EXPLANATORY MEMORANDUM TO

THE INVESTIGATORY POWERS (CODES OF PRACTICE AND MISCELLANEOUS AMENDMENTS) ORDER 2018

2018 No. 905

1. Introduction

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

2. Purpose of the instrument

2.1 The instrument brings into force three revised codes of practice regarding functions carried out under the Regulation of Investigatory Powers Act 2000 ("RIPA"). The various codes of practice have been updated to:

(a) bring them into line with current legislation and structures (such as the Investigatory Powers Act 2016 and its Commissioner);

(b) cover current practice;

(c) reflect changes to strengthen protection for juvenile covert human intelligence sources ("CHIS"), and for electronic information;

(d) bring various technical elements up to date.

2.2 The instrument also makes various amendments to provisions relating to the authorisation of covert investigatory powers, with amendments to:

(a) Schedule 1 to RIPA, updating the list of public authorities able to authorise surveillance activity and the use of CHIS under Part 2 of RIPA;

(b) the Schedule to the Regulation of Investigatory Powers (Directed Surveillance and Covert Human Intelligence Sources) Order 2010 (S.I. 2010/521) ("the 2010 Order"), updating the list of authorising authorities and the prescribed offices within those authorities;

(c) Schedule 8 to the Investigatory Powers Act 2016 ("IPA"), correcting an anomaly in the operation of combined warrants.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

Other matters of interest to the House of Commons

3.2 Disregarding minor or consequential changes, the territorial application of this instrument includes Scotland and Northern Ireland.

4. Legislative Context

Codes of Practice

4.1 The Secretary of State is required (section 71 of RIPA) to issue codes of practice relating to the exercise and performance of the powers and duties conferred or

imposed by or under Parts II and III of RIPA, section 5 of the Intelligence Services Act 1994 and Part III of the Police Act 1997. The Secretary of State has previously issued codes of practice under RIPA. This Order will bring into force three revised codes of practice relating to covert surveillance and property interference; CHIS and the investigation of protected electronic information. These revised codes of practice will replace the previous versions of the codes.

4.2 Section 72 of RIPA sets out the effect of the codes. A person must have regard to the codes when exercising any functions to which the codes relate. The codes are admissible as evidence and a court or tribunal may take them into account in any relevant proceedings.

Public authorities

4.3 Schedule 1 to RIPA lists the public authorities able to authorise directed surveillance or the use of CHIS under Part II of RIPA. The Secretary of State may by Order amend the public authorities listed in Schedule 1 to RIPA, by adding or removing public authorities (or making any change consequential on any change in the name of a public authority). The power to amend Schedule 1 to RIPA has been used on numerous occasions to reflect necessary changes to the list of public authorities. The Secretary of State is also able to make Orders prescribing the offices, ranks and positions of the persons designated in each public authority for the purpose of authorising directed surveillance or use or conduct of CHIS. The Schedule to the 2010 Order consolidates all the prescribed offices in a single table, setting out the offices, ranks and positions for each of the public authorities who operate under RIPA. As a result, where changes are necessary, this is done by way of amendment to the 2010 Order.

Combined warrants

4.4 Paragraph 33(1) of Schedule 8 to the IPA enables the Secretary of State to make regulations modifying any provision made under an enactment in consequence of any provision made by Schedule 8 to the IPA, which relates to combined warrants or authorisations.

5. Extent and Territorial Application

5.1 The extent of this instrument is the whole of the United Kingdom.

5.2 The territorial application of this instrument is the whole of the United Kingdom.

6. European Convention on Human Rights

6.1 The Minister of State for Security, Rt Hon Ben Wallace MP, has made the following statement regarding human rights:

"In my view the provisions of the Investigatory Powers (Codes of Practice and Miscellaneous Amendments) Order 2018 are compatible with the Convention rights."

7. Policy Background

What is being done and why

7.1 The purpose of this Order is:

(a) ***Codes of practice:*** to bring into force three revised codes of practice regarding functions carried out under the RIPA. The codes of practice relate to: covert surveillance and property interference; CHIS, and the investigation of protected electronic information. The revised codes of practice will replace the previous versions;

(b) ***Public authorities:*** to make a number of updates to the public authorities listed in Schedule 1 to RIPA as able to authorise directed surveillance and use or conduct of CHIS, as well as to the lists of offices, ranks and positions within those public authorities at which the directed surveillance or CHIS may be authorised and the purposes for which authorisations may be given. The lists of offices, ranks and positions are set out in the 2010 Order;

(c) ***Combined warrants:*** to amend the provisions relating to combined warrants in Schedule 8 to the IPA to remedy an unintended effect on warrant duration when combining targeted interception or equipment interference warrants made under the IPA with intrusive surveillance warrants under Part II of RIPA.

7.2 Further detail is set out below.

Codes of Practice

7.3 Section 71 of RIPA requires codes of practice to be issued about the exercise and performance of the powers and duties conferred or imposed by or under Parts II and III of RIPA, section 5 of the Intelligence Services Act 1994 and Part III of the Police Act 1997. The Government is updating three of the codes of practice already issued under this provision. Each of the three codes sets out the processes and safeguards governing the use of the relevant investigatory powers by public authorities.

7.4 The codes 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. The codes are primarily intended to guide those public authorities which are able to exercise powers under the Act. 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 manner Parliament intended.

7.5 A summary of the three codes and the updates made is set out below:

Covert surveillance and property interference: this code of practice relates to the exercise of functions under Part II of the RIPA, section 5 of the Intelligence Services Act 1994, and Part III of the Police Act 1997, covering the authorisation of covert surveillance (both directed and intrusive surveillance) and property interference. Intrusive surveillance is covert surveillance that is carried out in relation to anything taking place on residential premises or in any private vehicle, or is carried out by means of a surveillance device. It includes, for example, covertly monitoring a suspect by means of a hidden listening device. Directed surveillance is covert surveillance that is not intrusive, and is carried out in relation to a specific investigation or operation in such a manner as is likely to result in the obtaining of private information about any person. It includes, for example, covertly monitoring a suspect when they are in a public area. Property interference is the entry on or interference with property or with wireless telegraphy. It includes, for example, covertly entering a private property for the purpose of installing a listening device.

The code was last issued in 2014 and is being revised to reflect changes in practice since that time, as well as changes introduced by the IPA.

The IPA introduced a number of changes including,

(i) the creation of a new Investigatory Powers Commissioner (who has replaced the existing oversight bodies for the use of covert surveillance and property interference),

(ii) restricting the circumstances in which property interference warrants or authorisations can be sought, introducing equipment interference warrants which will be used for much of this activity in the future.

In addition, this measure revises the code to align safeguards relating to the handling of material obtained through covert surveillance or property interference, including legally privileged or other sensitive material, and error reporting procedures, with the stronger safeguards introduced by the IPA. The revised code has also been updated with expanded guidance on the procedures to follow when carrying out online surveillance and aerial surveillance, and includes a number of technical changes throughout the document to reflect issues raised by practitioners and reflect best practice.

Covert Human Intelligence Sources: this code of practice relates to the use and conduct of CHIS under Part II of the RIPA. CHIS are people who, at the direction of a public authority, establish or maintain a relationship with someone else for the covert purpose of obtaining, providing access to or disclosing information. The code was last issued in 2014 and is being revised to reflect changes in practice since that time, as well as changes introduced by the IPA as set out above. The revised code has also been updated with expanded guidance on the procedures to follow when using CHIS for internet based investigations, together with further amendments aimed at reinforcing the protection of those acting as CHIS. In addition, the revised code includes a number of technical changes throughout the document to reflect issues raised by practitioners and reflect best practice.

Protection of electronic information: this code of practice relates to the use of the power in Part III of the RIPA, which enables public authorities to,

(i) require protected electronic information which they have obtained lawfully or are likely to obtain lawfully to be put in intelligible form;

(ii) acquire the means to gain access to protected information, and

(iii) acquire the means to put protected information into an intelligible form. This power is usually used in criminal investigations.

The code is being revised to reflect changes made by the IPA, including the creation of a new Investigatory Powers Commissioner, replacing the previous oversight bodies for the provisions relating to the protection of electronic information, and the equipment interference regime (one of the means by which a public authority might typically obtain encrypted information). A minor change has also been made to clarify that the role of the National Technical Assistance Centre in the notification process is advisory, and provide for a possible future transfer of that role to another body.

Public authorities

7.6 Part II of RIPA sets out a framework for the authorisation of covert surveillance and CHIS, to ensure their authorisation on specific grounds where it is necessary and proportionate, thereby complying with ECHR requirements. Such authorisations may

only be made by the public authorities listed in Schedule 1 to RIPA, and must only be authorised by persons designated by order under RIPA.

7.7 Those persons are set out separately in the Schedule to the 2010 Order, along with the grounds on which such authorisations may be made. This ensures that the framework is only used by those bodies approved by parliament, and that authorisation procedures are handled at a suitable level of seniority within each public authority. Both Schedule 1 to RIPA and the Schedule to the 2010 Order have been updated periodically to reflect changes in the names and functions of public authorities, or in the names of offices ranks or positions or purposes for authorisation of the powers, as a result of restructuring within the public authorities themselves or wider government changes.

7.8 Schedule 1 of RIPA is being updated by this Order to remove the Northern Ireland Office and the Dover Harbour Board from the Schedule, as neither body has the need to continue authorising powers under Part II of the RIPA, and to add the Marine Management Organisation, which assumed functions that used to be exercised by the Marine Fisheries Agency operating within DEFRA, and requires the use of powers under Part II that used to be available to that agency.

7.9 This Order also updates the Schedule to the 2010 Order to reflect changes in the structure, functions or job titles of public authorities. The changes made to the 2010 Order are consistent with the existing structures already agreed by Parliament. The changes relate to the following public authorities, all of whom (or a predecessor of the same body) are currently able to exercise powers under Part II of RIPA:

- Department for Environment, Food and Rural Affairs
- Home Office
- Department of Justice in Northern Ireland (for functions previously exercised by the Northern Ireland Office)
- Department for Business, Energy and Industrial Strategy (in respect of the Insolvency Service)
- Department for Transport (in respect of the Driver and Vehicle Standards Agency)
- Welsh Assembly Government
- Environment Agency
- Food Standards Agency
- Gambling Commission
- Independent Office for Police Conduct
- Gangmasters Labour and Abuse Authority
- Health and Safety Executive
- Marine Management Organisation
- Her Majesty's Chief Inspector of Education, Children's Services and Skills
- General Pharmaceutical Council
- Dover Harbour Board
- Natural Resources Wales

Combined warrants

7.10 Schedule 8 of the IPA allows some types of warrants and authorisations to be issued together in one combined warrant. A combined warrant can include an intrusive surveillance warrant issued under section 32 of RIPA. Schedule 8 also sets out the rules that apply when combined warrants are issued.

7.11 One of the rules (paragraph 27 of Paragraph 8) deals with the duration of combined warrants. It provides that you must look at the duration each warrant or authorisation would have if issued separately, as a single instrument. The combined warrant then has the shortest of those durations.

7.12 This order amends paragraph 27 in respect of combined warrants that include an intrusive surveillance warrant issued under section 32 of RIPA where the application for the warrant was from any of the intelligence services.

7.13 Section 44(3) of RIPA provides that if such a warrant is signed by an official instead of the Secretary of State it has a duration of 2 working days (instead of the normal 6 months).

7.14 However, if such a warrant is included in a combined warrant the procedures in the IPA will apply. That includes the 'double lock' of both Secretary of State authorisation and Judicial Commissioner approval. Because of the additional safeguard of Judicial Commissioner approval, it is not necessary for a warrant signed on behalf of the Secretary of State by a senior official (having been personally and expressly authorised to do so by the Secretary of State) to only last for two working days. Furthermore, there are practical difficulties in seeking Judicial Commissioner approval to renew the warrant within two working days. This Order therefore amends paragraph 27 of Schedule 8 to the IPA to provide that section 44(3) does not apply in these circumstances.

8. Consultation outcome

8.1 A public consultation on the RIPA codes of practice was carried out between 16 November 2017 and 28 December 2017. A total of 12 responses were received to the consultation. These were from members of the public, representatives of legal bodies, an oversight body, and public authorities empowered under the Act. As a result of the consultation, a number of changes have been made to the codes of practice in relation to a number of issues. These include procedures for making combined warrants or authorisations, or for using material that reveals the existence of an interception warrant, further clarification of when an authorisation may be required for online surveillance, processes for conducting reviews of authorisations, safeguards for trade unions, variations in the duration of authorisations where legally privileged material is involved, and processes for authorising multiple CHIS or deploying CHIS overseas. Further detail is set out in the Government's response to the consultation, which is available on the gov.uk website.

8.2 An informal consultation was also carried out among public authorities listed in Schedule 1 to RIPA, to invite details of any updates required to Schedule 1 or the 2010 Order as a result of organisational changes. Responses are reflected in the changes included in this Order.

9. Guidance

9.1 The codes of practice brought into effect by this order contain guidance about the powers covered by this order, including guidance about the effect of the codes as set out above. Additional guidance is provided by the Investigatory Powers Commissioner, who has a statutory duty to oversee the authorisation of these techniques under RIPA.

10. Impact

10.1 There is no impact on business, charities or voluntary bodies.

10.2 There is no impact on the public sector.

10.3 An Impact Assessment has not been prepared for this instrument.

11. Regulating small business

11.1 The legislation does not apply to activities that are undertaken by small businesses.

12. Monitoring & review

12.1 The government will keep under review the operation of this legislation, including:

(a) through the independent inspection and oversight by the Investigatory Powers Commissioner; and

(b) in respect of the amendment made to Schedule 8 to the IPA, section 260 of that Act requires the Secretary of State to report on the operation of the Act, after a period of 5 years and 6 months after Royal Assent. The report must be published and laid before Parliament. In preparing the report the Secretary of State must take into account any report on the operation of the Act produced by a Select Committee of either House of Parliament.

13. Contact

13.1 Susan Wale at the Home Office Telephone: 020 7035 1216 or email: susan.wale@homeoffice.x.gsi.gov.uk can answer any queries regarding the instrument.