

EXPLANATORY MEMORANDUM TO
THE REGULATION OF INVESTIGATORY POWERS (INVESTIGATION OF
PROTECTED ELECTRONIC INFORMATION: CODE OF PRACTICE) ORDER
2007

2007 No.

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 otherwise than on the Surveillance Commissioners by or under Part 3 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 thirtieth report, the Department acknowledges that there may be 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 for consultation. 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 time 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 Part 3 of the Act provides a statutory framework that enables public authorities to ensure that protected electronic information which they have obtained lawfully or are likely to obtain lawfully can be put into an intelligible form. The provisions in Part 3 have not been commenced. Subject to Parliamentary approval of this Order the Government will commence those provisions.

4.3 Within Part 3 of the Act, Section 49 provides a power to impose a requirement upon a person to put lawfully acquired protected electronic information into an intelligible form (to provide access to it or to decrypt or decode it) or to disclose the key (such as a code or password) to enable the data to be put into an intelligible form.

4.4 Section 53 of the Act provides that it will be an offence to knowingly fail to comply with a disclosure requirement, with a maximum penalty of five years imprisonment in national security cases or two years in other cases. Where a person claims not to have or not to know the key to the data, the prosecution must prove beyond reasonable doubt that the person did have or did know the key.

4.5 Section 54 of the Act provides that it will be an offence to reveal a disclosure requirement that is required to be kept secret, with a maximum penalty of five years imprisonment in all cases.

4.6 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.

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 (Investigation of Protected Electronic Information: Code of Practice) Order 2007 are compatible with the Convention.”

7. Policy Background

7.1 Part 3 of the Act was conceived in anticipation that the same information security technologies which have allowed electronic commerce to flourish and enabled businesses and

individuals to protect and authenticate their electronic data when going about their lawful business would be exploited by terrorists and criminals to secure their information and the privacy of their electronic communications to protect and conceal evidence of unlawful conduct.

7.2 That scenario, and challenges that public authorities were expected to encounter, did not arise as quickly as was anticipated in 2000. That has been in large part because software which uses cryptographic processes has remained cumbersome to use properly – something exploited by technical facilities, such as the National Technical Assistance Centre (NTAC), which processes protected data on behalf of law enforcement and the intelligence agencies.

7.3 The situation is now changing rapidly, with a new generation of easy-to-use encryption being incorporated into standard operating systems of computers and other electronic devices. Investigators are now encountering protected data more and more frequently, and that will increase as encryption becomes more pervasive. That in turn will pose challenges to investigators seeking to put protected information into an intelligible form and working within statutory custody time limits.

7.4 The draft code of practice sets out guidance on the scope of the Part 3 provisions and how they should be applied and sets rules for public authorities on the giving of notices which impose disclosure requirements. Foremost amongst those rules is that no public authority may serve any notice under section 49 of the Act without the prior written approval of NTAC to do so. The code also makes clear that no requirement to disclose a key to protected information should be imposed upon any company or firm authorised by the Financial Services Authority without prior notification to the Chief Executive of the Authority or a person designated by him for that purpose.

7.5 In view of the current terrorist threat, the expected emergence of cryptographic processes in mainstream use of electronic information, and the practical experiences investigators have now had in encountering protected electronic information, the Government believes that it is right to now seek Parliamentary approval of the draft code of practice and, subject to that approval, to commence the provisions of Part 3 of the Act.

8. Impact

8.1 A Regulatory Impact Assessment was prepared for the Part 3 provisions when they were at their Bill stage¹. Option 2 of that assessment remains valid.

8.2 Exercise of the provisions of Part 3 may impact upon businesses, charities or voluntary bodies required to make a disclosure of either protected information in an intelligible form or the means to put protected information into an intelligible form. The code of practice provides that should any person incur costs in complying with a notice an appropriate contribution towards those costs may be made by the public authority that has imposed the disclosure requirement.

¹ That assessment is reproduced as Annex 2 to the memorandum available online at: <http://www.publications.parliament.uk/pa/jt200102/jtselect/jtcom/169/169ap83.htm>

8.3 In practice, the issue of costs will be most relevant where a third party is assisting in an investigation or operation and the expectation in the code of practice is that the issue of costs should be dealt with in preliminary discussions between the public authority and the person to be given the notice or any person in a business, a charity or a voluntary body who is responsible for assisting the execution of a disclosure requirement. There is no realistic expectation that disclosure requirements will be imposed upon charities or voluntary bodies.

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.