

**UNCLASSIFIED**

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

**Review Period: January – December 2022**

**David Perry K.C.**

**May 2023**

## 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. K.C. who, in July 2020, provided his third and final annual report, covering the calendar year 2019.
3. This is my third annual report. It follows the format of my earlier reports and covers the calendar year 2022.
4. As in my earlier reports, it is helpful to begin with a summary of 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 it stands. This is made clear by section 53(4) which provides that it is not the function

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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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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 Stark 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.

### The Commissioner’s Functions

6. As part of his functions, the Commissioner is required<sup>3</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>4</sup>
  - (ii) the acquisition and disclosure of communications data;<sup>5</sup>
  - (iii) the use of “*directed surveillance*”, “*intrusive surveillance*” and “*covert human intelligence sources*” and “*interference with property*”.<sup>6</sup>
  - (iv) the investigation of electronic data protected by encryption.<sup>7</sup>
  
7. The Commissioner is also required to keep under review the duty which is imposed on His Majesty’s Procureur by section 12<sup>8</sup> and the general duties imposed under section 51.<sup>9</sup>

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<sup>3</sup> By reason of section 53(2) of RIPL.

<sup>4</sup> In particular the exercise and performance by His Majesty’s Procureur of the powers and duties conferred or imposed on her by sections 1 to 10 of RIPL.

<sup>5</sup> This is regulated by Chapter II of Part 1 of RIPL, sections 17 to 20.

<sup>6</sup> These activities are regulated by Part II of RIPL, sections 21 to 45.

<sup>7</sup> Such investigations are governed by Part III of RIPL, sections 46 – 52.

<sup>8</sup> Section 12 provides that it shall be the duty of His 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 legislation).

<sup>9</sup> Section 51 contains general duties imposed on certain specified authorities (His 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.

## 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>10</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>11</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>12</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>13</sup>

## 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 Commissioner were persons who hold or had held certain types of judicial office. This was amended with

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<sup>10</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>11</sup> Section 54(3).

<sup>12</sup> Section 54(5).

<sup>13</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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effect from 28 March 2018,<sup>14</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>15</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>16</sup> the United Kingdom Investigatory Powers Commissioner (since October 2019 the 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, following my request, were appointed by the Bailiff as Assistant Commissioners for the purposes of my April 2023 inspection visit. These Assistant Commissioners were Mr Nicholas Fletcher and Mr Danny Caldwell.<sup>17</sup>
12. One again, 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 again my gratitude to the Bailiff both for his continued support for the inspection process and his willingness to appoint Mr Fletcher and Mr Caldwell as Assistant Commissioners.
13. As in the case of my previous inspections, both Assistant Commissioners brought an expertise and understanding to the task of the inspection which no Commissioner 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 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 confidential reports may, at the Bailiff's discretion, be provided to those who apply for and authorise the use of investigative powers, so as to assist with training and the continuing pursuit of best practice.

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<sup>14</sup> By the Regulation of Investigatory Powers (Bailiwick of Guernsey) (Amendment) Ordinance 2018.

<sup>15</sup> Section 55(2A).

<sup>16</sup> As a result of a practice initiated by my predecessor, Lord Anderson of Ipswich K.B.E. K.C..

<sup>17</sup> Both Mr Fletcher and Mr Caldwell were involved in my two previous inspections and this continuity has contributed to the effectiveness of the inspection process.

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14. It is to be hoped that Mr Fletcher and Mr Caldwell will continue to provide assistance as Assistant Commissioners in the future. Their continued involvement 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 in turn bring substantial benefit to the people of Guernsey. The improvements in working practices which I have noted during my time as Commissioner are to a very great extent attributable to their involvement in the inspection process.

### **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. As in the case of my earlier reports it is helpful to provide a brief summary of these various investigative techniques.<sup>23</sup>

#### *Interception of Communications*<sup>24</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 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

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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> The following summary is largely taken from my earlier reports and is included here for ease of reference and completeness.

<sup>24</sup> Part I, Chapter I, sections 1 to 16.

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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 His Majesty's Procureur under section 5.<sup>25</sup>

18. Interception warrants may be applied for by only a limited number of individuals, as specified in section 6(1).<sup>26</sup> Since October 2022 this list of individuals has included the Director of the Economic and Financial Crime Bureau.<sup>27</sup>
19. By reason of section 5(2), an interception warrant may only be issued if His 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>28</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>29</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>30</sup>
20. Detailed provision is made by RIPL for the contents of warrants;<sup>31</sup> their duration, cancellation and renewal,<sup>32</sup> their modification<sup>33</sup> and implementation.<sup>34</sup> General

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<sup>25</sup> Section 5(2) provides that an interception warrant shall not be issued except under the hand of His Majesty's Procureur. This is subject to the general interpretation provision in section 67 which makes clear that for these purposes 'His Majesty's Procureur' includes His Majesty's Comptroller.

<sup>26</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>27</sup> See the Economic and Financial Crime Bureau and Financial Intelligence (Bailiwick of Guernsey) Law 2022.

<sup>28</sup> When considering whether an interception warrant is necessary and proportionate His 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>29</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>30</sup> The meaning of an international mutual assistance agreement is explained in section 67(3).

<sup>31</sup> Section 7.

<sup>32</sup> Section 8.

<sup>33</sup> Section 9.

<sup>34</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>35</sup> As is generally the case in the United Kingdom, intercept product is inadmissible in criminal trials:<sup>36</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>37</sup>

### *Acquisition and disclosure of communications data*<sup>38</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>39</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. The powers under Chapter II of Part I are most commonly used in relation to electronic data.
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

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<sup>35</sup> And may in certain circumstances amount to the commission of a criminal offence: section 16.

<sup>36</sup> Section 14.

<sup>37</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>38</sup> Chapter II of Part I sections 17 – 20.

<sup>39</sup> The meaning of “communications data” is explained in section 67(3).



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obtaining the communications data to be proportionate to what it is sought to be achieved.<sup>40</sup>

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>41</sup> Since October 2022 the list of designated persons has included the Director of the Economic and Financial Crime Bureau.<sup>42</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>43</sup> Data may additionally be requested in the interests of public safety or public health,<sup>44</sup> or for the purpose of assessing or collecting taxes<sup>45</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>46</sup> The Committee for Home Affairs has power to specify other purposes for which communications data may be obtained.<sup>47</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>48</sup>

### *Surveillance and Covert Human Intelligence Sources*<sup>49</sup>

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<sup>40</sup> Section 18(5) of RIPL.

<sup>41</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>42</sup> See the Economic and Financial Crime Bureau and Financial Intelligence Unit (Bailiwick of Guernsey) Law 2022.

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

<sup>44</sup> Section 18(2)(d), (e).

<sup>45</sup> Section 18(2)(f).

<sup>46</sup> Section 18(2)(g).

<sup>47</sup> Section 18(2)(h).

<sup>48</sup> See sections 5(3), 18(2) and 67(3) which make clear the distinction between intercept product and communications data.

<sup>49</sup> Part II, Chapter I sections 21 – 38.

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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 or with the assistance of a surveillance device.*” It does not include certain activities specified in section 69(2).<sup>50</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>51</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

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<sup>50</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>51</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 in advance, 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.

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includes not only the Island Police Force and Customs and Excise but also public authorities such as the Guernsey Financial Services Commission, and since October 2022, the Director of the Economic and Financial Crime Bureau.<sup>52</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 on any residential premises or in any 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>53</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>54</sup>
34. Because of its potentially intrusive character, authorisation for intrusive surveillance may only be granted by His Majesty's Procureur, the Chief Officer of the Island Police Force, the Chief Officer of Customs and Excise or, since October 2022, the Director of the Economic and Financial Crime Bureau<sup>55</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>56</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

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<sup>52</sup> Section 25 and Schedule 1.

<sup>53</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>54</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>55</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>56</sup> Section 26(2)(3).

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serious crime; or (c) in the interests of the economic well-being of the Bailiwick.<sup>57</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>58</sup>

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

36. General rules in relation to the grant, renewal and duration 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>59</sup>

38. The public authorities entitled to use CHIS are the same as those authorised to use directed surveillance.<sup>60</sup> The system for authorisation, and the range of grounds for which CHIS may be authorised are also the same.<sup>61</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>62</sup>

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<sup>57</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>58</sup> Section 26(4).

<sup>59</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>60</sup> Section 25(4) and Schedule 1.

<sup>61</sup> Section 24.

<sup>62</sup> Section 24(5)(a).

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- (ii) a different officer (known as a controller) must oversee the use of the CHIS;<sup>63</sup>
- (iii) records must be kept of the use made of the CHIS (and other specified matters);<sup>64</sup>
- (iv) the CHIS's identity must be protected.<sup>65</sup>

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>66</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 His Majesty's Procureur<sup>67</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>68</sup>

41. Section 43 contains provisions which govern the form and duration of authorisations.<sup>69</sup>

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<sup>63</sup> Section 24(5)(b).

<sup>64</sup> Section 24(5)(c), (d).

<sup>65</sup> Section 24(5)(e).

<sup>66</sup> Pat II, Chapter II, section 39 – 45.

<sup>67</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 Force, or of the rank of Surveyor in Customs and Excise may authorise the conduct (see section 41(2) and the Regulation of Investigatory Powers (Prescription of Offices, Ranks and Positions) Regulations 2004). The power to authorise urgent interference with property now extends to the Director of the Economic and Financial Crime Bureau.

<sup>68</sup> Section 40(2). His 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>69</sup> The general rule is that authorisations must be in writing and cease to have effect after 3 months. His Majesty's Procureur is required to cancel an authorisation if the action authorised by it is no longer necessary.

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

### *Investigation of data protected by encryption*<sup>70</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>71</sup> who believes on 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>72</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>73</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>74</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.

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<sup>70</sup> Part III, sections 46 to 52.

<sup>71</sup> Section 46(2).

<sup>72</sup> Section 46(3).

<sup>73</sup> Section 46(2)(b)(ii).

<sup>74</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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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.

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 resort to intrusive investigative techniques take place only where this is justified and after careful and 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 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 associated codes of practice. 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>75</sup>

### **Conduct of the Review**

51. The inspection visit took place between 17 to 20 April 2023 with the assistance of Assistant Commissioner Caldwell and Assistant Commissioner Fletcher.
52. In the course of my inspection visit, 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

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<sup>75</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). 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.



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by oral briefings with personnel involved in the authorization, management and oversight of covert operations. The Assistant Commissioners were also provided with the opportunity to inspect files showing the procedures that were followed in each case where a covert power was used. I was able to discuss the procedures and practices with the Chief Officers of the Island Police Force and Guernsey Border Agency,<sup>76</sup> as well as with His Majesty's Procureur and His Majesty's Comptroller. Their observations were extremely helpful and provided valuable insights into the conscientious manner in which they seek to discharge their respective functions.

53. 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 rigorous and detailed review of the use of the investigatory powers that fall within my remit.

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

54. In keeping with previous practice 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.
55. Without disclosing the details of specific operations, it is to be noted that as in previous years the overwhelming majority of authorisations requested and granted were in support of the law enforcement activities conducted for the purpose of preventing or detecting serious crime, largely, but not solely, arising from large scale, commercial drug trafficking.
56. Further detail is contained in the confidential reports prepared by the Assistant Commissioners under my supervision. Those reports have been provided to the Bailiff as confidential appendices to this report, and may, at the Bailiff's discretion, be provided to those who apply for and authorize investigatory powers, so as to assist with training and the continuing improvement of law enforcement practices.

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<sup>76</sup> The Guernsey Border Agency is referred to in the legislation as Customs and Excise.

## Overview of 2022

57. One significant development in the course of the year was the legal recognition given to the Economic and Financial Crime Bureau by the Economic and Financial Crime Bureau and Financial Intelligence Unit (Bailiwick of Guernsey) Law 2022. The Bureau was originally established by the Committee for Home Affairs in 2021 and had been functioning on a non-statutory basis since that date. The new law establishes the Office of the Director of the Bureau and clarifies the role and functions of both the Bureau and the Financial Intelligence Unit to tackle money laundering and terrorist financing. While the Bureau is in its very early stages it is expected to be a significant addition to effective law enforcement within the Bailiwick.
58. In the course of 2022, both the Guernsey Force and the Guernsey Border Agency were involved in combatting a range of offences including drug trafficking and money laundering.
59. Drug seizures resulting from certain surveillance techniques amounted to some £610,790.30 worth, while cash seizure amounted to some £10,600.

### *Interception*

60. A total of 20 interception warrants were issued in support of 7 investigative operations. 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 98 written approved applications for communications data. A further 40 urgent oral applications were authorised.
62. In the period under review, the vast majority of traffic data applications were submitted to prevent or detect drug trafficking. As in previous years communications data formed part of so many investigations, in conjunction with so many other types of evidence and

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intelligence that it would be impossible to attribute any particular number of arrest convictions or seizure to its use.

63. 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 are fit for purpose, and the personnel involved are committed to observing high standards of compliance and took great care over their work. Assistant Commissioner Danny Caldwell has provided a more detailed confidential report with recommendations to improve practice in the future.

### *Intrusive Surveillance/Interference with Property*

64. There were no intrusive surveillance authorisations granted in 2022. Seven 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 properly 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*

65. A total of 10 directed surveillance authorisations were viewed in the course of the inspection, three related to drug trafficking and three related to drug trafficking and the proceeds of drug trafficking. The remaining four arose from investigations into offences of burglary, drug manufacturing, possession of indecent images and assault on a child. The powers were exercised lawfully and for the correct statutory purposes.

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

66. Assistant Commissioner Nicholas Fletcher has provided a detailed review of the use of the operation and management of CHIS. His confidential report is available to the Bailiff for use as he sees fit. It suffices for the purposes of this report to note that the relevant requirements of RIPL have been properly observed.

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### *Investigation of Data Protected by Encryption*

67. The Law Officers have confirmed that the process for obtaining section 46 notices remains robust and is well-handled. In the course of the Inspection three section 46 notices were reviewed. The applications were well-reasoned and appropriate permissions had been sought from a judge. The results of the inspection visit support the Law Officers' assessment.

### **Economic and Financial Crime Bureau**

68. Assistant Commissioner Nicholas Fletcher has provided a confidential report following an inspection conducted to assess the level of compliance of the Bureau with the statutory scheme. This confidential report has been provided to the Bailiff for use as he sees fit.

### **General Safeguards**

69. The inspection revealed that appropriate safeguards are in place to satisfy the requirements of sections 12 and 51. Further observations are contained in the confidential report prepared by Assistant Commissioner Danny Caldwell, which, as noted above, has been provided to the Bailiff for use as he sees fit.

### **Notification of Errors**

70. In the case of surveillance measures, no errors were identified during the course of the inspection. There was a very small number of recordable errors relating to communications data, such as errors in the information provided to Communications Service Providers and one error in respect of warranty. These errors were identified at the time and remedied without any adverse consequences being suffered by individuals.

### **Conclusion**

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71. As in the case of my previous inspection visits, I was provided with all necessary support and assistance during the inspection process. Those who facilitated the process were extremely courteous, well-informed and generous with their time. As in previous years, they were responsive to requests for information and receptive to feedback in relation to how practices might be improved in the future.
72. As in previous years, my inspection visit revealed that public officials involved in the operation of RIPL strive to achieve good standards of compliance with the legislative scheme. They are exercising their powers lawfully and the lawful and proportionate 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 although the time will come when the legislation will need to be reviewed to ensure it is up to date and properly serves the needs of modern day Guernsey.
73. The overall conclusion of this, my third report as Commissioner, is that the people of Guernsey have good reason to be assured that the legislation is operated lawfully and with proper appreciation of the public interest.

**David Perry K.C.**

**May 2023**