended to more clearly recognise that information in the public domain, even if placed there by the data subject themselves, can attract an expectation of privacy.

Cancellation and Cessation of Equipment Interference

Comments were made with regards to the process that should be followed when equipment interference activity ceases, and when the means of interference needs to be undone. These comments sought clarification as to what process should be followed in these circumstances.

Response

In response to these comments, amendments have been made to the relevant paragraphs in chapters 5 and 6 of the Draft Equipment Interference Code of Practice. These changes make clear that once issued, an equipment interference warrant will be used to carry out the authorised interference and to remove the means of interference, if required.

Warrants signed by senior officials

We received comments seeking clarity on the process that should be followed by a senior official when signing a warrant, particularly in relation to the information that a senior official should record when signing a warrant on behalf of the issuing authority.

Response

In order to clarify this point, further information has been included in the codes which states that where a senior official seeks permission to sign a warrant on behalf of the issuing authority, the senior official must explain the case, either in writing or orally, to the issuing authority and, where the case is being explained orally, the senior official must keep a written record of the conversation

Information included in warrant applications

Respondents also sought assurance that as part of the duty on a relevant authority to ensure that the case for a warrant is presented in a fair and balanced way, the authority should provide information that could potentially weaken the case for issuing the warrant.

Response

In response, we have made amendments to the codes that clearly state that, 'In particular, all reasonable efforts should be made to take account of information which weakens the case for the warrant'.

Sharing of material

A number of respondents asked for more detail to be included in the codes to explain the processes that apply where material obtained under a warrant – particularly in relation to bulk powers – is being shared, including with overseas authorities.

Response

We have included additional detail in the codes on the processes that apply in circumstances where it is necessary for material obtained under a bulk warrant to be disclosed to a UK law enforcement agency, in response to a request for assistance in relation to a law enforcement investigation or operation. In particular, we have made clear the safeguards that apply to such a request, including that the law enforcement agency must have exhausted all other means of progressing the relevant investigation and that the request is necessary and proportionate.

We have also included more detail in relation to the processes that apply where material obtained under a warrant is to be disclosed to overseas authorities. Specifically, we have made clearer the considerations that must be made by authorities responsible for issuing warrants in relation to the safeguards that will be applied to material that is disclosed to an overseas authority.

Technical Capability Notices

A number of respondents requested that additional clarity be added to the sections of the codes about technical capability notices, specifically on provisions relating to the removal of electronic protection.

Response

We have made it clearer that any obligation maintain the capability to remove electronic protection may only be imposed under a technical capability notice where it is reasonably practicable for the relevant telecommunications operator to comply with the obligation.

We have also made changes to the codes to add clarity on how the giving of a technical capability notice will work in circumstances where more than one telecommunications operator is involved in the provision of a service.

Confidential or privileged information

A number of respondents sought additional details to be included in the codes in relation to confidential or privileged information, with a particular focus on confidential journalistic material, sources of journalistic information and legal professional privilege.

A suggestion was also made that the codes could be used to ensure that relevant persons received training with regards to the acquisition of sensitive material, such as confidential journalistic material or material subject to legal privilege.

Response

We have made a number of changes to the codes in response to the points that have been raised. We have made clear that where a warrant is sought to identify the source of journalistic information, the public interest requiring such a warrant must override any other public interest. We have also made clearer the safeguards that apply where a warrant to obtain non-content data may be used as part of the identification of a journalist's source.

In order to assist oversight by the Investigatory Powers Commissioner, we have also included new record keeping requirements for public authorities in relation to warrants involving: items subject to legal privilege; confidential journalistic material; the identification of journalistic sources; and members of relevant legislatures.

Further, to ensure that appropriate training requirements are provided in relation to confidential material, as well as any other training that may be required for persons using the powers in the Act, language has been included that states that relevant persons should receive mandatory training regarding their professional and legal responsibilities, including the application of the provisions of the Act and the codes of practice.

Further Consultation

Some respondents sought clarity on what consultation had already taken place on the codes of practice, and requested further opportunities for consultation.

Response

The draft codes of practice have been in development for over a year after first being published in March 2016 alongside the Investigatory Powers Bill.

Throughout this period, the Home Office have consulted with a wide range of individuals and organisations. In preparing these drafts we have consulted extensively with communication service providers, the law enforcement and intelligence community, the three existing Commissioners who oversee and monitor aspects of the legislation (Office of the Interception of Communications Commissioner, Office of the Surveillance Commissioners, and Intelligence Services Commissioner) and the new Investigatory Powers Commissioner. We have also engaged with representatives of legal bodies, journalists' groups, civil liberties organisations, and both Government and industry technical experts.

Further, this consultation fully complied with all aspects of the Cabinet Office consultation principles. Indeed, in some aspects the Government exceeded requirements.

The powers to which these codes relate are of vital importance to security and intelligence and law enforcement agencies, and there is a statutory requirement for the issuing of accompanying codes of practice. The codes will provide important guidance about the operation of the powers, and the safeguards and oversight that applies to their use. As a result of the extensive consultation to date, and to avoid any unnecessary delay, the Government does not intend to extend the consultation period further.

Issues Out of Scope of the Codes

A number of responses were received that referred to issues outside of the scope of the codes of practice. For example, a number of respondents suggested that certain investigatory powers should be removed from legislation. Others sought the imposition of requirements upon the Investigatory Powers Commissioner that would require an Act of Parliament to enact.

Response

This consultation sought comments on the draft codes of practice regarding the powers in the Investigatory Powers Act. The codes of practice provide additional detail about how the powers in the Act will operate. They may not be used to amend or contradict the provisions of the Act. As such, any comments that sought an effect beyond which the codes of are capable of achieving are not relevant to this consultation, and have not been acted upon.

Next steps

Regulations bringing these codes into force will be laid and debated before Parliament. They will only come into force when they have been debated in both Houses of Parliament and approved by a resolution in both Houses.