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SI0117

Covert Surveillance of Legal Consultations



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1. Introduction

Statute requires that directed surveillance of any legal consultations on specified premises be treated as intrusive surveillance as per [The Regulation of Investigatory Powers \(Extension of Authorisation Provisions: Legal Consultations\) Order 2010](#).

2. Aims

Directed surveillance that is carried out in relation to anything taking place on any specified premises at any time during the surveillance, used for the purpose of legal consultations shall be treated for the purposes of [Part II of the Regulation of Investigatory Powers Act 2000](#) (RIPA) as intrusive surveillance.

3. Outline

Specified premises are:

- Any place in which persons who are serving sentences of imprisonment or detention, remanded in custody or committed in custody for trial or sentence may be detained;
- Any place in which persons may be detained under;
 - Paragraph: 16(1), (1A) or (2) of [Schedule 2](#) or
 - Paragraph 2(2) or (3) of [Schedule 3](#) to the [Immigration Act 1971](#) or
 - [Section 36\(1\) of the UK Border Act 2007](#);
- In which persons may be detained under:
 - [Part VI of the Criminal Procedures \(Scotland\) Act 1995](#),
 - the [Mental Health \(Care and Treatment\) \(Scotland\) Act 2003](#), or
 - the [Mental Health \(NI\) Order 1986](#)
- Police stations;
- The place of business of any professional legal adviser; and
- Any place used for the sittings and business of any court, tribunal, inquest or inquiry.

4. Definitions

“**Legal Consultation**” is a consultation between a Professional Legal Adviser and his client or any person representing his client.

It is also a consultation between a professional Legal Adviser or his client or any such representative and a Medical Practitioner made in connection with, or in contemplation of, legal proceedings and for the purposes of such proceedings:

- An “**inquiry**” means an inquiry under the [Inquiries Act 2005](#);
- A “**medical practitioner**” means a person registered under the [Medical Act 1983](#); and
- The “**premises**” has the meaning given in [section 48\(8\) of the Regulation of Investigatory Powers Act 2000](#).

5. Material Subject to Legal Privilege

The definition of “**legal consultation**” in the 2010 Order does not distinguish between

legal consultations which are legally privileged wholly or in part and legal consultations which may be in furtherance of a criminal purpose and therefore not protected by legal privilege.

Covert surveillance of all legal consultations covered by the 2010 Order (whether protected by legal privilege or not) is to be treated as intrusive surveillance.

The ‘Legal privilege’ definition in:

- [Section 98 of the Police Act 1997](#) and
- [Article 12 of the PACE \(NI\) Order 1989](#),

This definition should be used to determine how to handle material obtained through surveillance authorised under RIPA, including through surveillance which is treated as intrusive surveillance.

Under the definition in the [Police Act 1997](#), legal privilege does not apply to communications or items held, or oral communications made, with the intention of furthering a criminal purpose (whether the lawyer is acting unwittingly or culpably). Legally privileged communications or items will lose their protection for these other purposes if the professional legal adviser

intends to hold or use them for a criminal purpose.

Privilege is not lost if a professional Legal Adviser is properly advising a person who is suspected of having committed a criminal offence.

Where covert surveillance or property interference is likely or intended to result in

the acquisition of knowledge of matters subject to legal privilege, an authorisation shall only be granted or approved if the Senior Authorising Officer, Secretary of State, or approving Surveillance Commissioner, as appropriate, is satisfied that there are exceptional and compelling circumstances that make the authorisation necessary.

Where the surveillance or property interference:	
Is not intended	<p>To result in the acquisition of knowledge of matters subject to legal privilege, such exceptional and compelling circumstances may arise in the:</p> <ul style="list-style-type: none"> • Interests of national security; • Economic well-being of the UK; or • For the purpose of preventing or detecting serious crime.
Is intended	<p>To result in the acquisition of knowledge of matters subject to legal privilege, such circumstances will arise only in a very restricted range of cases, such as where there is a threat to:</p> <ul style="list-style-type: none"> • Life or limb; • National security, and the surveillance or property interference is reasonably regarded as likely to yield intelligence necessary to counter the threat.

Intrusive surveillance, including surveillance which is treated as intrusive by virtue of the 2010 Order, is subject to prior approval by a Surveillance Commissioner

(unless the case is urgent whereby the Chief Constable can consider an Urgent Oral Authorisation).

Matters subject to legal privilege are particularly sensitive and surveillance which acquires such material may give rise to issues under [Article 6](#) of the European Convention on Human Rights (ECHR) (right to a fair trial) as well as engaging [Article 8](#) (right to respect for private, home and family life). Proper handling of such material can reduce the risk of such issues arising.

If the Police Service deliberately acquires knowledge of matters subject to legal privilege, they may use that knowledge to counter the threat which led them to acquire it, or another threat of equivalent magnitude, but it will not be admissible in court.

The Police Service will ensure that knowledge of matters subject to legal privilege, whether or not it is acquired deliberately, is kept separate from law enforcement investigations and criminal prosecutions.

In cases likely to result in the acquisition of knowledge of matters subject to legal privilege, the senior authorising officer or Surveillance Commissioner may require regular reporting so as to be able to decide whether the authorisation should continue.

In those cases where legally privileged material has been acquired and retained, the matter should be reported to the senior authorising officer by means of a review and to the relevant Commissioner or Inspector during the next inspection

A substantial proportion of the communications between a lawyer and his client may be subject to legal privilege. Therefore, in any case where a lawyer is the subject of an investigation or operation, authorising officers should consider whether the special safeguards detailed in this Service Instruction apply.

Where there is any doubt as to the handling and dissemination of knowledge of matters which may be subject to legal privilege, advice should be sought from the Police Service of Northern Ireland (PSNI) Human Rights Legal Adviser before any further dissemination of the information takes place. Similar advice should also be sought where there is doubt over whether information is not subject to legal privilege due to the “in furtherance of a criminal purpose” exception.

The retention of legally privileged material, or its dissemination to an outside body should be accompanied by a clear warning

that it is subject to legal privilege. It should be safeguarded by taking all practicable steps to ensure there is no possibility of it becoming available, or its contents becoming known, to any person whose possession of it might prejudice any criminal or civil proceedings to which the information relates.

Any dissemination of legally privileged material to an outside body should be notified to the relevant Commissioner or Inspector during their next inspection.

6. Retention and Destruction of Material

The PSNI will ensure that arrangements are in place for the secure handling, storage and destruction of material

obtained through the use of directed or intrusive surveillance or property interference as per PSNI Review, Retention and Disposal Schedule 2019.

The senior authorising officer will ensure compliance with the appropriate data protection requirements under the Data Protection Act and any other relevant codes of practice relating to the handling and storage of material.

Particular attention is drawn to the requirements of the [Code of Practice](#) issued under the [Criminal Procedure and Investigations Act 1996 \(CPIA\)](#). This requires that material which is obtained in the course of a criminal investigation and which may be relevant to the investigation must be recorded and retained.

Dissemination, copying and retention of material must be limited to the minimum necessary for authorised purposes. For the purposes of this code, something is necessary for the authorised purposes if the material:

- Is, or is likely to become, necessary for any of the statutory purposes set out in the 2000, 1997 or 1994 Act in relation to covert surveillance or property interference;
- Is necessary for facilitating the carrying out of the functions of public authorities under those Acts;
- Is necessary for facilitating the carrying out of any functions of the Commissioner or the Investigatory Powers Tribunal;
- Is necessary for the purposes of legal proceedings; or
- Is necessary for the performance of the functions of any person by or under any enactment.

7. Handling of Material that is subject to Legal Privilege

Material that is subject to legal privilege will be disseminated, stored, retained and disposed of in line with any specific conditions that are contained within the authorisation.

Legally privileged material will be clearly marked as being such and dissemination will be limited to only those parties who are authorised. The material will be handled in a manner that is consistent with procedures set out for the storage and handling of classified material.

Legally privileged material that is deliberately acquired will only be disseminated for the purpose of countering the identified threat, or another threat of equivalent magnitude.

Legally privileged material that is acquired and is not deemed relevant will not be copied or disseminated; the master and working copy will be sealed and securely stored. Material that is subject to legal privilege will not be used to further other investigations unless explicitly approved within the authorisation or any review. The dissemination strategy will ensure that any

subsequent investigation or prosecution is not compromised.

The copying and handling of any material will be fully audited. Material that is subject to legal privilege will not be recorded on PSNI intelligence databases.

Dissemination of material to an outside body will only be considered when it is necessary. Material that is disseminated to an outside body will retain any additional handling conditions.

The additional handling conditions will be notified to that body as a condition of such dissemination.

Any employee of the PSNI who is given access to the material will be required to sign to confirm that they will not disclose the material other than in accordance with the dissemination policy.

Material that is subject to legal privilege will only be retained for as long as is necessary to:

- Counter the threat in respect of which it was obtained;
- Comply with obligations with respect to the CPIA; and

- Comply with Section 9.5 of the Revised Code of Practice for Covert Surveillance and Property Interference (2018).

When obligations with respect to the three points above have been discharged the senior authorising officer will direct that the material be destroyed. Disposal will be witnessed and certified by the PSNI Human Rights Legal Adviser.

Any legal privilege specific handling procedures will not apply to material that is not subject to legal privilege due to the ‘in furtherance of a criminal purpose’ exception.

The PSNI Human Rights Legal Adviser will be consulted on all aspects of the acquisition, retention, handling, dissemination and disposal of legally privileged material. Advice from independent counsel may be utilised when deemed appropriate.

8. The Role of the Prosecution Service

In the event that criminal proceedings are being contemplated the following guidance will be adhered to:

Pre-charge:

The Public Prosecution Service (PPS) must not be part of the process that may identify legally privileged material. The PPS must not be privy to it as they may need to be consulted about the nature of the charge or provide advice on evidential matters.

Post-charge:

CPIA will be engaged and full revelation will be made to the PPS

Appendix A Contact Us

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