



1st June 2015

**Circular to all Senior Responsible Officers (SROs) under Chapter 2 of Part I
of the Regulation of Investigatory Powers Act 2000 (RIPA 2000)**

Independence of Designated Persons (DPs)

Background

As you will be aware the revised Code of Practice ("the Code") for the Acquisition and Disclosure of Communications Data came into force in March 2015 and there are several policy changes within it that will require careful reflection.

One of the changes in the Code relates to the role of the DP. Paragraph 3.12 outlines that DPs **must** be independent from operations and investigations when granting authorisations or giving notices related to those operations. This is a strengthening of the previous version of the code which stated that DPs **should not** be responsible for granting authorisations or giving notices in relation to investigations in which they are directly involved.

This policy change was brought about in response to the European Court of Justice (ECJ) Judgement which struck down the Data Retention Directive (2006/24/EC) as the directive did not include sufficient safeguards as to why and by whom such data may be accessed. The Judgment did not prevent Member States implementing their own laws requiring the retention of communications data but it did critically note that the Directive itself contained no safeguards to access to the retained data, including in relation to the independence of the person authorising access to the retained data. Within the UK, the Data Retention & Investigatory Powers Act (DRIPA) 2014 implements data retention and also requires that any access to such data is undertaken by the use of Chapter 2 of Part 1 RIPA or a court order.

Clarification and actions to consider

We have received a number of questions from public authorities regarding this policy change and its operational consequences and have produced this circular in consultation with the Home Office to assist public authorities to implement procedures which ensure that any acquisition of communications data is authorised by DPs who are independent of the operation or investigation.

The ECJ Judgement and the revised Code does not define operational independence per se. Therefore, one of the significant hurdles SROs will need to overcome is how to determine whether those persons currently performing the role of DP are sufficiently independent of those investigations and operations. The following points are aimed at assisting SROs to undertake a review of their systems and processes to satisfy themselves, their chief officer and, ultimately, the Interception of Communications Commissioner (“the Commissioner”) that the public authority has a system in place to maintain DP independence:

- A DP must not be directly responsible for the operation or investigation (i.e. they should not have a strategic or tactical influence on the investigation). This will ensure that decisions taken on the necessity and proportionality of an application are not influenced unconsciously by operational imperatives, such as pressure to expedite results on a particular operation.
- A useful proxy is that the DP should be far enough removed from the applicant’s line management chain which will normally mean they are not within the same department or unit.
- It is not regarded as good practice for applicants to be able to choose who the DP will be on a case by case basis (save for in urgent circumstances).
- A defined cadre of DPs would assist the SRO and SPoC to manage the compliance requirements. When we state a “cadre of DPs”, as we often do in our recommendations at inspection, we mean it should not be, for example, any inspector or any superintendent in a police force, but a recognised list defined by role and / or position. A cadre of DPs makes it easier for the SRO to ensure compliance with the Code.

SROs will need to ensure that they have a formal procedure setting out the arrangements in place to ensure independence. During our inspections we will examine those procedures and measures so as to be satisfied they will ensure independence. We will seek to explore how the DPs are nominated / selected to consider applications and to audit compliance against the Code. Public authorities should consider what records they might need to keep or changes that could be made to their systems to keep this area under review.

In all circumstances where public authorities use DPs who are not independent from an operation or investigation (save for the exceptions set out below) this must be notified to the Commissioner at the next inspection¹. The details of the public authorities and the reasons such measures are being undertaken may be published and included in the Commissioner’s report.

¹ See paragraph 3.14 of the Code

Exceptions - matters of urgency

Where it is necessary to act urgently, in circumstances where a public authority is not able to call upon the services of a DP who is independent (see Para 3.13 of the Code) the points to understand here are:

- Urgency² may relate to circumstances where there is an immediate threat to life or an exceptionally urgent operational requirement for the prevention or detection of serious crime or a credible and immediate threat to national security; and
- Such is that urgency that we would ordinarily expect the urgent oral process³ to have been invoked as there was no time to complete the normal written process; and
- It must be clear in each case why it was not possible, in the circumstances, to use an independent DP; and
- Where a DP is not independent from the investigation or operation their involvement and their justification for undertaking the role of the DP must be explicit in their recorded considerations.

Other exceptions

There are two other exceptions specified in the Code as set out below. It is important to note that the Code requires the SRO to inform the Commissioner of the DPs who **will not** be independent in these cases. The notification cannot therefore be retrospective as the security or logistical issues should be immediately apparent to the SRO.

1. Public authorities with small specialist criminal investigation departments - It is recognised within the Code⁴ that there are challenges for such public authorities, for example, the Maritime Accident Investigation Branch, local authorities (notwithstanding the current requirement for judicial authorisation) etc. This exception **does not** apply to police forces, law enforcement agencies or the intelligence agencies.

2. Matters relating to national security⁵ - the exception relates to ongoing operations or investigations immediately impacting on national security issues where the public authority is not able to call upon a DP who is independent from their operations and investigations. It should be noted the term national security relates to matters (as described in footnote 16 of the Code) which relate, for example, to protection against threats from terrorism. This exception **does not** apply to public authorities undertaking investigations that have general security issues associated to them (for example, an investigation relates to an allegation of criminal conduct by a member of a public authority).

² See footnote 52 of the Code

³ See paragraphs 3.65 to 3.71 of the Code relating to Urgent Oral Process

⁴ See paragraphs 3.13 (first indentation) of the Code

⁵ See paragraphs 3.13 (second indentation) of the Code