EXPLANATORY MEMORANDUM TO
THE RETENTION OF COMMUNICATIONS DATA (FURTHER EXTENSION OF INITIAL PERIOD) ORDER 2005

2005 No.

1. This explanatory memorandum has been prepared by the Home Department and is laid before Parliament by Command of Her Majesty.

2. Description

2.1 The purpose of this draft Order is to further extend the initial period, provided in section 105 of the Anti-terrorism, Crime and Security Act 2001 ('the Act'), for a further two years such that the further extended initial period would end on 13 December 2007.

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

4. Legislative background

4.1 This draft Order is made in exercise of the powers conferred by section 105(3) of the Act and requires approval by resolution of each House of Parliament before it can be made.

4.2 Part 11 of the Act set up a structure within which the Secretary of State can issue a voluntary code of practice relating to retention of communications data. The Retention of Communications Data (Code of Practice) Order 2003[1], issued under section 102 of the Act brought into force, on 5 December 2003, such a code of practice, which had been drawn up in accordance with the procedures set out in section 103.

4.3 Communications service providers can volunteer to retain data for extended periods of time for the purposes of safeguarding national security and the prevention or detection of crime or the prosecution of offenders which may relate directly or indirectly to national security.

4.4 Under section 104 the Secretary of State can by order authorise the giving of directions to communications service providers to retain communications data. An order under section 104 can only be made after any requirements contained in the code of practice have been reviewed. However section 105 provides for the lapsing of the section 104 power at the end of an "initial period", unless the power is exercised within that time (i.e. an order is made authorising the giving of directions) or an order is made under section 105 extending the initial period. Any such extension of the initial period is for a further period of two years.

4.5 The Act was passed on 14 December 2001 with an initial period of two years provided for in section 105(2). The Retention of Communications Data (Extension of Initial Period) Order 2003[2], made under section 105(3), which came into force on 5 December 2003,

[1] S.I. 2003 No. 3175
[2] S.I. 2003 No. 3173

had the effect of extending the initial period for a further two years, such that the extended initial period ends on 13 December 2005.

5. Extent

5.1 This instrument applies to all of the United Kingdom.

6. European Convention on Human Rights

6.1 Hazel Blears, Minister of State for the Home Department, has made the following statement regarding Human Rights:

> "In my view the provisions of The Regulation of Communications Data (Further Extension of Initial Period) Order 2005 are compatible with the convention rights."

7. Policy Background

7.1 Communications data is information held by communication service providers relating to the communications made by the users of their services. This includes itemised call records, routing information and subscriber details. Communications data does not include the content of any communication.

7.2 Communications data remains a vital investigative tool for the intelligence services in the work they undertake to safeguard national security and for law enforcement agencies engaged in the prevention and detection of criminal offences and the prosecution of offenders which may relate directly or indirectly to national security. Evidence of terrorists' long-term planning, may not be known about or investigated until months after it takes place. Historic data can help retell events leading up to and including a terrorist attack. Equally this data can, and does, help prove individuals' alibis.

7.3 Part 11 of the Act provided a basis for the retention of communications data by providers for extended periods of time, either voluntarily under a code of practice or on mandatory basis upon the giving of directions. That part of the Act recognised the importance communications data can have in detecting terrorist suspects and preventing terrorist acts but also the duty placed on service providers to meet their data protection obligations and to erase or anonymise data.

7.4 Indeed, the Privacy and Electronic Communications (EC Directive) Regulations 2003[3] require certain communications traffic data must be erased or made anonymous once a communication is completed – unless the service providers' needs to retain it for a business purpose. If the provider has no need to keep that data it is destroyed.

7.5 The voluntary code of practice has been in place since December 2003. Since that time the Government has been working with a number of communications providers that have volunteered to retain communications data in line with the code of practice or have indicated a willingness to do so.

7.6 Volunteer providers and potential volunteer providers have considered, or are in the process of considering, how extended retention of communications data in line with the voluntary code of practice would be put into effect in relation to the data generated or

[3] S.I. 2003 No. 2426

processed by their respective networks or services. This can be a significant and technically complex undertaking in itself.

7.7 Proposals have been, and are in the process of being, put to the Government for implementing extended retention of data. The Government has sought, and will continue to seek, the advice of independent technical consultants to advise on the practicality and value for money of the data retention solutions proposed by communications providers. The Government also takes account of the market share of the service provider and the extent to which intelligence agencies and law enforcement agencies have placed lawful requirements upon the provider for the disclosure of communications data.

7.8 Because the arrangements being undertaken by communications providers, particularly those with significant undertakings, involve a complex process of conception, design, evaluation and implementation it is the Government's view that the requirements of the code of practice cannot yet be fully reviewed. For that reason the Government seeks to further extend the initial period provided for in section 105 of the Act.

7.9 In view of the current terrorist threat, in view of those communication providers that have volunteered to retain data in line with the code of practice but would prefer to be directed to retain data and in view of those communications providers that prefer only to be directed to retain data it is essential that the Government not allow the powers in section 104 of the Act to lapse.

8. Impact

8.1 A Regulatory Impact Assessment has not been prepared for this instrument. Other than communications service providers, it has no impact on business, charities or voluntary bodies.

8.2 To the extent that the extended retention of communications data impacts upon communications providers Section 106 of the Act provides that it shall be the duty of the Secretary of State to put in place arrangements for making available to communications providers appropriate contributions towards costs incurred by them complying with the provisions, or retaining data in line with, the code of practice, or costs incurred as a consequence of the retention of any communications data (such as the costs in retrieving specific data from any retained data).

8.3 Arrangements are in place to ensure communications providers undertaking to retain data in line with the code of practice are able to recover the costs they incur in doing so.

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.