

IOCCO Response - New Reporting Requirements

1. Purpose

1.1 To respond to Parliament's requirements to seek assurance that the Data Retention and Investigatory Powers Act 2014 (DRIPA) requirements, when amending elements of the Regulation and Investigatory Powers Act 2000 (RIPA), do not extend its scope, in particular-

- the extra-territorial reach of RIPA Part 1 (s4 DRIPA), and,
- a revision of the definition of "telecommunications service" (s5 DRIPA).

1.2 There does not appear to be a legal requirement for the Interception of Communications Commissioner ("the Commissioner") or any other independent oversight body to review the implementation of section 1 DRIPA which relates to the giving of notice by a Secretary of State requiring the retention of specific communications data by a communications service provider (CSP), or, whether DRIPA widens the retention requirements when compared to the Data Retention (EC Directive) Regulations 2009 which it replaced. The Information Commissioner¹ does have responsibilities once the data is retained by means of a notice but that role is related to the data protection principles² (for example, data security, the lawful processing of the data and business processes to stop over retention).

2. The changes to RIPA Part 1

2.1 Statutory purpose of economic well-being

2.1.1 The Code of Practice for the Interception of Communications and the Code of Practice for the Acquisition of Communications (made under s71 of RIPA)

¹ <http://ico.org.uk/>

² http://ico.org.uk/for_organisations/data_protection/the_guide/the_principles

explain where the interception of communications or the acquisition of communications data is necessary in the economic interests of the United Kingdom, it must be taken into account whether, on the facts specific to the case, it is directly related to state security. The term "state security," which is used in Directive 2002/58/EC (concerning the processing of personal data and protection of privacy in the electronic communications sector), should be interpreted in the same way as the term "national security" which is used in RIPA and the codes of practice.

2.1.2 Section 3 of DRIPA amends the s5(3)(c) and s22(2)(c) statutory purposes to the following -

s5(3)(c) "For the purpose, in circumstances appearing to the Secretary of State to be relevant to the interests of national security, of safeguarding the economic well-being of the United Kingdom"

s22(3)(c) "in the interests of the economic well-being of the United Kingdom so far as those interests are also relevant to the interests of national security."

2.2 Extra-territorial reach of RIPA Part 1

2.2.1 RIPA Part 1 has always had implicit extraterritorial effect. Some companies based outside the United Kingdom, including some of the largest communications providers in the market, questioned whether the legislation applied to them. These companies argued that they would only comply with requests where there was a clear obligation in law. When RIPA Part 1 was drafted it was intended to apply to telecommunications companies offering services to United Kingdom customers, wherever those companies were based.

2.2.2 Section 4 of DRIPA amends RIPA Part 1 and makes explicit the extra-territorial reach in relation to both the interception of communications and the acquisition of communications data by adding specific provisions. This confirms that requirements for interception and communications data to overseas companies that are providing communications services within the United Kingdom are subject to the legislation.

2.3 The definition of “telecommunications service”

2.3.1 The original definition within s2(1) of RIPA stated that-

“telecommunications service” means any service that consists in the provision of access to, and of facilities for making use of, any telecommunication system (whether or not one provided by the person providing the service).

2.3.2 Section 5 of DRIPA amends the definition in RIPA to ensure that internet-based services, such as webmail, are included in the definition. The following text is now included after s2(8) RIPA -

“(8A) For the purposes of the definition of “telecommunications service” in subsection (1), the cases in which a service is to be taken to consist in the provision of access to, and of facilities for making use of, a telecommunication system include any case where a service consists in or includes facilitating the creation, management or storage of communications transmitted, or that may be transmitted, by means of such a system.”

3. The role of the Interception of Communications Commissioner (“the Commissioner”)

3.1 New reporting requirements

3.1.1 The potentially wide scope of the “telecommunications service” definition and the extra-territorial reach provoked debate within Parliament during the passage of the DRIP Bill³. As a consequence, s58 RIPA was amended so that the Commissioner is required to report to the Prime Minister half-yearly, rather than annually.

3.1.2 The timing of the reports is as soon as is practicable after the end of each calendar year and after the end of the period of six months beginning with the end of each calendar year. Our next report will be published as soon as is practicable after the end of 2014. To meet the requirements expressed by Parliament, our next report will, as well as reporting on the general carrying out

³ See [The Data Retention and Investigatory Powers Bill - Commons Library Standard Note](http://www.parliament.uk/business/publications/research/briefing-papers/SN06934/the-data-retention-and-investigatory-powers-bill) - download full report at <http://www.parliament.uk/business/publications/research/briefing-papers/SN06934/the-data-retention-and-investigatory-powers-bill> and “Secret expansion of spying despite Coalition’s pledge”, *Sunday Times*, 13 July 2014, p8

of the Commissioner's functions, report on whether DRIPA, in practice, does exactly what the Government said it would –

".....reassure people that the Bill does exactly what the Government are saying: it merely replaces the powers already in existence The commissioner currently reports annually on these matters, and the Opposition proposal, as I understand it, is that he would report on a six-monthly basis. He would, therefore, not just be looking at the situation, but reporting on what was happening. Were he [the Interception Commissioner] to find that there was an extension of powers that would be made clear to the people....."

Home Secretary – Hansard – Column 708

3.1.3 The Shadow Home Secretary made similar reference –

"The six monthly review will reassure the House that the Bill is being implemented in the way that Parliament intended"

Yvette Cooper MP – Hansard – Column 724

3.1.4 The half-yearly reports will seek to provide the public and Parliament with greater understanding, evidence, and assurance of the role the Commissioner and IOCCO and the way in which communications data and interception is being used by public authorities and the safeguards in place. The Commissioner's last report⁴ had, for the first time, no confidential annex and sought to bring a rigorous and independent assessment of these issues especially given the concern in the aftermath of the Snowden-related media reports.

3.2 Statistical Requirements - Communications Data

3.2.1 IOCCO has been working for some time with the Home Office to achieve amendments to the statistical requirements in the code of practice for the acquisition and disclosure of communications data. IOCCO has submitted a matrix to the Home Office which sets out the necessary statistical and reporting requirements for law enforcement, the intelligence agencies, and other public authorities to pave the way towards greater transparency and also, looking to the future, provide statistical information which will assist the provisions relating

⁴ <http://www.iocco-uk.info/sections.asp?sectionID=1&type=top>

to the retention of communications data by CSPs and the subsequent acquisition and disclosure of that data to be kept under review.

".....As the commissioner made clear in his report, the Home Office was working with him to improve the statistics collected by public authorities. He identified a number of further elements in his report, including the total number of applications submitted, the total number of items of data requested, the total items of data broken down by statutory purpose for which they were required and the total items of data broken down by crime type or other purpose for which they were required....."

Minister for Security and Immigration - Hansard - Column 814

3.2.2 IOCCO will continue to work with the Home Office on this with a view to the new statistical requirements being adopted by 1st January 2015. This could, if necessary, be achieved by the Commissioner requiring all public authorities to retain this information as part of their general duty under s58(1) of RIPA to disclose or provide to the Commissioner *"all such documents and information as he may require for the purpose of enabling him to carry out his functions under Section 57 of the Act."*

3.3 Review of interception and communications data powers

3.3.1 IOCCO will engage with the independent reviewer of terrorism legislation⁵, David Anderson QC, who is to lead a review before the General Election, of:

- the capabilities and powers required by law enforcement and the security intelligence agencies, and
- the regulatory framework within which those capabilities and powers should be exercised.

3.3.2 There are several strands to his review which we can assist with. We will share our experiences and any information he may need to assist him in determining the safeguards to protect privacy; the challenges of changing technologies; the statistical and transparency requirements that should apply; and, the effectiveness of the existing legislation and oversight arrangements.

⁵ See <https://terrorismlegislationreviewer.independent.gov.uk/>

3.4 Engagement with Communication Service Providers (CSPs)

3.4.1 IOCCO has a strategic relationship with CSPs which greatly assists us to carry out thorough inspections of the requirements made of them concerning the acquisition and disclosure of communications data and their ability to comply with warrants relating to the interception of the content of communications (for example, on a regular basis the CSPs share with us their audit files which contain the name of the public authority acquiring data, the reference number of the request, the data description and the statutory purpose used). This information allows us to perform a back audit when inspecting public authorities to assess whether there is a corresponding authority in place and its scope.

3.4.2 We will liaise with CSPs within the United Kingdom and those outside of the territory⁶ advising them to make additional information available to us when requirements to undertake interception or disclose communications data under RIPA are made by public authorities which appear to the CSP to be new requirements or new interpretations of RIPA beyond those intended by Parliament. We will then assess whether those requirements were what Parliament intended and report our findings.

3.4.3 We will engage with the nine interception agencies that may undertake lawful interception by means of a Chapter 1 Part 1 RIPA warrant authorised by a Secretary of State to determine the identity of CSPs, both within the United Kingdom and outside of our territory, upon which requirements are being made. We will then assess whether those requirements are new or expanded requirements, whether they were what Parliament intended and report our findings.

3.4.4 The larger element of our work will be to engage with all police forces, law enforcement agencies, the intelligence agencies and other public authorities who may undertake the acquisition of communications data within Chapter 2 of Part

⁶ IOCCO is already aware of the companies based outside the United Kingdom who questioned whether RIPA applied to them and also those who have, for a number of years, responded to RIPA requirements made of them.

1 RIPA to determine the identity of CSPs, both within the United Kingdom and outside of our territory, upon which requirements are being made. We will then assess whether those requirements are new or expanded requirements, whether they were what Parliament intended and report our findings.

3.5 Contact Us

3.5.1 If you wish to bring some information to our attention that has a direct bearing on the issues that IOCCO has been tasked by Parliament to consider, please do so to info@iocco.gsi.gov.uk.

3.5.2 Your submission should be concise and directly relate to the impact of the extra-territorial reach of RIPA Part 1, the revision of the definition of “telecommunications service”, or, the communications data statistical requirements.

25th July 2014