

# HOUSE OF LORDS

## Merits of Statutory Instruments Committee

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### 6th Report of Session 2009-10

**Draft Regulation of Investigatory Powers (Directed  
Surveillance and Covert Human Intelligence Sources) Order  
2010**

**Draft Regulation of Investigatory Powers (Communications  
Data) Order 2010**

**Draft Regulation of Investigatory Powers (Covert Human  
Intelligence Sources: Code of Practice) Order 2010**

**Draft Regulation of Investigatory Powers (Covert  
Surveillance and Property Interference: Code of Practice)  
Order 2010**

**Draft Regulation of Investigatory Powers (Extension of  
Authorisation Provisions: Legal Consultations) Order 2010**

**Regulation of Investigatory Powers (Authorisations  
Extending to Scotland) (Amendment) Order 2009**

**Regulation of Investigatory Powers (Covert Human  
Intelligence Sources: Matters Subject to Legal Privilege)  
Order 2009**

Correspondence:

**Rail Passengers' Rights and Obligations (Exemptions)  
Regulations 2009**

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### *The Select Committee on the Merits of Statutory Instruments*

The Committee has the following terms of reference:

- (1) The Committee shall, subject to the exceptions in paragraph (2), consider—
  - (a) every instrument (whether or not a statutory instrument), or draft of an instrument, which is laid before each House of Parliament and upon which proceedings may be, or might have been, taken in either House of Parliament under an Act of Parliament;
  - (b) every proposal which is in the form of a draft of such an instrument and is laid before each House of Parliament under an Act of Parliament,with a view to determining whether or not the special attention of the House should be drawn to it on any of the grounds specified in paragraph (3).
- (2) The exceptions are—
  - (a) remedial orders, and draft remedial orders, under section 10 of the Human Rights Act 1998;
  - (b) draft orders under sections 14 and 18 of the Legislative and Regulatory Reform Act 2006, and subordinate provisions orders made or proposed to be made under the Regulatory Reform Act 2001;
  - (c) Measures under the Church of England Assembly (Powers) Act 1919 and instruments made, and drafts of instruments to be made, under them.
- (3) The grounds on which an instrument, draft or proposal may be drawn to the special attention of the House are—
  - (a) that it is politically or legally important or gives rise to issues of public policy likely to be of interest to the House;
  - (b) that it may be inappropriate in view of changed circumstances since the enactment of the parent Act;
  - (c) that it may inappropriately implement European Union legislation;
  - (d) that it may imperfectly achieve its policy objectives.
- (4) The Committee shall also consider such other general matters relating to the effective scrutiny of the merits of statutory instruments and arising from the performance of its functions under paragraphs (1) to (3) as the Committee considers appropriate, except matters within the orders of reference of the Joint Committee on Statutory Instruments.

### *Members*

The members of the Committee are:

Rt Hon. the Baroness Butler-Sloss GBE	The Baroness Morris of Yardley
The Baroness Deech DBE	The Lord Norton of Louth
The Lord Hart of Chilton	The Lord Rosser ( <i>Chairman</i> )
The Lord James of Blackheath CBE	The Lord Scott of Foscote
The Lord Lucas	The Baroness Thomas of Winchester
The Lord Methuen	

### *Registered interests*

Members' registered interests may be examined in the online Register of Lords' Interests at [www.publications.parliament.uk/pa/ld/ldreg.htm](http://www.publications.parliament.uk/pa/ld/ldreg.htm). The Register may also be inspected in the House of Lords Record Office and is available for purchase from the Stationery Office.

### *Publications*

The Committee's Reports are published by the Stationery Office by Order of the House in hard copy and on the internet at [www.parliament.uk/parliamentary\\_committees/merits.cfm](http://www.parliament.uk/parliamentary_committees/merits.cfm)

### *Contacts*

If you have a query about the Committee or its work, please contact the Clerk of the Merits of Statutory Instruments Committee, Delegated Legislation Office, House of Lords, London SW1A 0PW; telephone 020-7219 8821; fax 020-7219 2571; email [merits@parliament.uk](mailto:merits@parliament.uk). The Committee's website, [www.parliament.uk](http://www.parliament.uk), has guidance for the public on how to contact the Committee if you have a concern or opinion about any new item of secondary legislation.

### *Statutory instruments*

The Government's Office of Public Sector Information publishes statutory instruments on the internet at [www.opsi.gov.uk/stat.htm](http://www.opsi.gov.uk/stat.htm), together with an explanatory memorandum (a short, plain-English explanation of what the instrument does) for each instrument.

# Sixth Report

## INSTRUMENTS DRAWN TO THE SPECIAL ATTENTION OF THE HOUSE

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**The Committee has considered the following instruments and has determined that the special attention of the House should be drawn to them on the grounds specified.**

### **Draft Regulation of Investigatory Powers (Directed Surveillance and Covert Human Intelligence Sources) Order 2010 and six related instruments<sup>1</sup>**

*Summary: The Home Office recently consulted on proposals for revising the Regulation of Investigatory Powers Act 2000 ('RIPA') framework. In a recent Written Statement, the Government said that as most of the responses to the consultation were broadly supportive of the proposals, they would take forward the proposals for secondary legislation described in the consultation document [HL Debates 4 November 2009: WS 17 to WS19]. This package of seven instruments, amongst other things: identifies the persons within the 43 specified public authorities who may authorise the use of directed surveillance and the use or conduct of covert human intelligence sources; and lists the 42 relevant public authorities who may acquire communications data under RIPA. Two of the SIs also bring into force the two revised RIPA Codes of Practice. Although the results of the consultation did not suggest any significant dissatisfaction with the proposals, given previous concerns raised about the RIPA framework both in the House and the media, the House may wish to satisfy itself as to the efficacy of the revised framework.*

**These instruments are drawn to the special attention of the House on the ground that they give rise to issues of public policy likely to be of interest to the House.**

1. On 17 April 2009 the Home Office launched a three month consultation on proposals relating to the Regulation of Investigatory Powers Act 2000 ('RIPA'). The consultation was designed to assist the Government, amongst other things, to: review the public authorities able to authorise the use of communications data, covert surveillance and covert human intelligence sources under RIPA; provide better<sup>2</sup> guidance; and reduce bureaucracy<sup>2</sup>. The consultation attracted 222 responses. In a Written Statement at the start of November, the Government said that as most of the responses were broadly supportive of the proposals in the consultation document, subject to minor changes, they would take forward the proposals for secondary legislation described in the consultation as soon as possible [HL Debates: 4 November 2009: WS17 to WS19].

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<sup>1</sup> Draft Regulation of Investigatory Powers (Extension of Authorisation Provisions: Legal Consultations) Order 2010, Draft Regulation of Investigatory Powers (Communications Data) Order 2010, Draft Regulation of Investigatory Powers (Covert Human Intelligence Sources: Code of Practice) Order 2010, Draft Regulation of Investigatory Powers (Covert Surveillance and Property Interference: Code of Practice) Order 2010, SI 2009/3403 Regulation of Investigatory Powers (Authorisations Extending to Scotland) (Amendment) Order 2009 and SI 2009/3404 Regulation of Investigatory Powers (Covert Human Intelligence Sources: Matters Subject to Legal Privilege) Order 2009

<sup>2</sup> Regulation of Investigatory Powers Act 2000: Consolidating Orders and Codes of Practice. Summary of responses to the 2009 consultation paper

2. This package of secondary legislation includes five affirmative instruments and two negative instruments. The purpose of each instrument is as follows:
- Draft Regulation of Investigatory Powers (Directed Surveillance and Covert Human Intelligence Sources) Order 2010: identifies the designated persons holding offices, ranks and positions with the relevant public authorities who may authorise the use of directed surveillance and the use or conduct of covert human intelligence sources. The SI consolidates four previous Orders;
  - Draft Regulation of Investigatory Powers (Extension of Authorisation Provisions: Legal Consultations) Order 2010: requires that directed surveillance that is carried out in places ordinarily used for legal consultation, at a time when they are being used for such consultations, is to be treated as intrusive surveillance for the purposes of RIPA. The Government is introducing the SI in order to comply with a recent House of Lords judgement<sup>3</sup>;
  - Draft Regulation of Investigatory Powers (Communications Data) Order 2010: lists the relevant public authorities who may acquire communications data under RIPA. The SI consolidates three previous Orders;
  - Draft Regulation of Investigatory Powers (Covert Human Intelligence Sources: Code of Practice) Order 2010: brings into force a revised code of practice relating to the conduct and the use of covert human intelligence sources by public authorities under RIPA. The revised code replaces the previous version;
  - Draft Regulation of Investigatory Powers (Covert Surveillance and Property Interference: Code of Practice) Order 2010: brings into force a revised code of practice relating to the carrying out of covert surveillance under RIPA and to interference with property or wireless telegraphy under the Police Act 1997 and the Intelligence Services Act 1994. The revised code will replace the previous version;
  - SI 2009/3403 Regulation of Investigatory Powers (Authorisations Extending to Scotland)(Amendment) Order 2009: the purpose of this amending Order is to ensure that the UK Border Agency may grant or renew authorisations under RIPA where all conduct to be authorised is likely to take place in Scotland; and
  - SI 2009/3404 Regulation of Investigatory Powers (Covert Human Intelligence Sources: Matters Subject to Legal Privilege) Order 2009: makes provision in relation to the authorisation of the use or conduct of covert human intelligence sources under RIPA to obtain, provide access to or disclose matters subject to legal privilege.
3. The draft Regulation of Investigatory Powers (Directed Surveillance and Covert Human Intelligence Sources) Order 2010 and the Regulation of Investigatory Powers (Communications Data) Order 2010 make substantive changes to the RIPA framework following the consultation. The first Order

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<sup>3</sup> In re McE (Appellant) (Northern Ireland), In re C (AP) and another (Appellants) (Northern Ireland), In re M (Appellant) (Northern Ireland) [2009] UKHL 15

amends the list of 43 specified public authorities<sup>4</sup> who may authorise the use of directed surveillance and/or the use or conduct of covert human intelligence sources (see paragraph 4.5 of the Explanatory Memorandum). The second Order amends the list of 42 relevant public authorities<sup>5</sup> who may acquire communications data under RIPA. (see paragraph 4.3 of the Explanatory Memorandum). The results of the consultation did not suggest any significant dissatisfaction with the public authorities on the RIPA lists (see Appendix and pages 5 and 6 of the Summary of Responses). However, given the well-publicised concerns about the use of RIPA powers by some public authorities in the past, the House may wish to satisfy itself that all the public authorities on the two lists have a legitimate need for these powers.

4. The two Codes of Practice have been revised following the consultation. Central to the two Codes is the objective of ensuring proper proportionality in authorisations. In further information received from the Home Office (see Appendix), that Department says that the majority of respondents believed the new guidance was better than the old, and they responded to those who wanted further clarity by accepting in the revised codes many of the suggestions made. However, the Home Office also says that there are those who want very specific examples catering for many different types of case and, conversely, those who say that this level of guidance is not sufficiently flexible to be reliable. The House may wish to consider whether the Codes provide effective guidance on the key issue of proportionality.
5. The Regulation of Investigatory Powers (Directed Surveillance and Covert Human Intelligence Sources) Order 2010 maintains the existing authorisation arrangements for directed surveillance and covert human intelligence sources. In normal circumstances officers more senior to the

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<sup>4</sup> **For directed surveillance and covert human intelligence sources:** Armed Services; Armed Service Police; Care Quality Commission; Charity Commission; Civil Nuclear Constabulary; Department for Business, Innovation Skills; Department for Environment, Food and Rural Affairs; Department of Health – Medicines and Healthcare Products Regulatory Agency; Department for Transport – Maritime and Coastguard Agency; Department for Transport – Vehicle Operator Services Agency; Environment Agency; Financial Services Authority; Fire and Rescue Services; Food Standards Agency; Gambling Commission; Gangmasters Licensing Authority; Health and Safety Executive; HM Revenue and Customs; Home Office – UK Border Agency; Independent Police Complaints Commission; Intelligence Agencies (GCHQ, the Security Service and the Secret Intelligence Service); Local Authorities; Ministry of Defence Police; Ministry of Justice; Northern Ireland Office – Prison Service; Office of Communications; Office of the Police Ombudsman for Northern Ireland; Office of Fair Trading; Police Forces; Port of Liverpool Police; Scottish Crime and Drug Enforcement Agency; Serious Fraud Office; Serious Organised Crime Agency and Welsh Assembly Government. **For directed surveillance only:** Child Maintenance and Enforcement Commission; Department of Transport – Driving Standards Agency; Department for Work and Pensions; HM Chief Inspector of Education, Children’s Services and Skills; Information Commissioner; NHS Services; Port of Dover Police; Royal Mail and Royal Pharmaceutical Society of Great Britain

<sup>5</sup> Ambulance Services; Armed Service Police; Charity Commission; Child Maintenance and Enforcement Commission; Civil Nuclear Constabulary; Criminal Cases Review Commission/Scottish CCRC; Department of Agriculture and Rural Development (Northern Ireland); Department for Business, Innovation and Skills; Department of Enterprise, Trade and Investment (Northern Ireland); Department for Environment, Food and Rural Affairs; Department of the Environment (Northern Ireland); Department of Health – Medicines & Healthcare Products Regulatory Agency; Department for Transport – Accident Investigation Branches; Department for Transport – Maritime and Coastguard Agency; Environment Agency/Scottish Environment Protection Agency; Financial Services Authority; Fire and Rescue Services; Food Standards Agency; Gambling Commission; Gangmasters Licensing Authority; Health and Safety Executive; HM Revenue and Customs; Home Office – UK Border Agency; Independent Police Complaints Commission; Information Commissioner; Intelligence Agencies (GCHQ, the Security Service and the Secret Intelligence Service); Local Authorities; Ministry of Defence Police; Ministry of Justice; NHS Services; Northern Ireland Office – Prison Service; Office of Communications; Office of Fair Trading; Office of the Police Ombudsman for Northern Ireland; Pensions Regulator; Police Forces; Ports Police (Dover and Liverpool); Postal Services Commission; Royal Mail; Scottish Crime and Drug Enforcement Agency; Serious Fraud Office and Serious Organised Crime Agency

usual authorising rank can authorise action (Article 3 (3)), but if the matter is urgent, and the normal authorising rank is unavailable, only a more junior rank and not the more senior ranks can authorise action (Article 4). In further information on this point (see Appendix), the Home Office points to the statutory Code of Practice and the more limited time period for authorisations as safeguards. The House may wish to question the Minister further on the authorisation process in urgent cases.

## OTHER INSTRUMENTS OF INTEREST

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### ***Draft Employment Relations Act 1999 (Blacklists) Regulations 2010***

6. These draft Regulations prohibit the compilation, distribution and use of lists (“blacklists”), the purpose of which is to facilitate discrimination against trade union members and activists by employers and employment agencies. This is the first time that the power to lay such Regulations has been used despite the Employment Relations Act 1999 having been in force for ten years. The draft Regulations follow the results of an investigation by the Information Commissioner in March 2009 which found that one organisation had for many years provided a service to around forty construction companies appraising the suitability for employment of individuals (see Explanatory Memorandum paragraph 7.1). In relation to the burden of proof, the Committee notes that the Regulations provide that the tribunal must find that there was a contravention “if there are facts from which the tribunal could conclude, in the absence of any other explanation” that it occurred, unless the person complained against “shows that it did not” (Regulation 5(3); similar provisions occur in regulations 6(3), 9(2) and 13(2)). The Committee further notes that the starting point for calculating compensation should be at least £5000, whatever the actual effect of the conduct found to be in contravention of the Regulations (regulations 8(3), 11(5)).

### ***Draft Infrastructure Planning (Decisions) Regulations 2010***

7. These affirmative Regulations are part of the third tranche of regulations setting the procedures for handling National Policy Statements on major infrastructure projects. They prescribe a list of matters to which the relevant decision-maker (either the Infrastructure Planning Commission or the Secretary of State) must have regard when taking decisions on applications for nationally significant infrastructure projects. The list comprises listed buildings, licences under the Food and Environment Protection Act 1985, deemed consents under the Coast Protection Act 1949, hazardous substances and the UN Environmental Programme Convention on Biodiversity of 1992. This tranche deals with issues related to the examination and decision making phases and further regulations and guidance covering the examination of applications, compulsory purchase and fees will follow shortly.

### ***Proscribed Organisations (Name Changes) Order 2010 (SI 2010/34)***

8. This SI exercises the power to specify other names for an organisation that is already proscribed in Schedule 2 to the Terrorism Act 2000 under the names ‘Al-Ghurabaa’ and ‘The Saved Sect’. The alternative names are: ‘Al

Muhajroun', 'Call to Submission', 'Islam4UK', Islamic Path and London School of Sharia. The SI came into force on 14 January. The effect of the Order is that it is a criminal offence for a person to belong to or to encourage support for an organisation operating under one of the alternative five names, and that the financial assets of the organisation can be subject to freezing and seizure.

**RAIL PASSENGERS' RIGHTS AND OBLIGATIONS  
(EXEMPTIONS) REGULATIONS 2009 (SI 2009/2970):  
GOVERNMENT RESPONSE AND OTHER CORRESPONDENCE**

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9. In our 2nd report of this session the Committee drew these Regulations to the special attention of the House on the grounds of inappropriately implementing EU legislation as they delayed the implementation of passenger benefits because the Department for Transport had not yet worked out the full implications.
10. The Committee also wrote to the Minister to express its concern over the way this legislation was being handled. The Secretary of State for Transport's reply was published in our 4th report of this session, with a commentary to the effect that although the letter apologised for the defects it did not explain why they had occurred or what was being done to resolve matters. Lord Adonis has now sent a supplementary letter that provides specific information on the two points raised (the reason for delay and which of the EU protections were not already offered by domestic legislation). This is published at Appendix 2.

**INSTRUMENTS NOT DRAWN TO THE SPECIAL ATTENTION OF  
THE HOUSE**

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**The Committee has considered the instruments set out below and has determined that the special attention of the House need not be drawn to them.**

**Draft Instruments requiring affirmative approval**

Draft Child Trust Funds (Amendment) Regulations 2010

Draft Electronic Commerce Directive (Hatred against Persons on Religious Grounds or the Grounds of Sexual Orientation) Regulations 2010

Draft Employment Relations Act 1999 (Blacklists) Regulations 2010

Draft Infrastructure Planning (Decisions) Regulations 2010

Draft Motor Vehicles (International Circulation) (Amendment) Order 2010

Draft Overhead Lines (Exempt Installations) Order 2010

Draft Passengers' Council (Non-Railway Functions) Order 2010

**Instruments subject to annulment**

- SI 2009/3200 General Teaching Council (Registration of Temporary Teachers from Relevant European States) (England and Wales) Regulations 2009
- SI 2009/3214 European Communities (Designation) (No. 5) Order 2009
- SI 2009/3298 Civil Enforcement of Parking Contraventions (County of Oxfordshire) (District of West Oxfordshire) Designation Order 2009
- SI 2009/3319 Allocation and Transfer of Proceedings (Amendment) Order 2009
- SI 2009/3320 Civil Courts (Amendment No. 2) Order 2009
- SI 2009/3334 Police Act 1997 (Criminal Records) (Disclosure) (Amendment No. 3) Regulations (Northern Ireland) 2009
- SI 2009/3335 Railways (East London Railway Services) Exemption Order 2009
- SI 2009/3336 Railways (Transport for London) (Exemptions) Order 2009
- SI 2009/3337 School Support Staff Negotiating Body (Prescribed Organisations) Regulations 2009
- SI 2009/3340 National Health Service (Pharmaceutical Services) (Appliances) (Amendment) Regulations 2009
- SI 2009/3344 Eels (England and Wales) Regulations 2009
- SI 2009/3345 Marine and Coastal Access Act 2009 (Commencement No. 1 and Transitional Provisions) Order 2009
- SI 2009/3352 Criminal Defence Service (Recovery of Defence Costs Orders) (Amendment) Regulations 2009
- SI 2009/3361 Crown Court (Amendment) Rules 2009
- SI 2009/3362 Magistrates' Courts (Amendment) Rules 2009
- SI 2009/3363 British Nationality (General) (Amendment) Regulations 2009
- SI 2009/3367 Cosmetic Products (Safety) (Amendment No. 4) Regulations 2009
- SI 2009/3389 Housing Benefit and Council Tax Benefit (War Pension Disregards) (Amendment) Regulations 2009
- SI 2009/3390 Civil Procedure (Amendment No. 2) Rules 2009
- SI 2009/3391 Sea Fishing (Illegal, Unreported and Unregulated Fishing) Order 2009
- SI 2010/17 National Lottery (Annual Licence Fees) Regulations 2010
- SI 2010/34 Proscribed Organisations (Name Changes) Order 2010

## APPENDIX 1: DRAFT REGULATION OF INVESTIGATORY POWERS (DIRECTED SURVEILLANCE AND COVERT HUMAN INTELLIGENCE SOURCES) ORDER 2010 AND SIX RELATED INSTRUMENTS<sup>6</sup>

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### Information from the Home Office

**Q1.** *Summary of responses to the 2009 consultation paper: Page 5. Who were the 11 respondents in favour of removing a number of public authorities from the RIPA lists, and which authorities were they?*

**A1.** They were: 1 individual working in a local authority (Sandwell), 2 local authority councillors (from Haringey and Birmingham City Councils) and the law reform and human rights organisation 'Justice'. The rest were members of the public.

**Q2.** *Summary of responses: Page 5. If 37% of respondents argued that there should be no or minimal change to the list of public authorities in the RIPA framework, does that mean implicitly that 63% did want the framework to be changed?*

**A2.** No. Only 101 out of 222 respondents addressed this point. Out of these 101, 83 argued for no or minimal change. The percentage we quoted throughout the document was of the total number of responses to the consultation, not of the number responding to individual points.

**Q3.** *Summary of responses: Page 7. The Government position is that covert investigation under RIPA should only be used when other reasonable options have been considered and ruled out, and the revised codes emphasise this point. Why hasn't this requirement been put in legislation rather than the code?*

**A3.** RIPA already states that the authorisation of the interception of communications (s5(4)) and intrusive surveillance (s32(4)) should include consideration of whether the information sought could reasonably be obtained by other means. Although RIPA does not use the same wording for directed surveillance, the Government believes that new guidance developed specifically for local authorities should make this clear in order to help them weigh up whether RIPA authorisations are appropriate in each circumstance. You are right, therefore, to suggest that in the case of directed surveillance this is a matter of guidance rather than law.

**Q4.** *Summary of responses: Page 9. Why is the enhanced definition of proportionality in the code and not in the legislation?*

**A4.** RIPA did not define what constitutes a proportionate action and what does not because of the many variables to be weighed in each very different case across the range of public authority investigations. Previous codes of practice have attempted to provide a little more guidance on this point. They state that one of the factors to be weighed is the importance of the technique to the investigation. This has not prevented some arguably disproportionate usage (for instance to address littering and dog fouling). Hence the current proposal to include an assessment of the severity of the offence when considering proportionality.

**Q5.** *Summary of responses: Page 14. At the time of the consultation, only 24.5% of respondents replied that the codes provide sufficient clarity. Is there any remaining dissatisfaction on this point?*

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<sup>6</sup> Draft Regulation of Investigatory Powers (Extension of Authorisation Provisions: Legal Consultations) Order 2010, Draft Regulation of Investigatory Powers (Communications Data) Order 2010, Draft Regulation of Investigatory Powers (Covert Human Intelligence Sources: Code of Practice) Order 2010, Draft Regulation of Investigatory Powers (Covert Surveillance and Property Interference: Code of Practice) Order 2010, SI 2009/3403 Regulation of Investigatory Powers (Authorisations Extending to Scotland) (Amendment) Order 2009 and SI 2009/3404 Regulation of Investigatory Powers (Covert Human Intelligence Sources: Matters Subject to Legal Privilege) Order 2009

**A5.** The majority of respondents believed the new guidance was better than the old. Only 29 out of 222 believed the contrary. However, we have responded to those who wanted further clarity by accepting in the revised codes many of the suggestions they made.

There are those who want very specific examples catering for many different types of case and, conversely, those who say that this level of guidance is just not sufficiently flexible to be reliable. Faced with some authorities experiencing difficulty over RIPA authorisations, we have tried to give a few helpful steers and to deal with the considerations that should be taken into account when deciding whether to use RIPA, without being overly prescriptive. Ultimately, of course, it is for the courts to decide what in any given case is proportionate.

January 2010

### **Further information from the Home Office**

We would make the following observations:

The statutory codes of practice make it clear (surveillance and CHIS codes pages 22 and 21 respectively) that authorisation by the column 3 officer is reserved for those instances where further delay would be likely to endanger life or jeopardise the investigation or operation, not simply for administrative or time-related convenience. It positively excludes the column 3 officer authorising in normal circumstances where the regular authorising grade is not available. In these circumstances, authorisation should be made by the next available officer up the line.

There are checks and limitations on ‘urgent’ authorisations by column 3 officers:

- Authorisations given by the designated ‘urgent’ grade have effect only for 72 hours, rather than the much longer periods when given by the regular authorising grade (12 months for CHIS, 3 months for directed surveillance).
- The reasons for the emergency will be noted with the authorisation records RIPA requires public authorities to keep and are inspected regularly by the independent Office of Surveillance Commissioners.

The assumption that the more senior the officer the more safe the authorisation decision is not automatically correct. This was emphasised by many respondents to the RIPA consultation that firmed up the proposed consolidating orders. Page 10 of the Government’s response to the consultation dealt with the point (as follows):

- 16% (36, including the Chief Surveillance Commissioner) commented that seniority was not the key factor in authorisation; rather, the key was appropriate training, expertise, experience and time - which, as many respondents suggested, the most senior executives would lack, even if they were able to attend lengthy training courses;
- 21% (46) commented that authorisation was already at a level that combined seniority with operational competence and that a higher level would be too remote from operations
- 8.5% (19) commented that this operational understanding meant that without significant - and, in the circumstances, impractical - training, senior executives would effectively simply rubber stamp investigations, causing delays by adding to bureaucracy;
- 2.5% (6 respondents) felt that raising the rank of authorisers could lead to a decline in RIPA authorisation standards for these reasons; and
- 15% (33) considered that consistency in decision making would be achieved not by designating higher rank authorisation, but by a system of accredited training to existing officers such as was currently being developed for single points of contact acquiring communications data.

January 2010

## **APPENDIX 2: RAIL PASSENGERS RIGHTS AND OBLIGATIONS (EXEMPTIONS) REGULATIONS 2009 (SI 2009/2970): GOVERNMENT RESPONSE**

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### **Letter from Lord Adonis, Secretary of State for the Department for Transport**

I was very sorry to see from your Committee's 4<sup>th</sup> report of the current Session that you found my letter of 7 December about the above Statutory Instrument wanting in two respects.

First, you were looking for further information about the length of time it took my Department to obtain data on the costs and benefits of implementing the Regulation. Our working assumption has been that the Regulation would be implemented in full, in order to provide rail passengers with enhanced rights, unless doing so would impose undue administrative or financial burdens on the rail industry. Since early 2008 we have repeatedly invited representatives of the passenger train operators, who have expressed concern about the likely costs of implementation, to provide evidence to support their position. It would appear that they found it difficult to assemble the necessary evidence, because it was not forthcoming until April 2009.

At that point the Association of Train Operating Companies (ATOC) provided estimates of the costs of implementing the various provisions of the Regulation, amounting to a range between £3m and £5m for the full cost of implementing the core provisions and a range between £32m and £115m for the full cost of implementing the non-core provisions. The estimates were reviewed by the Department's economists and as a result we sought further clarification from ATOC. In the event, we concluded that their figures were not sufficiently substantiated or robust to enable the Department to make a sound decision about the extent of implementation. In the consultation paper which we published in August, which was primarily about our proposals for enforcement of the Regulation, we therefore included a question about the costs and benefits. As I explained in my previous letter, we hope the responses will give us a sounder basis for taking decisions about the extent of implementation. I understand the Committee's concern about the delay involved and have given you my assurance that decisions will be taken as early as practicable.

Second, you asked about the extent to which the protections for passengers provided by the Regulation are already offered by domestic regulation. For the UK, the core elements of the Regulation - which cover particularly the areas of information and ticketing provision, compensation, and assistance and rights for persons with reduced mobility - provide relatively little in the way of new protections. The principle of regulation of passenger rights is well established in the UK in relation to domestic services, to ensure that passengers who may need to use the services of a number of different operators to make their journeys receive a seamless and coordinated service that meets their needs. Conversely, the non-core elements of the Regulation largely provide protections which are ancillary to those in existing domestic legislation.

Key elements of the existing protections are as follows. First, the National Rail Conditions of Carriage, to which train operators are obliged to adhere by the terms of their operating licence, specify minimum levels of compensation in the event of a delay as well as conditions on the availability of tickets, through tickets and reservations, assistance in the event of delay, liability for passengers and luggage, insurance against third party liability, and the right to transport of people with disabilities.

Second, the Disability Discrimination Act 1995 (which will in future be consolidated into the Equality Act) contains requirements in relation to assistance for disabled persons. Franchise agreements also have specific conditions relating to such people, such as the provision of information. The Regulation goes further, giving protection not just to disabled persons but to persons with reduced mobility in general, even where the reduced mobility is due to causes other than disability, such as age.

Third, in terms of compensation for delay, current compensation levels specified in the National Rail Conditions of Carriage and franchise agreements exceed the minimum levels specified in the

Regulation. The Department is currently introducing new and more demanding compensation commitments, namely 50% of the single journey fare for delays in excess of 30 minutes and 100% of the single journey fare for delays in excess of 60 minutes. These are being introduced as and when franchises come up for renewal.

The main differences between the regimes before and after the Regulation are as follows. The Regulation will apply to undertakings which are not franchised as well as those which are. It imposes certain obligations relating to information on independent ticket vendors who, until now, have not been regulated. The requirement in relation to information before and during the journey will be more specific. In the area of compensation for personal injury, the Regulation creates a new regime based on stricter liability than the old regime. It also creates a new right to a non-refundable advance payment before the action is tried, although in practice intra-industry rules (in the form of the Claims Allocation and Handling Agreement, compliance with which is a licensing condition) has already created a right to a refundable one. In the case of compensation for delays, liability is stricter, and a right to assistance on board (including with meals) is created. The Regulation also imposes obligations on undertakings to take measures and adopt policies in respect of the personal security of passengers. The new right which the industry believes will give rise to by far the greatest cost is the transferability of tickets which are not issued in the name of a specified passenger. The industry believes this means the potential sharing of tickets by passengers, resulting in a loss of income to operators.

I hope the Committee will find this information helpful. I apologise that it was not provided earlier.

17 December 2009