

UNCLASSIFIED

**REPORT OF THE INVESTIGATORY POWERS
COMMISSIONER
(GUERNSEY)**

REVIEW PERIOD: JANUARY – DECEMBER 2017

**LORD ANDERSON OF IPSWICH K.B.E. Q.C.
AUGUST 2018**

INTRODUCTION

1. The Investigatory Powers Commissioner [**the Commissioner**] is a judge of the Guernsey Court of Appeal, appointed by the Bailiff under the Regulation of Investigatory Powers (Bailiwick of Guernsey) Law 2003 [**RIPL**] s53 to keep under review the exercise and performance of the powers and duties conferred and imposed under certain parts of RIPL.
2. Those powers and duties relate to the following investigatory techniques:
 - a. Interception of communications (RIPL Part I Chapter I, ss 1-10 and 12)
 - b. Acquisition and disclosure of communications data (RIPL Part I Chapter II)
 - c. Directed surveillance, intrusive surveillance and covert human intelligence sources [**CHIS**] (RIPL Part II Chapter I)
 - d. Interference with property (RIPL Part II Chapter II)
 - e. Investigation of electronic data protected by encryption etc. (RIPL Part III).

RIPL confers limited powers on specified persons to authorise the use of those techniques for stated purposes. It also regulates the use that can be made of material gained as a result.

3. It is not the function of the Commissioner to keep under review the exercise of any power of the States of Guernsey, the States of Alderney, the Chief Pleas of Sark or any committee thereof to make, amend or revoke any legislation (RIPL s53(4)).
4. The Commissioner is obliged to make an annual report to the Bailiff with respect to the carrying out of the Commissioner's functions (RIPL s54(4)). That report is to be made as soon as practicable after the end of each calendar year, and a copy of it laid before the Royal Court together with a statement as to whether any matter has been excluded from it because it appears to the Bailiff, after consultation with the Commissioner, that publication of that matter would be (RIPL s54(7)):
 - a. contrary to the public interest, or
 - b. prejudicial to national security, the prevention or detection of serious crime, the economic well-being of the Bailiwick, or the continued discharge of the functions of

any public authority whose activities include activities that are subject to review by the Commissioner.

5. I was appointed as Investigatory Powers Commissioner in 2017, in succession to Sir David Calvert-Smith who retired from the Court of Appeal upon reaching the statutory retirement age of 72. This is my first annual report, covering the calendar year 2017.

THE POWERS UNDER REVIEW

6. Full legal definitions of the powers under review are to be found in RIPL and are not repeated here. But for the benefit of those without detailed expertise in these matters, I indicate in this section in general terms what the use of these powers may involve in practice, and summarise the nature of the constraints placed by RIPL upon their exercise.

Interception of communications (RIPL Part I Chapter I)

7. The interception of communications in the course of their transmission traditionally refers to the opening of mail but in more recent times has taken the form of listening in to telephone conversations (phone-tapping).
8. The interception of such communications in the course of their transmission is normally a criminal offence in Guernsey (RIPL s1).
9. Interception is however lawful when authorised by an interception warrant issued personally by a Law Officer (s5: the reference to HM Procureur is deemed by s67 to include HM Comptroller). Warrants may be applied for by the Chief of Police, the Chief Officer of Customs and Excise, and competent authorities of other countries or territories with which Guernsey has a mutual assistance agreement (s6).
10. A warrant may only be issued if HM Procureur believes it is necessary in the interests of national security, for the purpose of preventing or detecting serious crime, for the purpose of safeguarding the economic well-being of the Bailiwick or to give effect for serious crime purposes to the provisions of international mutual assistance agreements (s5(3)). The conduct authorised by the warrant must also be proportionate to what it is sought to achieve (s5(2)(b)).
11. Serious crime is defined, for the purposes of RIPL, as offences which involve the use of violence, result in substantial financial gain or constitute conduct by a large number of persons in pursuit of a common purpose, or for which a person over 21 with no previous

convictions could reasonably be expected to be sentenced to imprisonment for three years or more (s67(3)).

12. Detailed provision is made in RIPL for the contents of warrants (s7), their duration, cancellation and renewal (s8), their modification (s9) and their implementation (s10). Safeguards relating to the dissemination, retention and disposal of intercepted material are set out in ss 12 and 13.
13. Disclosure of the issue of a warrant, the interception of a communication or the content of an intercepted communication (intercepted material or “intercept”) is generally prohibited (ss 14-16). As in the UK, but in contrast to most of the rest of the world, intercept is therefore inadmissible as evidence in criminal trials in Guernsey. This means that when intercept is sought in Guernsey, the intention is generally to find not evidence but intelligence which can help build a picture of the criminality involved, or assist in planning a disruption or further intervention from which admissible evidence may be acquired.
14. The very limited circumstances in which interception is lawful without a warrant are set out in RIPL s3.

Acquisition and disclosure of communications data (RIPL Part I Chapter II)

15. Communications data are data about use made of a telecommunications service, excluding the contents of the communications themselves. They are sometimes described as the “who, how, when and where” of a communication. Communications data are generally obtained retrospectively from a communications service provider [**CSP**] that retains that information, such as a mobile phone company or broadband provider. When intercept is collected in the course of transmission pursuant to RIPL Part I Chapter I, the related communications data are also collected.
16. There is no power in Guernsey law to compel CSPs to retain communications data: accordingly, the availability of such data depends on the practices of the various CSPs, which vary considerably as between themselves.
17. The different types of communications data, defined in RIPL s67(3), are grouped for operational purposes under the following heads:
 - a. **subscriber information** held by Communication Service Providers [**CSPs**] in relation to their customers, e.g. address, phone number or email address and bank account data; and

- b. **call data** held by CSPs in relation to the use made of their telecommunications (or postal) system, including data identifying the apparatus, location or address to or from which a communication is transmitted, and location data provided by mobile phones on the move, as they communicate with base stations or phone masts (cell-site data).
18. The acquisition of communications data is treated by the law as less intrusive than the interception of content, even though it is possible to tell a good deal about a person's movements and contacts through analysis of communications data. Accordingly, the range of purposes for which communications data may be obtained (s18(2)) is considerably wider than in the case of interception. For example, communications data may be requested if necessary "*for the purpose of preventing or detecting crime or of preventing disorder*" (s18(2)(b)), not merely for the purpose of preventing or detecting *serious* crime (s5(3)). It may also be requested in the interests of public safety or public health, for the purpose of assessing or collecting taxes or, in an emergency, for preventing death or injury (s18(2)(d)-(g)).
19. The range of public authorities permitted to access communications data is also wider than in the case of interception (s20). Police and Customs may issue their own authorisations, after the application of internal safeguards; other public authorities must obtain authorisation from the Law Officers.
20. Communications data can be obtained by the giving of notices to a postal or telecommunications operator, requiring the operator to obtain and/or disclose relevant data (s18(4)). As in the case of interception warrants, such notices may be issued by a designated person only when the requirements of necessity and proportionality are satisfied.
21. Provision is made in RIPL for the form and duration of authorisations and notices (s19).
22. Communications data, unlike intercept, are admissible as evidence in legal proceedings in Guernsey, and indeed often form a significant part of the prosecution case in relation to organised crime or conspiracy.

Directed and intrusive surveillance (RIPL Part II Chapter I)

23. Surveillance is defined by RIPL s69 as including "monitoring, observing or listening to persons, their movements, their conversations or their other activities or communications", and recording the product. For the purposes of RIPL, surveillance does not include the use of CHIS or warranted interception.

24. To be classed as intrusive, surveillance must be covert (s21(9)), and carried out in relation to anything taking place on any residential premises or in any private vehicle (s21(3)). Though it may involve the presence of an individual, it has traditionally taken the form of a technical surveillance device: for example a “bug” placed in a vehicle or dwelling. Surveillance carried out by a device designed or adapted principally for the purpose of providing information about the location of a vehicle is not intrusive (s21(4)(a)).
25. Because of its capacity to intrude into the private spaces of vehicle and home, intrusive surveillance may be authorised only for the same limited purposes and on satisfaction of the same conditions as to necessity and proportionality (s26(2)(3)). Authorisations for intrusive surveillance may also be issued by the Chief Officer of the Police and Customs and Excise (s26(1)(6)), but save in cases of urgency they may not take effect until approved by one of the Law Officers, who also have a power to quash or cancel (ss 30-31).
26. General rules about grant, renewal and duration of authorisations are in RIPL s34. Provisions relating to applications for intrusive surveillance by the UK intelligence services and armed forces are in ss 33 and 35.
27. Covert surveillance that is not intrusive but that is undertaken for the purposes of a specific investigation or operation, in such a manner as is likely to result in the obtaining of private information about a person, is known as directed surveillance (s21(2)). A classic form of directed surveillance is static, foot or mobile surveillance in the street. The use of tracking devices, and targeted open source research, may also class as directed surveillance. Directed surveillance assists in the prevention and detection of a wide range of crimes, from drugs offences to harassment. Though generally targeted on a particular suspect, it can and does identify the associates of known targets, as well as criminal activity not already known to the Guernsey Police. Like other forms of surveillance, it may also help decide the most propitious moment to launch executive action.
28. Directed surveillance is controlled in a manner analogous to the acquisition of communications data. The range of grounds on which the obtaining of communications data may be authorised are the same (s23(3)), and the range of public authorities permitted to authorise it (Schedule 1) is wide. The usual requirements of necessity and proportionality apply.

Covert human intelligence sources (CHIS) (RIPL Part II Chapter I)

29. A person is deemed to be a CHIS if they establish or maintain a personal or other relationship with a person for the covert purpose of obtaining information, or if they covertly disclose information obtained from such a relationship (RIPL s21(8)). CHIS can be,

but are not always, paid small amounts of money for their work by the public authorities that use them.

30. The public authorities entitled to use CHIS are the same as those authorised to use directed surveillance (Schedule 1). The system for authorisation, and the range of grounds for which CHIS may be authorised, are also the same (s24). Additional requirements are spelled out in s24(5). In particular:

- a. An officer (known as the handler) must have day-to-day responsibility for contact with the CHIS and for his or her welfare.
- b. A different officer (known as the controller) must oversee the use of the CHIS.
- c. Records must be kept of such use.
- d. There must be restricted access to details of the source's identity.

Interference with property (RIPL Part II Chapter II)

31. RIPL s 39 renders lawful "entry on or interference with property or with wireless telegraphy", if authorised by HM Procureur in accordance with the Law. The concept of interference with property is not closely defined. It includes, for example, the interference with the fabric of a dwelling that may be required to insert a surveillance device: with this in mind, RIPL s27(3) provides for the HM Procureur to issue combined authorisations under RIPL Part II Chapters I and II.

32. Property interference may be authorised only where HM Procureur believes that it is necessary for the purpose of preventing or detecting serious crime or in the interests of national security, and that the taking of the action is proportionate to what it seeks to achieve (RIPL s40(2)).

Investigation of data protected by encryption (RIPL Part III)

33. The law of Guernsey (like that of the UK, but not that of Jersey) allows for the issue of notices requiring the disclosure of the key to encrypted information that is lawfully within the possession of the authorities. Typically, it is used to obtain passwords allowing access to electronic devices such as mobile phones.

34. Such notices may be given where a person permitted under RIPL Schedule 2 reasonably believes it to be necessary on the restricted set of grounds applicable also to interception and intrusive surveillance, and to be proportionate: s46(2)(3).
35. Failure to comply with a notice under s46 is a criminal offence, punishable by up to two years' imprisonment after conviction on indictment and six months after summary conviction (s49). It is conceivable therefore that suspects facing long prison sentences if they are convicted of the index offence may choose to take their chances by disobeying a s46 notice. Part III has however proved its utility in Guernsey, as detailed further below.

Codes of Practice

36. RIPL ss 61-62 provides for the issue of codes of practice. Five such codes – on accessing communications data, CHIS, covert surveillance, interception of communications and interception of communications (postal) – were brought into operation pursuant to the Regulation of Investigatory Powers (Codes of Practice) (Bailiwick of Guernsey) Order 2004.
37. The authorities in Guernsey have also provided me with various internal guidance documents.
38. I have not conducted a comprehensive review of the codes of practice and guidance currently in force, though I did comment on a couple of unresolved issues that were brought to my attention during my inspection visit.

CONDUCT OF THE ANNUAL REVIEW

39. After my appointment as Commissioner, I held a day of preliminary meetings in September 2017 with Law Officers, Police and Customs and Social Security. At those meetings I was briefed in some detail on current conditions regarding crime and immigration, and the role of investigatory powers in supporting investigations, operations and prosecutions.
40. I also had the opportunity to review the last two reports of my predecessor, Sir David Calvert-Smith, together with their Confidential Appendices for the past two years. Guernsey was extremely fortunate to have the services of such a senior judge and former Director of Public Prosecutions. His reports seemed to me, with respect, to be as thorough and conscientious as any senior Judge working alone could have hoped to produce.
41. For several years now, the equivalent inspections in the UK have however been physically conducted on the ground not by judges at all but by specialised inspectors from the Investigatory Powers Commissioner's Office [IPCO]. Often from a law enforcement,

intelligence or civil service background, these inspectors have a close familiarity with the capabilities and procedures employed. Because they spend the entire year inspecting various authorising bodies, they also have a deep knowledge of constantly-evolving good practice. Much of this practice relates to matters outside the normal experience of a judge: for example, the considerable complexities and risks that attend the handling of CHIS; the procedures for investigation of criminality within public authorities; the optimal methods of deploying a variety of covert means at different stages of an investigation; and the operation of the various available systems for data management. With the best will in the world, it is always possible for practices to develop in an island jurisdiction that depart from those in play elsewhere.

42. Having come to know IPCO and two of its predecessor bodies, the Office of Surveillance Commissioners **[OSC]** and the Interception of Communications Commissioner's Office **[IOCCO]**, in particular by the delivery to and receiving from them of training, I was well conscious of the significant value that their inspectorate would be able to add to the inspection process. Accordingly and at my request, Rt Hon Sir Adrian Fulford, the Investigatory Powers Commissioner in the UK and a serving Lord Justice of Appeal, agreed to make available to me the services of an IPCO inspector for the purposes of my first inspection. That was in turn facilitated by the passage of the Regulation of Investigatory Powers (Bailiwick of Guernsey) (Amendment) Ordinance 2018, which amended RIPL s55(2) to allow for the appointment of an Assistant Commissioner who has not held judicial office.
43. On 10-12 April 2018, I conducted my annual inspection for the 2017 calendar year with, as my Assistant Commissioner, Clare Ringshaw-Dowle, a Chief Inspector of the Investigatory Powers Commissioner's Office **[IPCO]** in the UK. By arrangement with IPCO, the Government of Guernsey was asked to meet only Mrs Ringshaw-Dowle's costs of travel and subsistence during the three days that we spent on the island. Mrs Ringshaw-Dowle is a UK Civil Servant who regularly inspects the whole range of authorities making use of investigatory powers in England, Wales, Scotland and Northern Ireland. Particularly in relation to her specialist areas of intrusive and directed surveillance, CHIS and property interference, she brought knowledge and understanding to the task that no senior Judge could be expected to possess. The result was a series of illuminating discussions and recommendations which Guernsey Police and Border Agency undoubtedly found very useful.
44. The value added to my inspection by the Assistant Commissioner speaks for itself, and I hope that in the future a way will be found to maintain an element of IPCO input into the inspections that it is my function to carry out. I should like to place on record my gratitude to IPCO and Sir Adrian Fulford for their generous assistance to date, both in the provision of

an Assistant Commissioner and in making available to the Guernsey Law Officers, again without charge, the same training that was offered to the authorising judges in the UK.

SCOPE OF THIS REPORT

45. There is an obvious public interest in legislators, and indeed the people of Guernsey, understanding at least in outline how the intrusive powers conferred by law upon the public authorities translate into capabilities which are exercised on their behalf. That is the means by which those entrusted with these intrusive powers are rendered accountable to those whom they serve. Accordingly, in the body of this report, I have endeavoured to publish as fully as possible the conclusions of my review.
46. The trend in recent years in the UK and across northern Europe has been towards fuller disclosure of the use made of investigatory powers. An outstanding example is the work of IOCCO, one of the predecessor bodies of the UK's IPA, whose last annual report covering interception and communications data was published in December 2017.¹
47. In advising the Bailiff on what material should and should not be placed in the public domain, I have been guided by the practice of my predecessor Sir David Calvert-Smith, and by the developing practice of other oversight bodies. I have noted, in particular, that reports of the Interception of Communications Commissioner (Susie Alegre) and the Surveillance Commissioner for the Isle of Man (Brendan O'Friel) specify how many warrants and authorisations under the various different categories have been granted during the review period.²
48. I am also conscious, however, that there are special factors in a small jurisdiction such as Guernsey that make it difficult to disclose information as comprehensive as that which is released in the UK. To take two examples:
 - a. The last IOCCO report broke down figures for requests relating to criminal activity by crime type. Bearing in mind the low level of serious criminality in Guernsey, this is not a course that could safely be taken without giving at least a hint of the extent to which investigatory powers may have been used in specific operations or investigations.

¹ The Rt. Hon. Sir Stanley Burnton, Report of the Interception of Communications Commissioner – Annual Report for 2016, December 2017. See also the Annual Report of the Chief Surveillance Commissioner for 2016-2017, December 2017, which includes informative graphs showing the frequency of use of various kinds of surveillance over time.

² The latest Isle of Man reports available online as of April 2017 are the Interception of Communications Commissioner's annual report for 2015 (GD 2016/0020) and the Surveillance Commissioner's annual report for 2016 (GD 2017/0007).

- b. The lengthy Annex D to the last IOCCO report sets out the facts of 29 error investigations in considerable detail. Once again, to take a similar course would risk the identification of specific individuals and operations.
49. In this my first report, I have sought (above) to describe a little more fully the nature of the powers under review, and also to give an indication of how much each power has been used. I have not given a detailed breakdown for the use of investigatory powers by the different public authorities in Guernsey, so as to avoid any risk of the use of powers in specific operations being identified, but note that the overwhelming majority of authorisations and warrants requested and granted were:
- a. in support of the activities of Guernsey Police and the Guernsey Border Agency; and
 - b. for the purpose of preventing or detecting crime.
50. Further detail is reserved to the Confidential Appendix provided to the Bailiff, which will be provided at his discretion to users of investigatory powers so as to inform their training and pursuit of good practice. It is for the Bailiff to determine, after consultation with the Commissioner, the extent to which it would be prejudicial or contrary to the public interest for material to be published in the open version of this annual report (RIPL s54(7)). The Bailiff consulted me in a full and entirely satisfactory manner prior to making that determination.

INTERCEPTION

51. A total of 33 warrants for interception were issued during 2017, relating to the subjects of six investigations. That is an increase of approximately 50% on the number issued during 2016, and is at similar levels to the number issued in 2015. Most of the investigations concerned drug trafficking into Guernsey and associated money laundering offences.
52. I made a detailed examination of the use of interception warrants in three of the six investigations in which they were used, and reviewed the other three in outline. I also made enquiries into the processes for retention, sharing and destruction of intercept.
53. Some learning points were identified and passed on to those concerned. The overall picture was however a highly positive one, of intrusive but valuable powers being used in a lawful, proportionate and conscientious manner. I was particularly impressed by the thorough yet comprehensible nature of the applications, and the careful consideration given by Law Officers before any decision to approve them.

COMMUNICATIONS DATA

54. As in the UK (where no fewer than 754,559 items of communications data were acquired by public authorities in 2016), communications data requests were the most widely used of the investigatory powers in Guernsey. There were 59 authorisations for subscriber information, 76 for call data and 40 for the two categories together.
55. Communications data is useful not just for linking individuals with electronic devices but for tracing their patterns of organisation, communication and movement. It can be of value not only for piecing together criminal networks and activities, but for supporting the alibis of innocent suspects and tracing e.g. missing persons. Another use is in “*resolving*” IP addresses, a technique which can be of value for example in identifying which of a number of possible devices has been accessing indecent images of children from a server.
56. Accordingly, communications data was used during the period under review not only to target drug trafficking networks but in support of investigations into a range of other crimes, as well as in a missing persons investigation.
57. Communications data formed part of so many investigations, in conjunction with so many other types of evidence and intelligence, that it would be a difficult or impossible task to attribute any particular number of arrests, convictions or seizures to its use.
58. I was however briefed on a number of operations where communications data were successfully used, and conducted my own examination of a number of cases in which authorisations were sought and granted. I also looked at the procedures which are used to recover communications data relating to persons who have been in contact with or otherwise associated with the subjects of interception.
59. Two administrative errors were drawn to my attention, neither of which had consequences for the privacy of individuals.
60. It appeared to me on the basis of my examination that these powers were used during the period under review in a lawful, proportionate and conscientious manner.

INTRUSIVE SURVEILLANCE / PROPERTY INTERFERENCE

61. Only two authorisations for intrusive surveillance and five for interference with property were applied for and granted in the period under review.

62. They were reviewed by my Assistant Commissioner Clare Ringshaw-Dowle, who found the applications well put together and pertinent, the briefings to Law Officers thorough and their own observations and directions both pertinent and clear.

63. In one case, a failure in timely internal communication was appropriately dealt with, without consequence for individual privacy, and steps have been taken to avoid recurrence.

DIRECTED SURVEILLANCE

64. A total of 38 directed surveillance authorisations were granted in the period under review. These were, once again, reviewed by my Assistant Commissioner who found the applications to be generally satisfactory but made a suggestion for further improvement.

COVERT HUMAN INTELLIGENCE SOURCES (CHIS)

65. During the reporting period Guernsey Law Enforcement (Police and Border Agency) used the services of registered CHIS

66. My predecessor was satisfied last year that the relevant sections of RIPL had been properly applied, that authorisations granted had been properly made and that the continuation or cancellation of such authorisations had been kept under proper review.

67. This remained true in the year under review, though my Assistant Commissioner was able to use her practical knowledge of CHIS operation to make a number of recommendations aimed at the improvement of practice.

INVESTIGATION OF DATA PROTECTED BY ENCRYPTION

68. 12 section 46 notices were applied for during the period under review. Improved compliance was noted in 2017, following a number of convictions in Guernsey for failure to disclose the PIN code for mobile telephones. These convictions have been followed by prison sentences, including one sentence consecutive to the sentence imposed for the principal offence.

69. An internal guidance document was produced during the period under review, detailing the processes for obtaining and serving s46 notices, and aimed at ensuring that due consideration was given to necessity and proportionality. Appropriate steps were taken to ensure that the guidance was lawful and conformed to best practice. I reviewed the guidance document, but time did not permit during my visit to examine the individual files in s46 cases.

CONCLUSION

70. The investigatory powers under review were, so far as I was able to judge, exercised during 2017 in a lawful, proportionate and conscientious way. They made a significant contribution to the prevention and detection of serious crime in Guernsey, particularly though not exclusively in relation to drug trafficking and associated money laundering. While it would be inappropriate to give details that might allow the use of these powers to be traced to particular cases, operations in which Law Enforcement (Police and Customs/Border Agency) used the powers under review resulted during the course of 2017 in:

- a. the seizure of drugs and cash worth several hundreds of thousands of pounds,
- b. the recovery, or court orders for the payment, of a substantial six-figure total,
- c. the removal from the market of substantial quantities of Class A and Class B drugs, and
- d. numerous arrests, and a number of convictions which were followed in some cases by substantial terms of imprisonment.

In addition Social Services made use of some of the powers available to them under the Law, resulting directly or indirectly in the prosecution of a number of offenders. The estimated saving of future overpayments over the year was more than £60,000, and overpayments detected for recovery amounted to almost £10,000.

71. My Assistant Commissioner and I observed a number of examples of excellent practice, from both Guernsey Police and Border Agency and Law Officers. The few errors that were drawn to our attention had been promptly corrected, and without serious detrimental effects. My Assistant Commissioner, with her considerable comparative experience, was able to make a number of suggestions for practical improvements, which Law Enforcement has indicated its willingness to implement. In the time available we were not able to look comprehensively at all aspects the subjects, and I hope that in future inspections it will be possible to concentrate on other particular aspects.

72. Overall, I derived a satisfactory impression from my first inspection as Investigatory Powers Commissioner. The people of Guernsey can be confident that these intrusive powers were used in 2017 wisely and productively on their behalf.

Lord Anderson of Ipswich K.B.E. Q.C.

29 August 2018