



Investigatory Powers
Commissioner's Office

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Advisory Notice 1/2018

Approval of Warrants, Authorisations and Notices by Judicial Commissioners

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A. Introduction

1. This Advisory Notice is made and published by the Investigatory Powers Commissioner pursuant to section 232(2) Investigatory Powers Act 2016. Its purpose is to provide advice and information to public authorities and to the general public as to the general approach that Judicial Commissioners will adopt under the Act when deciding whether to approve decisions to issue warrants, authorisations or notices. It is also intended to provide assistance and guidance to the Judicial Commissioners, with a view to achieving consistency in approach, although it is not binding on them. Reference in this Advisory Notice to warrants shall be taken to also include authorisations and notices under the Act where appropriate.

2. Decisions to issue warrants under the Act are made by a relevant Secretary of State or Scottish Minister.¹ All warrants issued under the Act are subject to prior Judicial Commissioner approval, save in the case of urgent warrants where Judicial Commissioner approval must be obtained within a defined period after the warrant has been issued.

3. The following powers are subject to the relevant public authority obtaining a warrant under the Investigatory Powers Act 2016: interception of communications, equipment interference, the retention of bulk personal datasets and the examination of certain material obtained under bulk warrants.

¹ For convenience this and subsequent Advisory Notices will refer simply to the Secretary of State.

B. Interpretation

4. This and subsequent Advisory Notices will adopt the following abbreviations:

SP – Submission Pack. The bundle of copy documents (whether in electronic or hard copy form) containing the application for a warrant, Minute Sheet and any supporting documentation as considered by the Secretary of State when making their original decision to issue a warrant.

IPA - Investigatory Powers Act 2016. Save where otherwise stated references to “the Act” refer to the IPA 2016.

IPC – Investigatory Powers Commissioner.

IPCO – Investigatory Powers Commissioner’s Office.

SLE – Service Level Expectations. Agreement between IPCO and public authority stakeholders regarding time periods for which decisions on warrants will usually be processed.

Urgent SP – Urgent Submission Pack. The bundle of copy documents (whether electronic or hard copy form) arising following the issue of a warrant under the urgent cases provisions found in the Act and for which a decision is required before the end of the relevant period.

WGD – Warrant granting department. The WGDs are the Home Office, the Foreign Office, the Ministry of Defence, the Northern Ireland Office and the Scottish Government.

WRA – Warrant requesting agency

C. Application of this Advisory Notice

5. This Advisory Notice applies to the exercise of the powers by Judicial Commissioners of approval for the initial granting of a warrant (or combination of warrants), any authorisation or notice, any potential renewal of a warrant and any review of a modification for the following provisions of the Act:

- Part 2 Chapter 1 - Targeted Interception Warrants; Targeted Examination Warrants; Mutual Assistance Warrants
- Part 4 Retention of Communications Data
- Part 5 Equipment Interference Warrants
- Part 6 Chapter 1 – Bulk Interception Warrants
Chapter 2 – Bulk Acquisition Warrants
Chapter 3 – Bulk Equipment Interference Warrants
- Part 7 Bulk Personal Dataset Warrants
- Part 9 National Security Notices
Technical Capability Notices

6. This Advisory Note also applies, with any necessary modifications, to the review of any of the above decisions by the IPC or a Judicial Commissioner to whom the powers have been delegated.

D. The Statutory framework

7. Part 2, Chapter 1, Section 19 of the Act states in respect of targeted interception warrants:

19 Power of Secretary of State to issue warrants

(1) The Secretary of State may, on an application made by or on behalf of an intercepting

- authority mentioned in section 18(1)(a) to (g), issue a targeted interception warrant if—
- (a) the Secretary of State considers that the warrant is necessary on grounds falling within section 20,
 - (b) the Secretary of State considers that the conduct authorised by the warrant is proportionate to what is sought to be achieved by that conduct,
 - (c) the Secretary of State considers that satisfactory arrangements made for the purposes of sections 53 and 54 (safeguards relating to disclosure etc.) are in force in relation to the warrant, and
 - (d) except where the Secretary of State considers that there is an urgent need to issue the warrant, the decision to issue the warrant has been approved by a Judicial Commissioner.

This is subject to subsection (4). (emphasis supplied)

Subsections (2) and (3) set out equivalent provisions, with distinctions that are immaterial for present purposes, for targeted examination warrants and mutual assistance warrants. Section 20 sets out the grounds on which a warrant may be issued.

8. Section 20(2)(b) sets out the grounds on which a targeted interception warrant may be issued by the Secretary of State. These grounds are the warrant is necessary in the interests of national security, for the purposes of preventing or detecting serious crime, or in the interests of the economic well-being of the United Kingdom so far as those interests are relevant to the interests of national security.

9. Section 23 sets out the jurisdiction of the Judicial Commissioners in approving warrants:

23 Approval of warrants by Judicial Commissioners

(1) In deciding whether to approve a person's decision to issue a warrant under this Chapter, a Judicial Commissioner must review the person's conclusions as to the following matters—

- (a) whether the warrant is necessary on relevant grounds (see subsection (3)), and
- (b) whether the conduct that would be authorised by the warrant is proportionate to what is sought to be achieved by that conduct.

(2) In doing so, the Judicial Commissioner must-

- (a) apply the same principles as would be applied by a court on an application for judicial review, and
- (b) consider the matters referred to in subsection (1) with a sufficient degree of care as to ensure that the Judicial Commissioner complies with the duties imposed by section 2 (general duties in relation to privacy).

(3) In subsection (1)(a) “relevant grounds” means—

- (a) in the case of a decision of the Secretary of State to issue a warrant, grounds falling within section 20;
- (b) in the case of a decision of the Scottish Ministers to issue a warrant, grounds falling within section 21(4).

(4) Where a Judicial Commissioner refuses to approve a person's decision to issue a warrant under this Chapter, the Judicial Commissioner must give the person written reasons for the refusal.

(5) Where a Judicial Commissioner, other than the Investigatory Powers Commissioner, refuses to approve a person's decision to issue a warrant under this Chapter, the person may ask the Investigatory Powers Commissioner to decide whether to approve the decision to issue the warrant.”

10. These provisions are mirrored in other sections of the Act concerning other powers exercisable under warrants.

E. Procedure for Judicial Consideration

11. Judicial Commissioners will be allocated by the IPCO Review Team a SP containing the following:
- The application for a warrant,
 - Minute Sheet and any supporting documentation as considered by the Secretary of State when making their original decision (save for any material over which legal privilege is claimed), and
 - Confirmation of compliance with the duty of disclosure as referenced at paragraph 34.
12. The SP will indicate whether the case for consideration is an initial approval, a modification or a renewal and will include reference to any previous decision(s) made in respect of that matter by IPCO.

F. Time period for making a decision on a SP

13. While the SP will indicate the time period within the SLE that a decision is required on the SP, this is for guidance only and it is a matter for the Judicial Commissioner whether they require additional time to consider the matter.
14. In all cases where a decision cannot be made in the time period noted on the SP, the Judicial Commissioner should notify the IPCO Review Team.

G. The Test to be applied

15. The Secretary of State is the primary decision maker under the Act as to whether a warrant should be issued. Parliament has however designated Judicial Commissioners as an independent safeguard to ensure that warrants that are issued satisfy the requirements of necessity and proportionality, which include the requirement that they are in accordance with the law.
16. In exercising that statutory responsibility, the Judicial Commissioners must have regard to the general privacy duties set out in section 2 of the Act. In particular:
- whether what is sought to be achieved by the warrant, authorisation or notice could reasonably be achieved by other less intrusive means,
 - whether the level of protection to be applied in relation to any obtaining of information by virtue of the warrant, authorisation or notice is higher because of the particular sensitivity of that information,
 - the public interest in the integrity and security of telecommunication systems and postal services, and
 - any other aspects of the public interest in the protection of privacy.

There are also additional safeguards for matters such as LPP and journalistic material as set out in s26 to 29, s111-114 and Pt6 of the Act.

17. The Judicial Commissioners will also have regard to the tests of necessity and proportionality as applicable under the Human Rights Act 1998 and under European Union law, to the extent that the European Convention on Human Rights and EU law apply to the powers/activities for which approval is sought. The role of the Judicial Commissioners was established by Parliament in part to ensure that such legal requirements are complied with, given that individuals who are subject to powers under the Act will not themselves know of, or be able to challenge in court, the exercise of such powers.

18. In accordance with s.23 of the Act, and the other analogous provisions in the Act, in deciding whether to approve a decision to issue a warrant, the Judicial Commissioners will ask themselves whether the Secretary of State’s decision to issue a warrant is:

- necessary on relevant grounds; and
- authorising conduct which is proportionate to what is sought to be achieved by that conduct.

19. The purpose of the so-called “double lock” provisions of the Act are to provide an independent, judicial, safeguard as to the legality of warrants, in particular to their necessity and proportionality. In cases engaging fundamental rights, the Judicial Commissioners will not therefore approach their task by asking whether a Secretary of State’s decision that a warrant is necessary and proportionate is *Wednesbury* reasonable, as this would not provide the requisite independent safeguard.

20. This is the approach that is taken by domestic courts in judicial review cases when reviewing measures and decisions that interfere with fundamental rights under the Human Rights Act 1998 and when applying EU law, and a similar approach is adopted when considering interferences with common law rights.² Since the Judicial Commissioners are required to adopt the same approach as would be applied by a court in judicial review proceedings, the Judicial Commissioners will adopt this approach in such cases.

21. The engagement of the Human Rights Act 1998 and EU law will also have a bearing on the scrutiny afforded in individual cases as a greater level of scrutiny will generally be required where the 1998 Act or EU law is engaged.

22. Case law of domestic courts and tribunals, the European Court of Human Rights and the Court of Justice of the European Union provides guidance on the meaning of necessity and proportionality. In particular, the following questions have been identified by domestic courts as part of the proportionality inquiry:³

- whether the objective is sufficiently important to justify the limitation of a fundamental right;
- whether the measure sought is rationally connected to the objective;
- whether a less intrusive measure could have been used; and
- whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community.

23. The European Court of Justice has set out specific requirements to ensure “strict proportionality” to the objective sought to be achieved, where access is required to be granted to data retained by companies operating electronic communications networks and systems.⁴

24. When considering necessity and proportionality, Courts have also emphasised the need to give due weight to the views of specialist departments and agencies on matters falling within their knowledge and expertise. They have also emphasised the importance of affording a margin of judgment to the primary decision-maker especially in relation to the measures necessary to combat risks to national security and for the purpose of the UK’s foreign relations.⁵ These principles will be important to the work of the Judicial Commissioners.

² E.g. *Belfast City Council v Miss Behavin’ Ltd* [2007] UKHL 19, [2007] 1 WLR 1420; Case C-333/14, *Scotch Whisky Association v Lord Advocate* ECLI:EU:C:2015:845, 25 December 2015; *R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26, [2001] 2 AC 532; *R (UNISON) v Lord Chancellor* [2017] UKSC 51, [2017] 3 WLR 409.

³ *Bank Mellat v HM Treasury (No 2)* [2013] UKSC 39, [2014] A.C. 700 at [20].

⁴ Joined Cases C-203/15 and C/696/15, *Tele2 Sverige & Watson* ECLI:EU:C:2016:970

⁵ E.g. *R (Lord Carlile of Berriew QC) v Secretary of State for the Home Department* [2014] UKSC 60; [2015] AC 945.

25. On certain issues, such as for example, what counts as legitimate ways to achieve foreign policy or national security priorities, the Judicial Commissioners' reviewing role will be necessarily limited and the Judicial Commissioners will afford a very wide margin of judgment to the Secretary of State in determining such matters.

26. Judicial Commissioners will always give full consideration to every application. However, the precise level of scrutiny given by Judicial Commissioners to warrant applications will depend on the specific facts of each application. It is a matter that will be considered on a case-by-case basis by each individual Judicial Commissioner.

27. There will be applications, such as those raising novel or controversial techniques, which will require a much greater level of scrutiny than others.

28. Most applications for warrants are of a routine or repeat nature and these will not call for such detailed information or material in the warrant application or such detailed consideration by the Judicial Commissioners as other more complex warrants. Such applications will be capable of being considered within short timescales.

29. The United Kingdom has a dualist constitutional system and unless incorporated into domestic law, international law is not justiciable in our domestic courts. However, international obligations can still be relevant, for instance if the meaning of UK legislation is in doubt or if the judge needs to interpret the European Convention on Human Rights. More generally, international obligations may influence the development of the common law and our domestic legislation should be construed as far as possible so as to comply with the international obligations we have undertaken⁶. For reasons such as these, the Judicial Commissioners may need to consider our international obligations.

H. Applicant's duty of disclosure

30. The fact that a warrant can only be issued with the permission of a Judicial Commissioner is an important constitutional safeguard. If it is to be effective, the Judicial Commissioners must have confidence that relevant material has been disclosed to them. To this end, the Judicial Commissioners will be provided with all the documents set out in paragraph 11 of this Notice, which includes all material being provided to the Secretary of State (save for any LPP material).

31. It is important that the Secretary of State has all relevant matters drawn to his or her attention when considering applications. In accordance with the Codes of Practice, all reasonable efforts will be made to take account of information which militates against the grant of the application, which includes material which weakens the case for the warrant, authorisation or notice. Where such material is identified by the applicant, it will be provided to both the Secretary of State and Judicial Commissioners in the application, where appropriate.

32. In fulfilling their duty to provide information which militates against the granting of the decision, those seeking warrants can be expected to consider and, where necessary, explain in the application:

- a. the potential degree of collateral intrusion on the privacy of those who are not the subject of the operation;
- b. any credible information they are aware of which suggests that the person is not, in fact, a legitimate subject of interest;
- c. other less intrusive but equally effective techniques or operations, where the most appropriate and proportionate technique is not obvious; and
- d. any other factor which materially weakens the case for the warrant, authorisation or notice of which they are aware.

⁶ see *R (SG) v Secretary for Work and Pensions* [2015] UKSC 16 at [137]; *Smith v Smith* [2006] UKHL 35 at [78]

33. The application will explain why the proposed activity is necessary and proportionate and, in circumstances where the law is unclear or the applicant is proposing a novel or contentious legal interpretation, a more detailed explanation of the relevant legal principles will be provided.

34. Those requesting a warrant will confirm as part of the application that, in accordance with the applicable Code of Practice, they have made all reasonable efforts to take account of information which may weaken the case for the warrant.

35. The IPCO Review Team will, on receipt of the SP check that this has been completed.

I. Access to additional information and seeking clarification from the WGD

36. A Judicial Commissioner should take into account all material that is relevant to the issues that he or she has to decide. It is anticipated that in the vast majority of cases sufficient information will be included in the SP for the Judicial Commissioner to make a decision without access to additional material. However, circumstances may arise where it is necessary to seek clarification or additional information.

37. In such cases, the following process should be followed:

- In matters where minor clarification of material within the SP is required the Judicial Commissioner should contact the IPCO Review Team who will seek clarification from the WGD and advise the Judicial Commissioner accordingly. A record will be retained within IPCO of the nature of the request and any additional information/clarification supplied.
- Where more than minor clarification is required, the Judicial Commissioner should identify the additional information they require and will notify the IPCO Review Team who will advise the WGD. The WGD will either withdraw the SP or will provide the information to the IPCO Review Team having also provided it to the Secretary of State.
- Whilst public authorities will disclose or provide to a Judicial Commissioner all documents and information as the Judicial Commissioner may require, for the purposes of the Judicial Commissioner's functions they will not supply material subject to legal professional privilege. If a Judicial Commissioner exceptionally considers that it is necessary to consider legally privileged material they will consult with the IPC before making a request to the WGD via the IPCO Review Team.

J. Access to other information already held by IPCO as a consequence of oversight

38. Circumstances may arise where material is held by IPCO as part of its other statutory functions that may be relevant to that decision and that is not included in the SP. In such cases it is expected that, before a decision is made by the Judicial Commissioner, the WRA and the WGD / Secretary of State will be informed of the material and given an opportunity to consider and address it.

K. Access to previous decisions of Judicial Commissioners and Advisory Notes

39. The WGD will draw attention to the Judicial Commissioner any relevant previous decisions made by a Judicial Commissioner, insofar as these are known to the WGD. The IPCO Review Team will do likewise and will also draw attention to relevant Advisory Notes.

L. Access to technical advice

40. Judicial Commissioners may wish to seek technical guidance on a matter within the SP. IPCO has access to specialist technical guidance both in house and through the Technical Advisory Panel. The IPCO Review Team will facilitate access to these resources and a record of the request and response will be kept in the SP. Where technical advice is received by a Judicial Commissioner in the context of a specific warrant application, it should be disclosed to the WRA and the WGD and they may need to consider referral back to the Secretary of State.

M. Access to Legal Assistance

41. IPCO has a Legal Advisor and Standing Counsel. Legal professional privilege applies to all legal advice and that privilege can only be waived by the IPC in consultation with the relevant Judicial Commissioner and the Legal Advisor.

42. A Judicial Commissioner can request the assistance of Standing Counsel on issues arising from a warrant application. Such requests should be channelled through the IPCO Review Team.

43. It is envisaged that such requests will be appropriate in cases raising novel, particularly complex, or especially important issues. Such requests may result in submissions by Standing Counsel. When such submissions are made, these will be disclosed to the WGD and the WRA which will be allowed an opportunity to comment and respond. Judicial Commissioners may seek such assistance from Standing Counsel and the WRA on the papers or by requesting attendance on the Judicial Commissioner.

44. A record of any advice or legal submissions will be retained by the Legal Adviser and IPCO.

N. The Recording and Review of a Decision

45. Judicial Commissioners will record their decision on the relevant form, always with reasons if the warrant is refused and at their discretion if it is approved. The nature and extent of those reasons is a matter for the Judicial Commissioner though in complex, novel or contentious matters it is anticipated that a detailed record of the decision will be made.

46. The Judicial Commissioners will consider making any decisions on approvals public, subject to any statutory limitations and necessary redactions. Such a decision will be made by the IPC in consultation with the Chief Executive of IPCO, the Judicial Commissioner giving the original approval and, in accordance with s.232 of the Act, the Secretary of State.

O. Reconsideration of a decision by the IPC

47. Section 23(5) IPA provides that “Where a JC, other than the IPC, refuses to approve a person’s decision to issue a warrant under this Chapter, the person may ask the IPC to approve the decision to issue the warrant.” (section 23(5) relates to targeted interception, there are equivalent references elsewhere in the Act in relation to other powers that are subject to Judicial Commissioner approval). Where a JC refuses to approve a decision to issue a warrant then reasons for that refusal will be forwarded to the WGD via the IPCO Review Team.

48. Under section 227(8) IPA, when a warrant has been refused by another JC, the IPC can delegate his ability to consider whether to approve the decision to issue a warrant. This does not apply to cases where the IPC took the original decision to refuse to approve a decision to issue a warrant.

49. The IPC, or JC to whom he has delegated the function, may request further information from the WGD before making a decision. The situation is similar to when a JC seeks clarification or further information from a WGD when considering whether to approve a decision to issue a warrant in the first instance. At this stage, it is not possible to introduce substantive new material to support the warrant application that was not known to the person who decided to issue the warrant at the time of their original

decision (for example, material that could have had a substantive bearing on their decision) as this would require a new warrant application to be submitted.

50. While there is no time limit imposed by either the Act or the Codes of Practice, WGDs (following consultation with the relevant WRA) will in practice ask the IPC to consider whether to approve the decision to issue a warrant within one month of the original refusal. WGDs may sometimes request that, if possible, IPCO deal with some cases within certain timescales where necessary for operational reasons.

51. If the WGD decides not to ask the IPC to decide whether to approve a warrant which another JC has refused, or the IPC decides not to approve the warrant, the WGD may later resubmit the warrant application with additional supporting information. The new warrant application must make clear that the warrant has previously been refused and should include the reasons for the original refusal under the warrant requesting agency's duty to disclose any material that weakens the case for the warrant. Where possible, and subject to proposed timescales for operational activity, IPCO will seek to ensure a warrant that has previously been refused is submitted to the same JC who refused it originally to ensure they are satisfied the reasons for refusing the original application have been properly addressed.