**EXPLANATORY MEMORANDUM TO**

# THE INVESTIGATORY POWERS (COMMUNICATIONS DATA) (RELEVANT PUBLIC AUTHORITIES AND DESIGNATED SENIOR OFFICERS) REGULATIONS 2022

**2022 No. 1395**

## 1. Introduction

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

## 2. Purpose of the instrument

2.1 This statutory instrument (SI) amends schedule 4 to the Investigatory Powers Act 2016 (IPA) to remove the UK Intelligence Community's power to authorise internally the acquisition of communications data (CD) other than in urgent circumstances in response to the High Court's ruling in the case of *Liberty v the Secretary of State for the Home Department and the Secretary of State for the Foreign and Commonwealth Affairs ("Liberty")*. This SI also amends the entry in Schedule 4 relating to the United Kingdom National Authority for Counter Eavesdropping (UK NACE) to make it more consistent with other similar entries.

## 3. Matters of special interest to Parliament

3.1 None.

## 4. Extent and Territorial Application

4.1 The extent of this instrument (that is, the jurisdiction(s) which the instrument forms part of the law of) is England and Wales, Scotland and Northern Ireland.

4.2 The territorial application of this instrument (that is, where the instrument produces a practical effect) is England and Wales, Scotland and Northern Ireland.

## 5. European Convention on Human Rights

5.1 The Secretary of State for the Home Department has made the following statement regarding Human Rights:

"In my view the provisions of the Investigatory Powers (Communications Data) (Relevant Public Authorities and Designated Senior Officers) Regulations 2022 are compatible with the Convention rights."

## 6. Legislative Context

6.1 In June 2022 the High Court, in *Liberty*, held that the Intelligence and Security Agencies ability under the IPA to self-authorise the acquisition of CD solely for serious crime purposes was incompatible with retained European Union law. That judgment was stayed until 1st January 2023 in order to allow the Home Office time to implement the judgment and protect operational effectiveness. The amendments made by this instrument will require those Agencies to seek such authorisations from the Investigatory Powers Commissioner in the future, unless the acquisition is urgent, in which case those Agencies will be able to continue to self-authorise that

acquisition, in the same way law enforcement agencies may do so. These changes are being made by amending Schedule 4 to the IPA to remove those Agencies' designation under column 5 in relation to serious crime and designate them in column 6 solely for the purposes of acquiring CD for the purpose of preventing and detecting serious crime in urgent situations. The amendments to Schedule 4, read with section 70 of that Act, have the effect described above.

6.2 UK NACE is already listed in Schedule 4 to the IPA but the Home Office wishes to make UK NACE's designation more consistent with the designation of other organisations which are part of wider organisations. For example, the designation of the organisation called Border Force is done by reference to the Home Office being the relevant public authority and the designated senior officer is an officer holding a certain rank with responsibility for the immigration and border security. This is the approach the Home Office is seeking to replicate for UK NACE and intends to adopt for future, similar, organisations.

## 7. Policy background

***What is being done and why?***

7.1 The judgment handed down in June 2022 requires the Intelligence and Security Agencies to seek prior independent authorisation for targeted CD requests which are for serious crime purposes only where the CD is being requested from a telecommunications operator subject to a data retention notice under Part 4 of the IPA. This Instrument will amend Schedule 4 to the IPA which lists public authorities that have powers to acquire CD under Part 3 of the IPA. The changes remove UKIC's power to self-authorise the acquisition of CD solely for serious crime purposes but allow them to self-authorise the acquisition of CD for that purpose in urgent circumstances, in the same way that law enforcement agencies can. The Intelligence and Security Agencies must comply with the court's judgment in the *Liberty* case in accordance with the rule of law and this instrument implements the Court's judgment. This Instrument will also amend the UK NACE entry in Schedule 4 to reflect UK NACE's position as a part of the Foreign, Commonwealth and Development Office (FCDO). Amending the UK NACE designation will make it more consistent with the approach taken for other similar bodies.

## 8. European Union Withdrawal and Future Relationship

8.1 This instrument does not relate to withdrawal from the European Union / trigger the statement requirements under the European Union (Withdrawal) Act.

## 9. Consolidation

9.1 This Instrument is not an appropriate instrument to consolidate past changes to Schedule 4 of the IPA.

## 10. Consultation outcome

10.1 The Home Office initiated the statutory consultation period which began on 28 July 2022 with the Investigatory Powers Commissioners Office (IPCO), The UK Intelligence and Security Agencies and the Foreign, Commonwealth and Development Office (FCDO). HMG wrote to these organisations and held meetings with representatives to discuss the impact and implications of the proposed

amendments. The consultation period ended on the 28 October 2022 with agreement on the purpose and effect of the SI.

## 11. Guidance

11.1 Guidance is not required. The bodies affected by the changes made by the Instrument understand the changes that will occur.

## 12. Impact

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

12.2 There is no, or no significant, impact on the public sector.

12.3 A full Impact Assessment has not been prepared for this instrument because of the low level of operational impact to those affected by the changes made by the Instrument per business.

## 13. Regulating small business

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

## 14. Monitoring & review

14.1 The approach to monitoring of this legislation is to work with the Investigatory Powers Commissioner's Office, the regulators of the IPA, to ensure any deviations from the legislation are identified early and addressed appropriately.

14.2 The instrument does not include a statutory review clause because it does not affect businesses and is being made in order to implement a court judgment.

## 15. Contact

15.1 Fozia Forsyth at the Home Office Telephone: 07787000387 or email: Fozia.forsyth@homeoffice.gov.uk can be contacted with any queries regarding the instrument.

15.2 Lucy Montgomery-Pott, Deputy Director for Investigatory Powers Unit, at the Home Office can confirm that this Explanatory Memorandum meets the required standard.

15.3 The Secretary of State at the Home Office can confirm that this Explanatory Memorandum meets the required standard.