

REPORT OF THE INVESTIGATORY POWERS COMMISSIONER

REGULATION OF INVESTIGATORY POWERS (BAILIWICK OF GUERNSEY) LAW 2003

A. THE LAW IN SUMMARY

The Regulation of Investigatory Powers (Bailiwick of Guernsey) Law 2003 (“The Law”) created a comprehensive statutory framework for the use of such powers by public authorities in the Bailiwick. These powers include:

- Interception of Communications
- The Acquisition of Communications Data
- Intrusive surveillance
- Directed surveillance
- Covert Human Intelligence Sources
- Interference with property and
- Access to encrypted data.

Interception

This is dealt with in Part I, Chapter 1 of The Law. (Sections 1-16)

It sets out the circumstances in which interception of communications is lawful and creates both a criminal offence and civil liability for unlawful interception. It deals with necessary territorial restrictions and mutual legal assistance between jurisdictions.

Only certain persons may apply for an interception warrant. Within the Bailiwick they are the Chief Officers of the Island Police Force and of the Border Agency. (Section 6).

Interception warrants may only be issued by Her Majesty’s Procureur or Comptroller (“the Law Officers”). (Sections 5 and 67(3)). They may only do so if they believe the issue of a warrant is necessary

- in the interests of national security,
- for the prevention or detection of serious crime,
- for the purpose of safeguarding the economic well-being of the Bailiwick or
- for the purpose of giving effect to an international agreement.

Serious crime is defined in Section 67(3) as conduct, constituting one or more criminal offences, which

- involves the use of violence,
- results in substantial financial gain, or
- is conducted by a large number of persons in pursuit of a common purpose, or for which
- a person aged 21 or more with no previous convictions could reasonably be expected to be sentenced to 3 or more years in prison.

Before a warrant may be issued HMP must ensure that the interception is proportionate to what is sought to be achieved and must take into account whether the information sought by the warrant could reasonably be obtained by other means.

Those served with a warrant must comply with it. Failure to do so is a criminal offence. (Section 10).

There are provisions for the retention, storage and destruction of material obtained on a warrant. (Section 12).

The fact that a warrant has been issued may not be referred to directly or indirectly in court proceedings save in wholly exceptional circumstances. Unlawful disclosure of any matter relating to a warrant is a criminal offence. (Sections 14-16).

The Committee of the Home Department, in consultation with HMP, may make regulations requiring communication service providers to maintain a reasonable intercept capacity. (Section 11)

Warrants may only be for a 3 month period if not renewed and may be cancelled if no longer necessary. Renewals may be for a maximum of 3 months save in cases where national security or the economic well-being of the island is at stake when a Law Officer may renew the warrant for a maximum of 6 months. (Section 8).

Communications Data

This is dealt with in Part 1 Chapter 2 of the Law. (Sections 17-20).

The persons who may grant authorisations to require service providers to provide communications data are set out. These are: the Head of Law Enforcement (who now holds the role of Chief Officer of Police and of Customs) and the Law Officers on behalf of the Security Services and other public authorities. (Section 20). The criteria which must be satisfied are the first three of those set out above in the case of interception warrants. (Section 18).

“Communications data” is defined in the definition section of the Law (Section 67). In summary it means anything to do with a postal or telephonic communication except the content of the communication itself.

Intrusive surveillance

This and the following 2 topics are dealt with in Part II Chapter 1 of The Law.

This, as with applications for communication data, can only be authorised either by the Head of Law Enforcement or a Law Officer on application to him or her by the Security Services, The Armed Forces and certain public authorities within Guernsey. An authority issued by the Head of Law Enforcement must be confirmed by a Law Officer before it is acted upon save in urgent cases. The criteria to be satisfied are the same as those for communications data authorisations. (Section 26-29).

“Intrusive” surveillance is surveillance carried out within a house, flat or vehicle and is carried out either by a person or by a surveillance device. (Section 21(3)).

Directed surveillance

This too is to be found in Part II Chapter 1.

Directed Surveillance may be authorised by a wider number of people within law enforcement agencies and other public authorities. (Section 25).

It involves any planned surveillance of persons or property short of intrusive surveillance. (Section 21(2)).

Covert human intelligence sources (CHIS)

These are also to be found in Part II Chapter 1.

While those who may authorise the use of CHIS are the same as those who may authorise directed surveillance the use of CHIS is hedged about with limitations and cautions. The criteria of necessity and proportionality are similar to but slightly wider than those for which intrusive surveillance and data communications authorities may be granted. In addition there must be a designated officer of the relevant authority with day-to-day responsibility for dealing with the CHIS and his or her welfare etc. Careful records of the use of the CHIS must be kept. (Section 24).

Interference with property

This topic is dealt with in Part II Chapter 2. (Sections 40-41).

All such applications must be made to a Law Officer save in urgent cases when a Chief Officer may authorise property interference but must then report the fact as soon as possible to a Law Officer. (Section 42).

Disclosure notices/Encrypted information

This topic is also dealt with in Part III and Schedule 2 to The Law.

It concerns information sought by any relevant public authority in electronic form, such information having been encrypted, or otherwise disguised, so that its meaning is not readily ascertainable. Any person who has lawfully come into possession of encrypted material may apply to a person holding judicial office for permission to serve a notice requiring the holder of the encrypted information to deliver it in intelligible form to the public authority concerned. Safeguards must be put in place to protect such material once it has been handed over. Criminal offences are created as follows:

- failing to comply with a notice (section 49)
- Tipping off in cases where the notice to produce the information includes an explicit requirement for secrecy. (Section 50) – maximum sentence 2 years.

While there is no duty to report such applications to the Commissioner, if there are proceedings arising from an alleged breach of the conditions under which the information obtained under a Disclosure Notice is held or used the opinion of the Commissioner may be sought and due regard should be had of it by the court trying the case. Section 51(4) and (7).

General

The maximum period for all authorisations under Chapter 2, whether initial or renewed, is 3 months, unless they are renewed within that time.

The role of the Commissioner

My role is set out in Part 4 of the Law. Broadly speaking it is

- to review the exercise and performance of powers and duties of those on whom they are conferred by Parts 1-3, save the Bailiff and the other holders of high judicial office in Part 3;
- to review the adequacy of arrangements made
 - o by the Law Officers concerning the restricted use of intercept material under Sections 1-10,
 - o by those responsible for exercising the powers and duties under Part I Chapter 2 and Part II, and
 - o by those responsible for operating the powers and duties granted by judicial office holders relating to encrypted material in Part 3.

If the Commissioner finds that there have been contraventions of the Law or that there are inadequate arrangements in place he is to report the fact to the Bailiff.

Finally it is the duty of the Commissioner to provide the Bailiff with an annual report.

The Tribunal

This is created and its role and composition defined in Part 4 of the Law. It has jurisdiction to hear and determine any complaint made by a person who believes that he or she has suffered detriment as a consequence of the operation of the Law.

B. MY INVESTIGATION

I have received and reviewed reports and the relevant underlying documentation from Guernsey Police, the Border Agency and the Social Security Department concerning their operation of the Law during the course of 2016 and have had the opportunity of discussing these and other matters with senior officers of all three and the Law Officers.

I am again very grateful to all those who assisted me in my task and speedily and efficiently answered such queries as I had as to the contents of the reports and the underlying documentation.

I am satisfied that I have had all necessary access to both documentation and personnel to enable me to discharge my functions under the Law.

From all that I have seen or heard I am satisfied that the provisions of the Law have been properly and effectively administered and have led to the prevention and detection of serious crime within the Bailiwick. The Police and Border agency have been able, by the use of one or more of the investigative techniques already described, to arrest and prosecute a number of persons for offences and to forestall other criminal enterprises.

SUMMARY

It would be inappropriate to go into detail in respect of individual operations and their results but it is possible to state that as the direct or indirect result of the deployment of one or more of these techniques during the year, the combined cooperative efforts of Law Enforcement (Police and Customs/Border Agency) in this area have, directly or indirectly, had the following results:

The seizure of drugs and cash worth more than £750,000.

The recovery, or court orders for the payment, of well over £100,000

The removal from the market of substantial quantities of Class A and B drugs.

The convictions of 11 offenders and total prison sentences of some 52 years.

In addition Social Services made use of some of the powers available to them under the Law. These resulted directly or indirectly in the prosecution of a number of offenders. In addition the estimated saving of future overpayments over the year was more than £70,000, and overpayments detected for recovery amounted to almost £10,000.

Interception

I am satisfied that those responsible for applying for such warrants appreciate the sensitive nature of the activities being undertaken and conscientiously apply the criteria laid down. Likewise the procedures for granting, refusing, cancelling or renewing such warrants have been conscientiously carried out within the framework of necessity (no reasonable alternative way of obtaining necessary information) and proportionality (no less intrusive way of obtaining the information). I have been shown all the underlying documentation and discussed it with Senior Officers before coming to this conclusion.

Communications data

I have made enquiries of those responsible for this topic and have seen the underlying documentation. I am satisfied that the proper criteria have been applied in every case.

Intrusive surveillance

HM Procureur has complied with her duty in respect of this topic.

Directed surveillance

I have examined the underlying documentation and discussed the topic with relevant senior officers. I am satisfied that the proper standards have been applied to the application, grant, review, renewal and cancellation of such authorisations by the agencies concerned.

Covert human intelligence sources (CHIS)

I have conducted a similar exercise in respect of this sensitive area. I am satisfied from my review of the documentation and my discussions with senior officers that the relevant sections of the Law have been properly applied, that authorisations granted have been properly made and that the continuation or cancellation of such authorisations is kept under proper review.

Interference with property

I am satisfied with the information I have received on this topic.

Encrypted information

I have reviewed the use of these powers as exercised in the course of 2016 and find that they were properly used.

Errors

Inevitably in the course of a year errors are made whether by those investigating crime or those required to perform duties or provide information under the various RIPL provisions. I have investigated the few errors committed during the year and am satisfied that none of them had any adverse effects on the rights of those under investigation. All were corrected immediately upon discovery.

C. THE CONFIDENTIAL APPENDIX

In accordance with section 54(7) of the Law, if it appears to the Bailiff, after consultation with the Commissioner, that the publication of any matter contained the Commissioner's Report would be contrary to the public interest, or prejudicial to national security, the prevention or detention of serious crime, the economic well-being of the Bailiwick, or the continued discharge of the functions by any public authority whose activities are subject to review by the Commissioner, the Bailiff may exclude that material from the copy of the Report to be laid before the Royal Court.

My predecessor as Commissioner, both under the 1997 Law which preceded the 2003 Law, and since made it his practice to do so. I am satisfied, as he was, that there is information within the material I need to reveal to the Bailiff which should not be disclosed in my Report. To do so would potentially have a damaging impact on the effectiveness of what are wholly necessary techniques in today's world for detecting and preventing serious crime.

Accordingly I attach to this Report a Confidential Appendix lest the Bailiff should agree that the publication of the material contained within it would be prejudicial in one or more of the ways defined in the section.

Sir David Calvert-Smith

March 2017