



Bar Council response to the Regulation of Investigatory Powers Act 2000: revised codes of practice

This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the Home Office consultation paper entitled 'Regulation of Investigatory Powers Act 2000: revised codes of practice.'

The Bar Council represents over 16,000 barristers in England and Wales. It promotes the Bar's high quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad.

3. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist, independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society. The Bar makes a vital contribution to the efficient operation of criminal and civil courts. It provides a pool of talented men and women from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rule of Law and our democratic way of life depend. The Bar Council is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board.

Consultation response

4. These three codes are issued under S.71 of the Regulation of Investigatory Powers Act 2000 ("RIPA") as amended by the Protection of Freedoms Act 2012 and the Investigatory Powers Act 2016 ("IPA"). The purpose of the codes is declared in the consultation document accompanying the three draft codes to be –

"The codes have been updated to reflect the changes made by the Investigatory Powers Act 2016. In particular:

- replacement of the existing oversight bodies by the Investigatory Powers Commissioner;

- new statutory error reporting requirements;
- changes made to the authorisation of equipment interference (i.e. the covert interference with equipment for the purpose of obtaining communications, equipment data or other information) and the interaction of this power with existing property interference powers;
- enhanced safeguards, such as requirements for authorising activity that may lead to the acquisition of material subject to legal privilege, communications of a member of a legislature, confidential journalistic material or other confidential material, and for the handling, retention or destruction of material obtained through use of the powers.

5. In addition we have made some changes which reflect developments since the codes were last revised. These are mainly technical changes which reflect best practice. They include in particular:

- expanded guidance on the use of surveillance and CHIS powers in online investigations;
- amendments intended to reinforce the protection of those acting as CHIS.”

6. These codes do generally achieve those purposes. At some stage they will need to be considered in the light of any findings of the Undercover Policing Inquiry chaired by Sir John Mitting - <https://www.ucpi.org.uk/> .

LPP material

7. According to paragraph 2 of Sch 7 to IPA –

“2 (1) Each code must include –

- (a) provision designed to protect the public interest in the confidentiality of sources of journalistic information, and
- (b) provision about particular considerations applicable to any data which relates to a member of a profession which routinely holds items subject to legal privilege or relevant confidential information.

(2) A code about the exercise of functions conferred by virtue of Part 2, Part 5 or Chapter 1 or 3 of Part 6 must also contain provision about when circumstances are to be regarded as “exceptional and compelling circumstances” for the purposes of any provision of that Part or Chapter that restricts the exercise of functions in relation to items subject to legal privilege by reference to the existence of such circumstances.”

8. The codes seek to satisfy this obligation in the following manner when considering communications subject to legal privilege –

(a) Covert Human Intelligence Sources Code, para 8.56 –

Circumstances which can be regarded as “exceptional and compelling” will only arise in a very restricted range of cases, where there is a threat to life or limb or in the interests of national security. The exceptional and compelling test can only be met when the public interest in obtaining the information sought outweighs the public interest in maintaining the confidentiality of legally privileged material, and when there are no other reasonable means of obtaining the required information.

(b) Covert Surveillance and Property Interference Code , para 9.51-

The exceptional and compelling test can only be met when the public interest in obtaining the information sought outweighs the public interest in maintaining the confidentiality of legally privileged material, and when there are no other reasonable means of obtaining the required information.

9. Each of the above two codes gives the same example –

Example: A public authority may need to deliberately monitor legally privileged communications where the legal consultation might yield intelligence that could prevent harm to a potential victim or victims, in addition to the privileged material. For example, if they have intelligence to suggest that an individual is about to conduct a terrorist attack and the consultation may reveal information that could assist in averting the attack (e.g. by revealing details about the location and movements of the individual) then they might want to monitor the legally privileged communications.

10. That example will be regarded as uncontroversial. If it is intended to indicate the limits of such exceptions, then we can agree. The fact that a single example is provided demonstrates how rarely communications which are subject to LPP should be accessible to the state. However, even in this example it is arguable that monitoring the communication as distinct from the communications data is not necessary to achieve the stated purpose. Para 8.70 of the Covert Human Intelligence Sources Code and para 9.72 of the Covert Surveillance and Property Interference Code require a legal adviser to the public authority which has obtained material to be consulted when it is believed that LPP material is obtained or retained. The codes go on to state that in cases of doubt as to whether LPP applies, the authority “may” seek advice from the Investigatory Powers Commissioner. In such cases of doubt, it should be mandatory for the authority to seek the Commissioner’s advice, rather than to proceed to access or retain the material in a state of uncertainty with the potential consequences for the

individual concerned, as well as the potential loss of trust in the activities of the authority. The codes should be amended accordingly.

Errors and the roles of the Investigatory Powers Commissioner and the Investigatory Powers Tribunal

11. Section 231 of IPA requires the Investigatory Powers Commissioner to notify a person in respect of whom a “serious error” has been made by a public authority whose conduct is subject to review by a judicial commissioner under IPA or any other enactment. An error is not serious unless the Commissioner considers that “the error has caused significant prejudice or harm to the person concerned”. What constitutes an “error” for these purposes is defined in s.231. This obligation to notify is subject to a public interest exception (s.231(4)). In addition to notifying the person of the error the Commissioner must inform that person of the right to appeal to the Investigatory Powers Tribunal. Inevitably, this obligation can only apply to errors of which the Commissioner is aware.

12. Each of the codes contains a section on errors and the duty to report serious errors to the Investigatory Powers Commissioner who will then decide whether the error requires to be notified to the person who is prejudiced or harmed by it. This self-reporting (reflecting s.235(6) of IPA) is potentially inadequate. However, the judicial commissioners appointed under part 8 of IPA have oversight functions (ss.229 and 235) which will enable them to check independently whether errors are being appropriately reported to the Commissioner. Given the calibre of the judicial commissioners currently appointed under IPA we have no doubt that duty will be exercised diligently.

References to statutory instruments

13. At various places the draft codes refer to statutory instruments (which are identified in this document). However, it provides no link to them and does not cite the specific parts of the SIs which are relied upon. If the text of the SIs is not to be annexed, a web link to the SI should be included in the code. Especially in cases of urgency, it is unsatisfactory to expect those seeking authorisation to search a web engine to find the statutory instrument invoked in the relevant code.

(1) Covert Human Intelligence Sources Code (“CHIS”)

General

14. A CHIS is used for covert manipulation of a relationship to gain any information. This is not necessarily the same as obtaining private information. It is nevertheless subject to Art.8 ECHR protection (para 2.13) and therefore requires authorised use of the CHIS to be (i) in accordance with law, (ii) necessary and (iii)

proportionate to the goal, i.e. the harm to be prevented (paras 3.1 to 3.17). The code sets out clearly what is and what is not a CHIS.

15. The establishment of a relationship can be online as well as one of physical proximity (para 4.10).

16. Authorisations of a CHIS by a public authority named in the *Relevant Sources Order 2013*¹ (which includes police officers) must be reported to a Judicial Commissioner, i.e. one appointed under IPA (para 5.10). The judicial commissioner can comment on the authorisation but has no power of authorisation or rejection unless the application is for a period of surveillance of 12 months or longer.

LPP material

17. By way of reminder, Lord Phillips said in *R v McE* [2009] UKHL 15 at [27]

“The relevant Strasbourg jurisprudence covers interception of communications, covert surveillance and the right to private consultation with a lawyer. The cases demonstrate that there is no absolute prohibition on surveillance in any of these situations. Both article 6 and article 8 of the Convention may be engaged. So far as article 6 is concerned, surveillance on communications between lawyer and client will not necessarily interfere with the absolute right to a fair trial. So far as article 8 is concerned, the issue is whether interference can be justified under article 8(2).”

18. Where it is likely that privileged material will be obtained, an enhanced authorisation procedure is required (para 8.28 and Annex A). Para 8.28 refers to the *Regulation of Investigatory Powers (Covert Human Intelligence Sources: Matters Subject to Legal Privilege) Order 2010*². This is unsatisfactory as the Secretary of State can approve applications for surveillance which involves LPP material made on behalf of the Intelligence Services, the Ministry of Defence, the Prison Service or a member of the armed forces without any requirement for approval by a judicial commissioner. This is inadequate and is inconsistent with the IPA. The absence of a role for judicial commissioners in such cases seems arbitrary. It may be challengeable under Art.6 or Art.8. The *Matters Subject to Legal Privilege) Order 2010* needs to be updated to incorporate a role for judicial commissioners in all cases involving LPP material before authorisation is final.

20. Paras 8.49 to 8.68 deal specifically with LPP material. Para 8.52 describes legal privilege as “particularly sensitive”. When items acquired by a CHIS are identified by

¹ http://www.legislation.gov.uk/uksi/2013/2788/pdfs/uksi_20132788_en.pdf

² 2010 No. 123 http://www.legislation.gov.uk/uksi/2010/123/pdfs/uksi_20100123_en.pdf

a legal officer of the public authority authorising the CHIS as being subject to legal privilege, the matter must be reported to the Investigatory Powers Commissioner as soon as possible. This inadequate protection is therefore dependent on the assessment by the lawyer employed by the public authority. It would be better were the acquisition of all communications which are capable of being subject to LPP to be referred to the Investigatory Powers Commissioner (or to a judicial commissioner to whom the Investigatory Powers Commissioner delegates the task) to consider. LPP is not always an easy matter to determine, especially where it is alleged that the exception applies. It is unrealistic to leave that assessment to a lawyer employed by the public authority which seeks to take advantage of information obtained by a CHIS.

21. In the nature of a CHIS' relationship with the subject, it may be that most communications of which the CHIS becomes aware is unlikely to be subject to LPP. This is because sharing it with the CHIS would, in most cases, destroy the confidentiality essential to LPP.

(2) Covert Surveillance and Property Interference Code

General

22. The code applies to covert surveillance under part II of RIPA, and entry on or interference with property or wireless telegraphy under the Intelligence Services Act 1994 and the Police Act 1997. It does not apply to wireless or property interference under the IPA. For these purposes "covert surveillance" includes (i) directed surveillance which is intrusive but is intended to obtain private information about any person and (ii) intrusive surveillance which occurs in premises or a vehicle.

23. The statutory prohibition on any reference in legal proceedings to the existence of an interception warrant issued under IPA results in complexities exemplified in para 4.27 which would be avoided if such evidence were admissible. The Bar Council has consistently argued that intercept evidence should be admissible in court with the leave of the judge. The prohibition seems particularly illogical when the code provides for foreign surveillance teams to operate in the UK and obtain evidence for use in their own jurisdiction, which will include intercept evidence admissible in those jurisdictions but not in England and Wales (paras 5.25 to 5.27).

LPP material

24. Authorisation for intrusive surveillance requires the approval of a judicial commissioner; authorisations for directed surveillance generally does not (paras 5.8 and 6.16). Applications for equipment and property interference warrants require approval by a judicial commissioner only if (i) the property is a dwelling, hotel or office premises or (ii) the authorised action is likely to result in any person incidentally

acquiring knowledge of material subject to LPP, confidential personal information or confidential journalistic material (paras 7.24 and 9.23 to 9.28).

25. Para 9.51 refers to the *Regulation of Investigatory Powers (Extension of Authorisation Provisions: Legal Consultations) Order 2010*³. This Order provides that any directed surveillance taking place in premises used for legal consultations shall be treated as intrusive surveillance, and consequently require the approval of a judicial commissioner. The qualifying premises include courts or inquiry buildings, lawyers' professional premises, prisons, police stations and immigration detention centres.

26. Where there is an application for a combined authorisation approval of the judicial commissioner would be required for the intrusive part but not the directed part. This could result in a judicial commissioner concluding that the entire application is disproportionate but having no power to prevent the directed surveillance warrant taking effect (para 4.18). If these different types of warrants are the subject of separate applications, is the judicial commissioner to be informed of the existence of the application for directed surveillance when considering whether to approve the application concerning intrusive surveillance?

(3) Investigation of Protected Electronic Information Code

27. This code governs the powers under RIPA to require a person to disclose encrypted or password protected material in an intelligible form. It might include the power to require a person to provide a password or details of encryption, usually when the person who possesses that information refuses to produce the material in an intelligible form, or if the person in possession of the material no longer has access to the key which is known only to another person. Issues will arise about the procedure to be adopted when the material is in the possession of a corporation, one or more of whose officers or employees has access to the key, i.e. who is the subject of an order – the corporation or the individual(s).

28. Para 4.27 deals with the necessary requirement that the information to which access is required should be identified precisely.

29. The draft code contains no provisions about material subject to LPP. That is not an objectionable omission. The pre-requisite of the use of the powers which are the subject of this draft code is that the protected information sought can lawfully be accessed. That in turn means the processes for obtaining necessary authorisation to obtain the information has already been obtained, or, in the case of urgency, will be obtainable. Failure to satisfy this pre-condition will render exercise of the powers

³ SI 2010 No.461 <https://www.legislation.gov.uk/uksi/2010/461/contents/made>

specified in this code unlawful, just as if the public authority concerned had conducted an unlawful search of premises.

30. There is nothing of particular concern in this draft code in the light of the above comments.

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