

**The Regulation of
Investigatory Powers
(Scotland) Act 2000:
Revised Codes of Practice for
Covert Surveillance and Covert
Human Intelligence Sources**

December 2013

**The Regulation of
Investigatory Powers
(Scotland) Act 2000:
Revised Codes of Practice for
Covert Surveillance and Covert
Human Intelligence Sources**

December 2013

© Crown copyright 2014

You may re-use this information (excluding logos and images) free of charge in any format or medium, under the terms of the Open Government Licence. To view this licence, visit <http://www.nationalarchives.gov.uk/doc/open-government-licence/> or e-mail: psi@nationalarchives.gsi.gov.uk.

Where we have identified any third party copyright information you will need to obtain permission from the copyright holders concerned.

This document is also available from our website at www.scotland.gov.uk.

ISBN: 978-1-78412-200-3

The Scottish Government
St Andrew's House
Edinburgh
EH1 3DG

Produced for the Scottish Government by APS Group Scotland
DPPAS22035 (01/14)

Published by the Scottish Government, January 2014

INTRODUCTION

1. This consultation seeks views on two revised Codes of Practice made under the Regulation of Investigatory Powers (Scotland) Act 2000 (RIP(S)A). These Codes deal with Covert Surveillance and Covert Human Intelligence Sources.

2. A number of changes have occurred since the Codes were first published. Minor issues include changes to the names of organisations included in RIP(S)A. Other issues include new Orders which seek to provide for an enhanced authorisation regime around covert activity which could result in obtaining legally confidential information, the amalgamation of Scotland's eight police forces and the Scottish Crime and Drug Enforcement Agency and an enhanced authorisation regime for Police Scotland's use of undercover officers. More information on these issues is provided below.

BACKGROUND ON THE REGULATION OF INVESTIGATORY POWERS (SCOTLAND) ACT 2000

3. RIP(S)A provides specified public authorities with a regulatory framework within which covert activity can be undertaken lawfully. It does this by requiring a public authority to set out fully the reasons why covert activity is necessary and to demonstrate that such a course of action is proportionate to what it seeks to achieve. Using this framework requires the public authority to give full consideration to the potential infringements on an individual's human rights, specifically under Article 8 of the European Convention of Human Rights (ECHR)¹.

4. The person responsible for authorising covert activity (the authorising officer) must first believe that the activity is **necessary**. This means that it must be necessary for a specific purpose as defined in section 6 of RIP(S)A for **directed surveillance**, section 7 for **covert human intelligence sources**, or section 10 for **intrusive surveillance**. The purposes provided at sections 6 and 7 are the same:

- preventing or detecting crime or of preventing disorder,
- in the interests of public safety, or
- for the purpose of protecting public health.

For intrusive surveillance, section 10 provides a single purpose of preventing or detecting serious crime.

^[1] **Article 8 – Right to respect for private and family life**

¹ Everyone has the right to respect for his private and family life, his home and his correspondence.

² There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

5. The authorising officer must also believe that the activity is **proportionate**. This means that he or she must be satisfied that the degree of intrusion is proportionate to what is sought to be achieved. This includes balancing the intrusion not only against the individual, but also against others who might be affected by the activity. If the information sought could be gained using less intrusive means then the activity will be deemed to be disproportionate and should not be authorised.

LEGAL CONFIDENTIALITY ORDERS

6. In 2008/09, the House of Lords, in considering an appeal from the Divisional Court in Northern Ireland, agreed with that Court's decision that directed surveillance (authorised under the Regulation of Investigatory Powers Act 2000 (RIPA, which is a UK Act)) of communications between lawyers and their clients breached Article 8 of the ECHR. The Secretary of State did not challenge the decision of the Divisional Court that the procedures used to authorise directed surveillance were disproportionate to the infringement of an individual's right to a private consultation with a lawyer.

7. In order to fully implement that decision in Scotland, the Scottish Government is seeking to make Orders under RIP(S)A which are equivalent to those which have been made under RIPA. The draft Scottish Orders are included for information at Annexes A and B of this consultation.

8. These Orders recognise that surveillance involving matters subject to legal confidentiality requires an additional independent level of consideration. This is achieved by making it a requirement for the applicant to apply for prior independent approval from the Office of Surveillance Commissioners (OSC). The Orders also narrow the purpose for which the activity may be authorised by restricting it to serious crime. A Surveillance Commissioner could choose not to grant approval should he or she feel that the proposed action is unnecessary and/or disproportionate.

9. These new arrangements are reflected at Chapter 4 in both the Covert Surveillance and Property Interference Code of Practice and the Covert Human Intelligence Source Code of Practice.

POLICE REFORM

10. Merging Scotland's eight police forces and the Scottish Crime and Drug Enforcement Agency into a single Police Service of Scotland represented the largest public sector reform in a generation. This change is reflected in the Codes of Practice. Changes were also made to the arrangements by which the Police Service of Scotland is able to authorise intrusive surveillance.

11. Intrusive surveillance is described in RIP(S)A as covert surveillance that is carried out in relation to anything taking place on any residential premises or in any private vehicle, and involves the presence of an individual on the premises or in the vehicle, or is carried out by means of a surveillance device.

12. Before police reform, this covert activity had to be authorised by the Chief Constable of the relevant police force (or the Director or Deputy Director of the

SCDEA). We recognised that the Chief Constable of a single police service covering all of Scotland would require assistance in fulfilling this part of their duties. Arrangements were made which allows the Chief Constable to designate senior officers (who must be Assistant Chief Constable rank or above) to carry out the role of authorising officer for intrusive surveillance. This arrangement was also made in respect of property interference authorisations which are provided for in the Police Act 1997. These changes are reflected in the revised Covert Surveillance and Property Interference Codes of Practice.

13. No changes were made to the requirement for prior approval to be sought from the OSC.

POLICE INVESTIGATIONS AND REVIEW COMMISSIONER

14. The Police and Fire Reform Act 2012 also established the Police Investigations and Review Commissioner (PIRC). The role of the PIRC is to undertake independent investigations into the most serious incidents involving the police and continue to provide independent scrutiny of the way police bodies operating in Scotland respond to complaints from the public. The PIRC provides assurance to the public that there is independent and effective oversight of police investigations in Scotland. The PIRC is able to authorise directed surveillance, CHIS and intrusive surveillance and this is reflected in the new Codes.

RELEVANT SOURCE

15. An independent report by Her Majesty's Inspectorate of Constabulary (HMIC), published in February 2012, examined police authorisation of undercover (UC) officers deployed against public order and domestic extremist subject following the deployment of Mark Kennedy. Extensive media reporting focussed on the collapse of the trial Kennedy was involved in, the withholding of his true identity from the court, his access to legally privileged information on behalf of the police, and his conducting sexual relationships within the groups he was assigned to.

16. The HMIC report made a number of recommendations in order to provide additional safeguards to reduce the risk of long term police-authorized undercover officers deployed for long periods being, or becoming engaged in activity that was not appropriate. These recommendations were:

- to raise the rank of police authorisation in line with intrusive surveillance and residential property interference (this is an ACC or more senior grade); and
- to require prior independent approval from the OSC (who already consider police authorisations for intrusive surveillance and residential property interference).

17. Although the HMIC report was made to UK Ministers, Scottish Ministers have agreed to put in place similar arrangements for the Police Service of Scotland and to establish, through the draft Order attached at Annex B, the following new requirements:

- that the initial authorisation of undercover operations to be at assistant chief constable level;

- to raise the emergency authorisation level to superintendent;
- for the OSC to be notified at the outset of all Police Service of Scotland undercover deployments;
- for prior approval by the OSC of all renewals of undercover deployment at 12 months; and
- that the level of internal authorisation in Police Service of Scotland deployments beyond 12 months should be raised to deputy chief constable or above.

VIEWS

18. RIP(S)A requires Scottish Ministers to prepare and publish a draft of any Codes made and to consider representations made to them about those drafts. This consultation paper and the accompanying documents set out the range of changes that have taken place since the Codes were first published. Views are sought on the revised Codes.

Scottish Government
Safer Communities Directorate
December 2013

Responding to the consultation paper

We are inviting written responses to this consultation paper by Friday 14 March 2014.

While the paper does not ask any specific questions, you are free to make your views known on any aspect of the revised Codes. Please provide reasons for your views and information from your own experience where appropriate.

Please send your response along with your completed respondent information form (see “Handling your response”) to:

Ann Kerr
Safer Communities Directorate
Police Division
Room 1W.R
St Andrew’s House
Regent Road
Edinburgh
EH1 3DG

If you have any queries please contact Graeme Waugh on 0131 244 2869.

This consultation, and all other Scottish Government consultation exercises, can be viewed online on the consultation web pages of the Scottish Government website at <http://www.scotland.gov.uk/consultations>. You can telephone Freephone 0800 77 1234 to find out where your nearest public internet access point is.

The Scottish Government has an email alert system for consultations (SEconsult: <http://www.scotland.gov.uk/consultations/seconsult.aspx>). This system allows stakeholder individuals and organisations to register and receive a weekly email containing details of all new consultations (including web links). SEconsult complements, but in no way replaces, SG distribution lists and is designed to allow stakeholders to keep up to date with all SG consultation activity and be alerted at the earliest opportunity to those of most interest. We would encourage you to register.

Handling your response

We need to know how you wish your response to be handled and, in particular, whether you are happy for your response to be made public. Please complete and return the respondent information form (provided along with this consultation paper and the Report) which forms part of the consultation. This will ensure that we treat your response appropriately. If you ask for your response not to be published we will regard it as confidential and will treat it accordingly, subject always to any legal requirements on the Scottish Government to disclose information.

All respondents should be aware that the Scottish Government are subject to the provisions of the Freedom of Information (Scotland) Act 2002 and would therefore have to consider any request made to in under that Act for information relating to responses made to this consultation exercise.

Next steps in the process

Where respondents have given permission for their response to be made public and after we have checked that they contain no potentially defamatory material, responses will be made available to the public in the Scottish Government Library (see the attached Respondent Information Form) by 15 March 2014. You can make arrangements to view responses by contacting the SG Library on 0131 244 452. Responses can be copied and sent to you, but a charge may be made for this service.

What happens next?

Following the closing date, all responses will be analysed and considered along with any other available evidence to help us reach a decision on finalising the content of the Codes. We aim to issue our conclusions on this in March 2014. Scottish Ministers will then take forward the Codes in accordance with the relevant Scottish Parliamentary Procedures.

Comments and complaints

If you have any comments or complaints about how this consultation exercise has been conducted, please send them to Police Division at the contact details provided above under "Responding to this consultation paper".

The Regulation of Investigatory Powers (Scotland) Act 2000 – Revised Codes of Practice for Covert Surveillance and Covert Human Intelligence Sources



RESPONDENT INFORMATION FORM

Please Note this form **must** be returned with your response to ensure that we handle your response appropriately

1. Name/Organisation

Organisation Name

Title Mr Ms Mrs Miss Dr Please tick as appropriate

Surname

Forename

2. Postal Address

<input type="text"/>		
Postcode	Phone	Email

3. Permissions - I am responding as...

Individual	/	Group/Organisation
<input type="checkbox"/>		<input type="checkbox"/>
Please tick as appropriate		

(a) Do you agree to your response being made available to the public (in Scottish Government library and/or on the Scottish Government web site)?

Please tick as appropriate

Yes No

(b) Where confidentiality is not requested, we will make your responses available to the public on the following basis

Please tick **ONE** of the following boxes

(c) The name and address of your organisation **will be** made available to the public (in the Scottish Government library and/or on the Scottish Government web site).

Are you content for your **response** to be made available?

Please tick as appropriate

Yes No

Yes, make my response, name and address all available

or

Yes, make my response available, but not my name and address

or

Yes, make my response and name available, but not my address

(d) We will share your response internally with other Scottish Government policy teams who may be addressing the issues you discuss. They may wish to contact you again in the future, but we require your permission to do so. Are you content for Scottish Government to contact you again in relation to this consultation exercise?

Please tick as appropriate

Yes



© Crown copyright 2014

ISBN: 978-1-78412-200-3

This document is also available on the Scottish Government website:
www.scotland.gov.uk

APS Group Scotland
DPPAS22035 (01/14)

w w w . s c o t l a n d . g o v . u k