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**Report of The Investigatory Powers Commissioner  
(Guernsey)**

**Review Period: January – December 2020**

**David Perry Q.C.**

**August 2021**

## Introduction

1. The Regulation of Investigatory Powers (Bailiwick of Guernsey) Law 2003 (“RIPL”) is a carefully constructed legislative scheme governing the use of certain law enforcement techniques, such as the interception of communications and surveillance. It is designed to ensure that the use of the particular surveillance techniques is regulated by law and externally supervised. As part of the supervisory regime, section 53 provides that the Bailiff shall appoint as Investigatory Powers Commissioner a judge of the Court of Appeal to carry out certain supervisory functions<sup>1</sup> and make an annual report with respect to the carrying out of those functions.<sup>2</sup>
2. I was appointed as Investigatory Powers Commissioner in September 2020. This was in succession to Lord Anderson of Ipswich K.B.E. Q.C. who, in July 2020, provided his third and final annual report, covering the calendar year 2019.
3. This is my first annual report, which for reasons explained below, covers not only the calendar year 2020, but also addresses the use of the various techniques during the first half of 2021 up to and including June 2021.
4. Before explaining the activities regulated by RIPL, it is helpful to summarise my role and responsibilities.

## The Investigatory Powers Commissioner

5. Part IV of RIPL (sections 53 – 62) bears the heading “*Scrutiny of Investigatory Powers*”. As noted, section 53 provides for the appointment by the Bailiff of the Investigatory Powers Commissioner whose functions (expressed in broad terms) are to keep under review the exercise and performance of the powers and duties conferred by RIPL. The Commissioner is concerned with the practical operation of the legislation as

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<sup>1</sup> As set out in section 53(2).

<sup>2</sup> See section 54(4).

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it stands. This is made clear by section 53(4) which provides that 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. Section 54(4) provides that the Commissioner is required “*from time to time and at least every twelve months*” to make a report to the Bailiff relating to the carrying out of the Commissioner’s functions as the Commissioner sees fit.<sup>3</sup>

### The Commissioner’s Functions

6. As part of his functions, the Commissioner is required<sup>4</sup> to keep under review the powers and duties conferred or imposed in relation to the following techniques of investigation or surveillance:
  - (i) the interception of communications;<sup>5</sup>
  - (ii) the acquisition and disclosure of communications data;<sup>6</sup>
  - (iii) the use of “*directed surveillance*”, “*intrusive surveillance*” and “*covert human intelligence sources*” and “*interference with property*”.<sup>7</sup>
  - (iv) the investigation of electronic data protected by encryption.<sup>8</sup>

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<sup>3</sup> There has been some delay in providing this annual Report, occasioned by the effects of the COVID-19 virus and the difficulty of visiting Guernsey. This has no bearing on its status or validity as an annual report within the meaning of section 54. It is to be hoped that, with the relaxation of travel restrictions, the next annual report will be published in the first half of 2022.

<sup>4</sup> By reason of section 53(2) of RIPL.

<sup>5</sup> In particular the exercise and performance by Her Majesty’s Procureur of the powers and duties conferred or imposed on her by sections 1 to 10 of RIPL.

<sup>6</sup> This is regulated by Chapter II of Part 1 of RIPL, sections 17 to 20.

<sup>7</sup> These activities are regulated by Part II of RIPL, sections 21 to 45.

<sup>8</sup> Such investigations are governed by Part III of RIPL, sections 46 – 52.

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7. The Commissioner is also required to keep under review the duty which is imposed on Her Majesty's Procureur by section 12<sup>9</sup> and the general duties imposed under section 51.<sup>10</sup>

### Reports by the Commissioner

8. Section 54 of RIPL provides for open channels of communication between the Commissioner and the Bailiff. Quite apart from his responsibility to produce an annual report, the Commissioner is required to make a report if there has been any contravention of RIPL in respect of which the Commissioner is concerned.<sup>11</sup> The Commissioner is also required to report to the Bailiff if at any time it appears that any of the arrangements by reference to which the duties imposed by sections 12 (interception of communications) and 51 (electronic data protected by encryption) have proved to be inadequate.<sup>12</sup> There is also a general power, vested in the Commissioner to make such other report to the Bailiff on any matter relating to the carrying out of the Commissioner's functions as the Commissioner thinks fit.<sup>13</sup>
9. So far as the annual report is concerned, the Bailiff is required to lay it before the Royal Court, for registration at the Greffe, together with a statement as to whether any matter has been excluded from it on the basis that publication would be contrary to the public interest or prejudicial to certain public interests.<sup>14</sup>

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<sup>9</sup> Section 12 provides that it shall be the duty of Her Majesty's Procureur to ensure that in relation to all interception warrants there are safeguards in place to restrict the use of, and access to, interception material to the minimum necessary for all authorised purposes (viz. purposes authorised by the statute).

<sup>10</sup> Section 51 contains general duties imposed on certain specified authorities (Her Majesty's Procureur, every Committee of the States of Deliberation, the States of Alderney and the Chief Pleas of Stark, the Chief Officer of the Island Police Force, the Chief Officer of Customs and Excise, and those officers or employees involved in the investigation of electronic data protected by encryption). These duties restrict the use of and access to keys to protected information to the minimum that is necessary for the statutory purpose of enabling protected information to be put into intelligible form.

<sup>11</sup> Save where the contravention has been the subject of a report made by the Bailiff to the Tribunal established by section 56 of RIPL: see section 54(2)(b).

<sup>12</sup> Section 54(3).

<sup>13</sup> Section 54(5).

<sup>14</sup> Section 54(7), the particular public interest grounds are identified as: (a) national security, (b) the prevention or detection of serious crime, (c) the economic well-being of the Bailiwick, or (d) the continued discharge of the functions of any public authority whose activities include activities that are subject to review by the Commissioner.

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### Assistant Commissioners

10. Section 55(1) of RIPL provides that the Bailiff may, after consultation with the Commissioner, appoint as Assistant Commissioners such number of persons as the Bailiff considers necessary for the purpose of providing the Commissioner with assistance in the performance of his functions. As originally enacted, section 55 provided that those persons eligible to be appointed as an Assistant Commissioners were persons who hold or had held certain types of judicial office. This was amended with effect from 28 March 2018,<sup>15</sup> with the result that the Bailiff may now appoint at the request of the Commissioner any person who is fit and proper to be an Assistant Commissioner.<sup>16</sup> This amendment was designed to permit the appointment of specialised inspectors from the United Kingdom's Investigatory Powers Commissioner's Office ("IPCO").
11. As in previous years,<sup>17</sup> the United Kingdom Investigatory Powers Commissioner (since October 2019 Rt Hon Sir Brian Leveson) agreed to make available (without charge to the Government of Guernsey, save as to travel and subsistence), the services of two Senior IPCO Inspectors who were appointed by the Bailiff as Assistant Commissioners for the purposes of my July 2021 inspection visit. These Assistant Commissioners were Mr Nicholas Fletcher and Mr Danny Caldwell.
12. I wish to place on record my gratitude to Sir Brian Leveson and all those concerned at IPCO for providing me with the services of these Inspectors and for their invaluable support during the inspection process. I also wish to extend my gratitude to the Bailiff for his willingness to appoint Mr Fletcher and Mr Caldwell as Assistant Commissioners.
13. Both Assistant Commissioners brought an expertise and understanding to the task of the inspection which no Commissioner, no matter how senior, could be expected to possess. Their detailed observations, together with recommendations drawn from their expert knowledge of current best practice in United Kingdom law enforcement, were

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<sup>15</sup> By the Regulation of Investigatory Powers (Bailiwick of Guernsey) (Amendment) Ordinance 2018.

<sup>16</sup> Section 55(2A).

<sup>17</sup> As a result of a practice initiated by my predecessor, Lord Anderson of Ipswich K.B.E. Q.C..

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made in oral briefings to relevant personnel during the course of our inspection visit and have since been reduced to confidential written reports which are submitted to the Bailiff together with this Report. These reports may, at the Bailiff's discretion, be provided to those who apply for and authorise investigation powers, so as to assist with training and the continuing pursuit of best practice.

14. It is to be hoped that Mr Fletcher and Mr Caldwell will continue to provide assistance as Assistant Commissioners in the future. This will not only serve to promote public confidence in the inspection process, it will also assist Guernsey law enforcement authorities in the more effective use of the powers under review, which will bring substantial benefit to the people of Guernsey.

### **The Powers Under Review**

15. As noted, RIPL is a detailed and comprehensive legislative structure governing interception of communications,<sup>18</sup> access to communications data,<sup>19</sup> surveillance and associated activities,<sup>20</sup> interference with property<sup>21</sup> and the investigation of electronic data protected by encryption.<sup>22</sup>
16. For the purposes of this Report it is sufficient to provide a brief summary of these various investigative techniques.

#### *Interception of Communications*<sup>23</sup>

17. Chapter I of Part I of RIPL provides a legislative structure governing the interception of communications in the course of their transmission by a public postal service (opening of mail) or by a public or private telecommunication service (telephone tapping). In broad terms, RIPL makes it unlawful to intercept such communications without authorisation and also creates a civil action where a communication is

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<sup>18</sup> Sections 1 to 16.

<sup>19</sup> Sections 17 to 20.

<sup>20</sup> Section 21 to 36.

<sup>21</sup> Sections 39 to 45.

<sup>22</sup> Sections 46 to 52.

<sup>23</sup> Part I, Chapter I, sections 1 to 16.

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intercepted in the course of its transmission by means of a private telecommunication system. Lawful interception may be conducted in one or other of two ways. First, where it is authorised under sections 3 (such as where the interception is consented to by the sender and intended recipient, or where the interception is by a postal or telecommunications service provider for legitimate purposes connected with the operation of that service). Second, where the interception takes place in accordance with an interception warrant issued by Her Majesty's Procureur under section 5.<sup>24</sup>

18. Interception warrants may be applied for by only a limited number of individuals, as specified in section 6(1).<sup>25</sup>
19. By reason of section 5(2), an interception warrant may only be issued if Her Majesty's Procureur believes that it is necessary on grounds falling within section 5(3) and that the conduct authorised by the warrant is proportionate to what is sought to be achieved by that conduct.<sup>26</sup> The grounds falling within section 5(3) are: (a) in the interests of national security; (b) for the purpose of preventing or detecting serious crime;<sup>27</sup> (c) for the purpose of safeguarding the economic well-being of the Bailiwick; (d) for the purpose of giving effect to the provisions of any international mutual assistance agreement.<sup>28</sup>
20. Detailed provision is made by RIPL for the contents of warrants;<sup>29</sup> their duration, cancellation and renewal,<sup>30</sup> their modification<sup>31</sup> and implementation.<sup>32</sup> General

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<sup>24</sup> Section 5(2) provides that an interception warrant shall not be issued except under the hand of Her Majesty's Procureur. This is subject to the general interpretation provision in section 67 which makes clear that for these purposes 'Her Majesty's Procureur' includes Her Majesty's Comptroller.

<sup>25</sup> Most relevantly, the Chief Officer of the Island Police Force, the Chief Officer of Customs and Excise, and a person who for the purposes of any international mutual assistance agreement (within the meaning of section 67(3)) is the competent authority of a country or territory outside Guernsey.

<sup>26</sup> When considering whether an interception warrant is necessary and proportionate Her Majesty's Procureur is required to consider whether the information which it is thought necessary to obtain under warrant could reasonably be obtained by any other means: section 5(4).

<sup>27</sup> For these purposes, "*serious crime*" means conduct which constitutes one or more criminal offences (a) which involves the use of violence, results in substantial financial gain or is conduct by a large number of persons in pursuit of a common purpose, or (b) for which a person who has attained the age of twenty-one and has no previous convictions could reasonably be expected to be sentenced to imprisonment for a term of three years or more: section 67(3).

<sup>28</sup> The meaning of an international mutual assistance agreement is explained in section 67(3).

<sup>29</sup> Section 7.

<sup>30</sup> Section 8.

<sup>31</sup> Section 9.

<sup>32</sup> Section 10.

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safeguards in relation to the dissemination, retention and disposal of intercepted material are set out in sections 12 and 13. These provisions are intended, among other things, both to preserve the secrecy of the operation of the interception regime and to protect to the maximum extent possible the privacy of those whose conversations are overheard without their consent.

21. Disclosure of the issue or existence of a warrant, the interception of a communication or the content of an intercepted communication (identifiable as such) is generally prohibited.<sup>33</sup> As in the United Kingdom, intercept product is inadmissible in criminal trials:<sup>34</sup> the primary purpose of interception is to gather intelligence to prevent or detect serious crime, and not directly to gather evidence for use in any legal proceedings.<sup>35</sup>

### *Acquisition and disclosure of communications data*<sup>36</sup>

22. Chapter II of Part I provides a framework for access to and the handling of communications data, as distinguished from the content of communications (which is governed by Chapter I). Communications data are data about the use made of a telecommunications or postal service, excluding the contents of communications themselves.<sup>37</sup> They are sometimes described as the “*who, how, when and where*” of a communication. For example, in relation to a postal item, communications data means anything written on the outside of the item.
23. A test of necessity must be met before any communications data are obtained. The assessment of necessity is one made by a designated person (this is a person designated for these purposes, see below). A designated person must not only consider it necessary to obtain the communications data but must also consider the conduct involved in obtaining the communications data to be proportionate to what it is sought to be achieved.<sup>38</sup>

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<sup>33</sup> And may in certain circumstances amount to the commission of a criminal offence: section 16.

<sup>34</sup> Section 14.

<sup>35</sup> This is apparent from the structure of Chapter I of Part I of RIPL and the definition of serious crime in section 67(3) which in Chapter I of Part I “shall not include a reference to gathering evidence for use in any legal proceedings.”

<sup>36</sup> Chapter II of Part I sections 17 – 20.

<sup>37</sup> The meaning of “communications data” is explained in section 67(3).

<sup>38</sup> Section 18(5) of RIPL.



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24. Designated persons are certain persons within certain specified public authorities which include the Island Police Force and Customs and Excise (in practice, the Guernsey Border Agency).<sup>39</sup>
25. The purposes for which communications data may be sought are considerably wider than in the case of interception. For example, communications data may be requested if it is necessary for the purpose of preventing or detecting crime or of preventing disorder (not merely for the purpose of preventing or detecting serious crime).<sup>40</sup> Data may additionally be requested in the interests of public safety or public health,<sup>41</sup> or for the purpose of assessing or collecting taxes<sup>42</sup> or, in an emergency, for preventing death or injury or any damage to a person's physical or mental health, or of mitigating any injury or damage to a person's physical or mental health.<sup>43</sup>
26. Communications data, unlike intercept product, are admissible in evidence in legal proceedings in Guernsey and are often used (for example, telephone billing records) in prosecutions of serious criminal offences.<sup>44</sup>

### *Surveillance and Covert Human Intelligence Sources*<sup>45</sup>

27. Chapter I of Part II of RIPL governs the conduct of three kinds of covert activity, directed surveillance, intrusive surveillance and the conduct and use of covert human intelligence sources ("CHIS").
28. For these purposes, surveillance is defined in section 69 and includes: "*(a) monitoring, observing or listening to persons, their movements, their conversations or their other activities or their other activities or communications, (b) recording anything monitored, observed or listened to in the course of surveillance, and (c) surveillance by*

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<sup>39</sup> Section 20(1) and section 67(3) of RIPL. It follows that the range of public authorities as designated persons is wider than in the case of interception. This reflects the more intrusive nature of interception.

<sup>40</sup> Section 18(2)(b).

<sup>41</sup> Section 18(2)(d), (e).

<sup>42</sup> Section 18(2)(f).

<sup>43</sup> Section 18(2)(g).

<sup>44</sup> See sections 5(3), 18(2) and 67(3) which make clear the distinction between intercept product and communications data.

<sup>45</sup> Part II, Chapter I sections 21 – 38.

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*or with the assistance of a surveillance device.”* It does not include certain activities specified in section 69(2).<sup>46</sup>

### *Directed Surveillance*

29. In order to amount to directed surveillance, the surveillance must be covert but not intrusive. Further, it must be undertaken for the purposes of a specific operation or investigation and in such manner as is likely to result in the obtaining of private information about a person, and otherwise than by way of an immediate response to events or circumstances.<sup>47</sup>
30. The criteria for the authorisation of directed surveillance, by a person designated for these purposes, is set out in section 23 which incorporates both the requirements of necessity and the principle of proportionality. In order for a designated person to grant an authorisation for directed surveillance the designated person must believe that the surveillance is necessary on the grounds set out in section 23(3). These grounds are virtually the same as those set out in section 18(2) in relation to communications data.
31. The range of public authorities permitted to authorise directed surveillance through individuals, officers, ranks or positions specific by regulations is relatively broad and includes not only the Island Police Force and Customs and Excise but also public authorities such as the Guernsey Financial Services Commission.<sup>48</sup>

### *Intrusive Surveillance*

32. In order to amount to intrusive surveillance, the surveillance must be covert and must be carried out in relation to anything taking place as any residential premises or on any

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<sup>46</sup> These activities include any conduct of a covert human intelligence source for obtaining or recording any information which is disclosed in the presence of the source, or any such entry or interference with property or with wireless telegraphy as would be unlawful unless authorised by an intelligence services warrant. Nor does it include warranted interception.

<sup>47</sup> Section 21(2) of RIPL. The requirement for the surveillance to be undertaken for the purposes of a specific operation or investigation is intended to ensure that unplanned surveillance, which could not be foreseen and authorised is advanced, is not unlawful. A classic form of directed surveillance is static, foot or mobile surveillance in the street whereby surveillance teams follow targets covertly to obtain information about what the targets are doing.

<sup>48</sup> Section 25 and Schedule 1.

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private vehicle, and involve the presence of an individual on the premises or in the vehicle, or be carried out by means of a surveillance device.<sup>49</sup> In many cases, a surveillance investigation or operation may involve both intrusive surveillance or interference with property (or with wireless telegraphy). In such cases, all of the various activities require authorisation.

33. In its classic form, intrusive surveillance involves the use of a listening device placed in a residential premises or in a vehicle.<sup>50</sup>

34. Because of its potentially intrusive character, authorisation for intrusive surveillance may only be granted by Her Majesty's Procureur, the Chief Officer of the Island Police Force or the Chief Officer of Customs and Excise<sup>51</sup> and only where the authorising officer believes that the intrusive surveillance is necessary on certain limited grounds and that the authorised surveillance is proportionate to what is sought to be achieved by carrying it out.<sup>52</sup> The grounds are similar to those governing the interception of communications: (a) in the interests of national security; (b) for the purpose of preventing or detecting serious crime; or (c) in the interests of the economic well-being of the Bailiwick.<sup>53</sup> A factor that must be taken into account in deciding whether an authorisation is necessary and proportionate is whether the information, which it is thought necessary to obtain by means of the intrusive surveillance, could reasonably be obtained by other less intrusive means.<sup>54</sup>

35. Authorisation for intrusive surveillance may be sought by police and customs officers.

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<sup>49</sup> Section 21(3) of RIPL. By reason of section 21(4), surveillance is not intrusive if it is carried out by a device designed or adapted principally for the purpose of providing information about the location of a vehicle. See also section 21(5) and (6) for further exclusions.

<sup>50</sup> For these purposes residential premises includes any premises occupied or used by any person, however temporarily, for residential purposes or otherwise as accommodation (including hotel or prison accommodation). A private vehicle is defined as any vehicle which is used primarily for the private purposes of the person who owns it or of a person who has the right to use it: section 67(3).

<sup>51</sup> Or individuals holding such officers ranks or positions within the Island Police Force or Customs and Excise as prescribed by regulations made under section 28. See the Regulation of Investigatory Powers (Prescription of Offices, Ranks and Positions) Regulations 2004.

<sup>52</sup> Section 26(2)(3).

<sup>53</sup> Section 26(3). There is no equivalent to section 5(3)(d) (giving effect to the provisions of any international mutual assistance agreement).

<sup>54</sup> Section 26(4).

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36. General rules in relation to the grant, renewal and direction of authorisations are to be found in section 34.

### *Covert Human Intelligence Sources*

37. A CHIS is a person who establishes or maintains a personal or other relationship with another person for the covert purpose of obtaining information, or if they covertly disclose information obtained from such a relationship.<sup>55</sup>

38. The public authorities entitled to use CHIS are the same as those authorised to use directed surveillance.<sup>56</sup> The system for authorisation, and the range of grounds for which CHIS may be authorised are also the same.<sup>57</sup> Additional requirements are also prescribed. In particular:

- (i) an officer (known as a handler) must have day-to-day responsibility for contact with the CHIS and for his or her welfare;<sup>58</sup>
- (ii) a different officer (known as a controller) must oversee the use of the CHIS;<sup>59</sup>
- (iii) records must be kept of the use made of the CHIS (and other specified matters);<sup>60</sup>
- (iv) the CHIS's identity must be protected.<sup>61</sup>

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<sup>55</sup> Section 21(8). An essential feature of the definition is that the CHIS (who may be a law enforcement officer or a civilian) acts covertly. This does not include the situation where a member of the public comes forward with information about a crime as part of their normal civic duties, or to contact numbers set up to receive information (such as Crimestoppers), but it does include an informant (or police officer) who cultivates a relationship with another person for the purpose of supplying (or obtaining) information about that person to the police or other law enforcement (or public) authorities.

<sup>56</sup> Section 25(4) and Schedule 1.

<sup>57</sup> Section 24.

<sup>58</sup> Section 24(5)(a).

<sup>59</sup> Section 24(5)(b).

<sup>60</sup> Section 24(5)(c), (d).

<sup>61</sup> Section 24(5)(e).

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39. Durations and renewals of authorisations are governed by section 34 and the persons entitled to grant authorisations are identified in section 25.

### *Interference with Property*<sup>62</sup>

40. Section 39 of RIPL provides that no entry on or interference with property or with wireless telegraphy shall be unlawful if it is authorised by an authorisation having effect under Chapter II. The grant of authorisations is governed by section 40 which provides that Her Majesty's Procureur<sup>63</sup> may authorise interference with property etc., where she believes 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 the action seeks to achieve.<sup>64</sup>

41. Section 43 contains provisions which govern the form and duration of authorisations.<sup>65</sup>

42. Section 44 places a duty on Her Majesty's Procureur to notify the Commissioner in writing of authorisations and approvals, given renewed or cancelled by her under Part II Chapter II.<sup>66</sup>

### *Investigation of data protected by encryption*<sup>67</sup>

43. Section 46 of RIPL provides for the giving of notices requiring the disclosure of encrypted information that is lawfully within the possession of the authorities. This power may be used to obtain passwords allowing access to electronic devices such as computer or mobile telephones. A disclosure notice may be given by a person acting with appropriate permission, given in accordance with Schedule 2,<sup>68</sup> who believes on

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<sup>62</sup> Pat II, Chapter II, section 39 – 45.

<sup>63</sup> In urgent cases other persons are entitled to act. In those situations an officer of not less than Chief Inspector in the Island Police, or of the rank of Surveyor in Customs and Excise may authorise the conduct (see section 41(2) of the Regulation of Investigatory Powers (Prescription of Offices, Ranks and Positions) Regulations 2004).

<sup>64</sup> Section 40(2). Her Majesty's Procureur is required to consider whether what is thought necessary to be achieved by the authorised action could reasonably be achieved by other means: section 40(3).

<sup>65</sup> The general rule is that authorisations must be in writing and cease to have effect after 3 months. Her Majesty's Procureur is required to cancel an authorisation if the action authorised by it is no longer necessary.

<sup>66</sup> Her Majesty's Procureur has complied with this duty.

<sup>67</sup> Part III, sections 46 to 52.

<sup>68</sup> Section 46(2).

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reasonable grounds that it is necessary in the interests of national security or for the purpose of preventing or detecting crime, or in the interests of the economic well-being of the Bailiwick,<sup>69</sup> or where it is necessary for the purpose of securing the effective exercise or proper performance by any public authority or any statutory power or statutory duty.<sup>70</sup>

44. Failure to comply with a notice issued under section 46 is a criminal offence, punishable by up to two years' imprisonment, or a fine, or both after conviction on indictment, and on summary conviction to imprisonment for a term not exceeding six months or to a fine not exceeding level 5 on the uniform scale, or both.<sup>71</sup>

### Codes of Practice and Guidance

45. Section 61 of RIPL makes provision for the making (and revising) of Codes of Practice relating to the exercise and performance of powers and duties that are conferred or imposed by the statutory scheme.

46. There are five Codes of Practice which have been made pursuant to section 61. These Codes address:

- (i) the interception of communications;
- (ii) the interception of communications (postal);
- (iii) accessing communications data;
- (iv) covert surveillance;
- (v) covert human intelligence sources.

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<sup>69</sup> Section 46(3).

<sup>70</sup> Section 46(2)(b)(ii).

<sup>71</sup> Section 49. Level 5 on the uniform scale is £10,000: section 1(2) of The Uniform Scale of Fines (Bailiwick of Guernsey) Law 1989.

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47. The Codes of Practice provide general guidance (in plain language) on the procedures that must be followed before any of the intrusive investigation techniques can take place. They are primarily intended for use by the various public officials who authorise or use the measures in question, although they will also prove useful to anyone interested in the operation of the legislative scheme and the procedures to be followed. The Codes are intended to be readily available to any members of those public authorities involved in operations under RIPL.

### **General Observations on the Statutory Scheme**

48. The detailed provisions of RIPL as supplemented by the Codes of Practice provide a comprehensive framework for the effective regulation of intrusive investigative techniques such as the interception of communications and surveillance of all kinds. This framework is intended to provide a lawful basis for executive action and appropriate protection for ordinary citizens by ensuring that intrusive investigative techniques take place only where this is justified and the subject of proper consideration. While the need for surveillance in the public interest is undeniable, so too is the need for those measures to be regulated so as to ensure that they are carried out in accordance with law and that the privacy of those who are the targets of surveillance is infringed only where the tests of necessity and proportionality are satisfied.

49. Proportionality is a crucial concept in both the legislation and the Codes of Practice. Thus, even if a particular course of surveillance conduct is directed at pursuing a legitimate aim, this will not in itself be sufficient to justify the interference if the means used to achieve the aim are excessive in all the circumstances. This is intended to ensure respect for the Convention rights guaranteed under the Human Rights (Bailiwick of Guernsey) Law 2000: any interference with a Convention right should be carefully designed to meet the objective in question and must not be arbitrary or unfair.

50. The statutory provisions and associated Codes of Practice have drawn heavily on the United Kingdom's Regulation of Investigatory Powers Act 2000 and the Codes of Practice made under section 71 of that Act. While the 2000 Act remains the governing statute in the United Kingdom for directed and intrusive surveillance and the use of

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CHIS, in the case of the interception of communication and the acquisition and disclosure of communications data, it has been replaced by the Investigatory Powers Act 2016 and the associated Codes of Practice.

51. These Codes have much in common with the earlier Codes of Practice but they also reflect a number of significant statutory changes. The most notable of these relates to the acquisition of communications data which is now authorised by a new Independent Office for Communications Data Authorisations (“OCDA”) established from March 2019.<sup>72</sup>

### Conduct of the Review

52. The inspection visit took place between 14 to 16 July 2021 with the assistance of Assistant Commissioner Caldwell and Assistant Commissioner Fletcher.<sup>73</sup>

53. In the course of my inspection, and in keeping with the practice established by my predecessors, I received classified written accounts of the use of each of the relevant powers by Guernsey law enforcement authorities. Those accounts were supplemented by oral briefings with personnel involved in the authorisation management and oversight of covert operations. I was also provided with the opportunity to inspect files showing the procedures that were followed in each case. I was also able to discuss the procedures and practices with the Chief Officers of the Island Police Force and Guernsey Border Agency,<sup>74</sup> as well as with her Majesty’s Procureur. Their observations were extremely helpful and provided valuable insights into the careful manner in which they discharge their respective functions.

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<sup>72</sup> OCDA was established by The Data Retention And Acquisition Regulations 2018 (No. 1123) following the decision of the Court of Justice of the European Union in the joined cases of *Tele2 Sverige AB v Post-och telestyrelsen* (C-203/15) and *Secretary of State for the Home Department v. Watson* (C-698/15). Following the Court’s judgment the UK Government accepted that amendments were needed to the Investigatory Powers Act to make it consistent with EU law, in particular to provide for independent authorisation for most communications data applications. As a result, OCDA was established to consider nearly all communications data applications made by public authorities in the UK, other than the intelligence agencies, on behalf of the Investigatory Powers Commissioner. In Guernsey, applications are channelled through a single point of contact within each public authority and these single points of contact are in a position to advise a designated person on whether authorisation is appropriate.

<sup>73</sup> This was one of the earliest dates on which an inspection visit could take place having regard to the restrictions on travel occasioned by the COVID-19 virus.

<sup>74</sup> The Guernsey Border Agency is referred to in the legislation as Customs and Excise.



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54. I am grateful to all those who assisted in the work of the inspection and the great efforts that were made to ensure I was provided with all the support and information necessary to conduct a thorough review.

### **The Scope of the Report**

55. In keeping with the practice of my predecessors I have attempted to provide sufficient detail of the use of the power under review without undermining the effective use of the powers in the future, or in specific operations.

56. It is to be noted that while section 54 of RIPL envisages the publication of annual reports by the Commissioner and this Report nominally refers to the calendar year 2020, I have also taken the opportunity to consider the use of the powers in the period from January 2021 until the time of the inspection in July 2021. This is the result of a decision I made at the time of the inspection visit and reflects the difficulties created for the inspection process by the COVID-19 virus. My intention was to ensure that there was proper oversight of the formal period under review (the calendar year 2020), and to take the opportunity, while available, to examine material relevant to the exercise of the powers under review up until the time of my inspection. This seemed appropriate in circumstances where no personal inspection visit had been possible in 2020 (for the annual report in respect of 2019). It is to be hoped that the normal inspection process will be resumed, unimpeded by travel restrictions, in 2022.

57. It should also be noted that the focus of my inspection was on the use of surveillance powers by the Island Police Force and the Guernsey Border Agency.<sup>75</sup> The use of RIPL surveillance powers by other Guernsey public authorities will be the subject of scrutiny in 2022.

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<sup>75</sup> As noted, the Guernsey Border Agency is known as Customs and Excise within the legislation.

## Overview of 2020

58. The past year has been unusual. In March 2020, Guernsey went into lockdown because of the spread coronavirus and travel restrictions were put in place. Both the Island Police Force and the Guernsey Border Agency were involved in overseeing the restrictions. Despite these difficulties, covert law enforcement activities into serious crime have continued and the investigating authorities have played a valuable role in detecting and deterring crime.
59. Drug seizures resulting from certain surveillance techniques fell from over £800,000 in 2019 to around £419,000 in 2020,<sup>76</sup> while cash seizures amounted to around £143,000 which is similar to that figure in 2019.

### *Interception*

60. A total of 41 interception warrants were issued in support of 16 investigative operations in the period under review. The equivalent figure for the previous calendar year was 37. The investigations largely related to the commercial importation or supply of controlled drugs with a small number of exceptions concerning the sexual exploitation of children and money laundering. On one occasion, warranted interception was applied for in the interests of the economic well-being of the Bailiwick and Her Majesty's Procureur properly concluded that the statutory basis for the warrant was not made out. This illustrates the care with which she carries out her statutory duties. In all cases the applications for warranted interceptions were drafted to a good standard and properly identified the statutory purpose and the requirements of necessity and proportionality.

### *Acquisition of Communications Data*

61. There were 215 written approved applications for communications data of which 90 were submitted by the Border Agency officers and 125 by police officers.

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<sup>76</sup> The fall is likely to be a reflection of the impact of the various travel restrictions.

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62. Of these 215, there were 150 written requests for communications data in support of warranted investigations.
63. In the period under review, the vast majority of traffic data applications were submitted to prevent or detect crime. They played a part in the investigation of drug trafficking. As in previous years communications data formed part of so many investigations, in conjunction with so many other types of evidence and intelligence that it would be impossible to attribute any particular number of arrest convictions or seizure to its use.
64. My inspection concluded that in the case of warranted interception and the accessing of communications data, the Guernsey law enforcement authorities acted lawfully and for the correct statutory purposes. The processes and procedures in place were fit for purpose, and the personnel involved are committed to observing high standards of compliance and took great care over their work.

### *Intrusive Surveillance/Interference with Property*

65. One authorisation for intrusive surveillance was granted in 2020 for the purpose of preventing or detecting serious crime (drug trafficking). Six property authorisations were granted in the same period all for the purpose of preventing or detecting serious crime (drug trafficking or money laundering). In all cases it was considered necessary and proportionate for the interferences to take place given what was to be achieved. Collateral intrusion and the associated plans to mitigate its risks were carefully considered and planned for in each case.

### *Directed Surveillance*

66. A total of 18 directed surveillance authorisations were granted in 2020 for the purpose of preventing or detecting crime, the majority of them related to drug trafficking and money laundering. Seven directed surveillance authorisations were granted orally owing to circumstances deemed to be of an urgent nature. The powers were exercised lawfully and for the correct statutory purposes.

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### *Covert Human Intelligence Sources (CHIS)*

67. During the reporting period Guernsey law enforcement used to the services of registered CHIS. Assistant Commissioner Fletcher was satisfied that the relevant sections of RIPL had been properly observed, that applications were properly made and properly granted and that the continuation or cancellation of such authorisation had been kept under appropriate review. Assistant Commissioner Fletcher has made a number of recommendations in relation to the operation and management of CHIS.<sup>77</sup> The implementation of those recommendations will be the subject of the inspection in 2022.

### *Investigation of Data Protected by Encryption*

68. There were 33 notices issued under section 46, the vast majority of them requiring passcodes for mobile telephones in the course of investigations into a range of criminal offences (mainly drug trafficking). Twelve individuals complied with the notices and criminal proceedings have been brought against 14 individuals. To date, 9 individuals have been convicted of non-compliance and sentenced to sentences ranging from 3 to 9 months' imprisonment.

69. The Law Officers have commented that the process for obtaining section 46 notices remains robust and is well-handled. There is no reason to doubt the Law Officers' assessment.

### **General Safeguards**

70. The inspection revealed that appropriate safeguards are in place and that the requirements of sections 12 and 51 are satisfied.

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<sup>77</sup> These recommendations and the reasons for them are explained in the confidential report prepared by Assistant Commissioner Fletcher and provided to the Bailiff.

## Notification of Errors

71. In the case of surveillance measures, no errors were identified during the course of the inspection, although one issue was notified at the start of the inspection. This issue arose when a directed surveillance authorisation had lapsed and was not formally cancelled. Despite this oversight, no covert activity took place following the lapse of the authorisation. As soon as the oversight was recognised the authorisation was formally cancelled. There was a very small number of recordable errors relating to communications data, such as errors in the information provided to Communications Service Providers. These errors were identified at the time and remedied without any adverse consequences being suffered by individuals.
72. It is the responsibility of Guernsey law enforcement authorities to maintain the highest standards of accuracy, and errors of this nature are always regrettable. That said, the fact that these errors were identified, rectified and notified to me for the purposes of preparing my Report is a sign that Guernsey law enforcement are alert to the possibility of error and properly aware of their responsibilities.

## Conclusion

73. I was provided with all necessary assistance during my inspection. Those who facilitated the process were extremely courteous, well-informed and generous with their time. They were equally responsive to requests for information and receptive to feedback in relation to how practices might be improved in the future.
74. My inspection visit revealed that public officials involved in the operation of RIPL are exercising their powers lawfully and that the use of the powers has made a significant contribution to the prevention and detection of serious crime in Guernsey. Applications for authorisations were drafted to a good standard and properly identified the statutory purpose for which the power was sought. The requirements of necessity and proportionality were considered with care. This reflects the commitment of all personnel involved to maintain high standards of conduct. Overall, the processes and procedures in place are fit for purpose. There are however improvements to be made in relation to the management of CHIS.

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75. The overall conclusion of this, my first report as Commissioner, is that the people of Guernsey have good reasons to be assured that the legislation is operated lawfully and with proper appreciation of the public interest.

**David Perry Q.C.**

**August 2021**