

Attorney General's Guidelines for Prosecutors: Schedule 3 of the Investigatory Powers Act 2016 (England and Wales)

Schedule 3 IPA: Prosecutors' Guidelines

1. These Guidelines concern the approach to be taken by prosecutors in applying Schedule 3 to the Investigatory Powers Act (IPA) in England and Wales. Paragraph 21 of Schedule 3 provides that disclosure to the prosecutor can be permitted during criminal proceedings so that the prosecutor can determine what action to take in order to ensure that the prosecution is fair. The paragraph also allows disclosure to a judge where the judge considers there are exceptional circumstances making the disclosure essential in the interests of justice.¹

Background

2. It has been long-standing Government policy that the fact that interception of communications has taken place in any particular case should remain secret and not be disclosed to the subject. This is because of the need to protect the continuing value of interception as a vital means of gathering intelligence about serious crime and activities which threaten national security. The Government judges that if the use of the technique in particular cases were to be confirmed, the value of the technique would be diminished because targets would either know, or could deduce, when their communications might be intercepted and so could take avoiding action by using other, more secure means of communication.
3. In the context of legal proceedings, the policy that the fact of interception should remain secret is implemented by section 56 of IPA. Section 56 provides that no evidence may be adduced, question asked, assertion or disclosure made or other thing done in, for the purposes of or in connection with any legal proceedings or Inquiries Act proceedings which discloses, in circumstances from which its origin in interception-related conduct may be inferred, any (i) content of an intercepted communication, (ii) any secondary data obtained from a communication, or (iii) tends to suggest that any interception-related conduct has or may have occurred or may be going to occur.
4. The effect of section 56 is that the fact of interception of the subject's communications and the product of that interception cannot be relied upon or referred to by either party to the proceedings. This is given further effect by sections 3(7), 7A(9) and 8(6) of the Criminal Procedure and Investigations Act 1996 (as amended). This protects the continuing value of interception whilst also creating a "level playing-field", in that neither side can gain any advantage from the interception. In the context of criminal proceedings, this means that the defendant cannot be prejudiced by the existence in the hands of the prosecution of intercept material which is adverse to his interests.

Detailed Analysis

First Stage: action to be taken by the prosecutor

¹ Disclosure in the context of RIPA/IPA action is distinct from disclosure under the Criminal Procedure and Investigations Act (CPIA) 1996, CPIA Code of Practice, the Attorney General's Disclosure Guidelines (AGDG), and Director's Guidance on Charging Sixth Edition (DG6).

5. Paragraph 21(1) of Schedule 3 to IPA provides:

Nothing in section 56(1) prohibits:

(a) a disclosure to a person ("P") conducting a criminal prosecution that is made for the purpose only of enabling P to determine what is required of P by P's duty to secure the fairness of the prosecution, or

(b) a disclosure to a relevant judge in a case in which the judge has ordered the disclosure to be made to the judge alone.

If protected information is disclosed to a prosecutor, as permitted by paragraph 21(1)(a), the first step that should be taken by the prosecutor is to review any information regarding an interception that remains extant at the time that he or she has conduct of the case.² In reviewing it, the prosecutor should seek to identify any information whose existence, if no action was taken by the Crown, might result in unfairness. Experience suggests that the most likely example of such potential unfairness is where the evidence in the case is such that the jury may draw an inference which intercept shows to be wrong, and to leave this uncorrected will result in the defence being disadvantaged.

6. If in the view of the prosecutor to take no action would render the proceedings unfair, the prosecutor should, first consulting with the relevant prosecution agency, take such steps as are available to him or her to secure the fairness of the proceedings provided these steps do not contravene paragraph 21(4). In the example given above, such steps could include:
- i. putting the prosecution case in such a way to ensure that a potentially misleading inference is not drawn by the jury;
 - ii. not relying upon the evidence which makes the information relevant;
 - iii. discontinuing that part of the prosecution case in relation to which the protected information is relevant, by amending a charge or count on the indictment or offering no evidence on such a charge or count; or
 - iv. making an admission of fact³.

There is no requirement for the prosecutor to notify the judge of the action that they have taken or propose to take. Such a course should only be taken by the prosecutor if they considers it essential in the interests of justice to do so (see below).

Second Stage: disclosure to the judge

7. There may be some cases (although these are likely to be rare) where the prosecutor considers that they cannot secure the fairness of the proceedings without assistance from the relevant judge. In recognition of this, paragraph 21(1)(b) of Schedule 3 provides that in certain limited circumstances, the prosecutor may invite the judge to order a disclosure of the protected information to the judge.

² Section 53 of IPA provides that it is the duty of the issuing authority to ensure that arrangements are in place to ensure that (amongst other matters) intercept material is retained by the intercepting agencies only for as long as is necessary for any of the authorised purposes. The authorised purposes include retention which, "is necessary to ensure that a person ("P") who is conducting a criminal prosecution has the information P needs to determine what is required of P by P's duty to secure the fairness of the prosecution " (section 53(3)(d)).

³ This is acceptable as long as to do so would not contravene section 56 i.e. reveal the existence of an interception warrant. Prosecutors must bear in mind that such a breach might conceivably occur not only from the factual content of the admission, but also from the circumstances in which it is made.

8. If the prosecutor considers that they require the assistance of the trial judge to ensure the fairness of the proceedings, or they are in doubt as to whether the result of taking the steps outlined at para 6 above would ensure fairness, they must apply to see the judge *ex parte*. Under paragraph 21(2), a judge shall not order a disclosure to themselves except where the judge is satisfied that the exceptional circumstances of the case make that disclosure essential in the interests of justice. Before the judge is in a position to order such disclosure the prosecutor will need to impart to the judge such information, but only such information, as is necessary to demonstrate that exceptional circumstances mean that the prosecutor acting alone cannot secure the fairness of the proceedings. Experience suggests that exceptional circumstances in the course of a trial justifying disclosure to a judge arise only in the following two situations:

(1) Where the judge's assistance is necessary to ensure the fairness of the trial

This situation may arise in the example given at paragraph 5 above, where there is a risk that the jury might draw an inference from certain facts, which protected information shows would be the wrong inference, and the prosecutor is unable to ensure that the jury will not draw this inference by the prosecutor's actions alone. The purpose in informing the judge is so that the judge will then be in a position to ensure fairness by:

- i. summing up in a way which will ensure that the wrong inference is not drawn;
- ii. giving appropriate directions to the jury; or,
- iii. requiring the Crown to make an admission of fact which the judge thinks essential in the interests of justice if the judge is of the opinion that exceptional circumstances require the judge to make such a direction (paragraph 21(3)). However, such a direction must not authorise or require anything to be done which discloses any of the contents of an intercepted communication or related data or tends to suggest that anything falling within section 56(2) has or may have occurred or be going to occur (paragraph 21(4)). Situations where an admission of fact is required are likely to be rare. The judge must be of the view that proceedings could not be continued unless an admission of fact is made (and the conditions in paragraph 21(3) are satisfied). There may be other ways in which it is possible for a judge to ensure fairness, such as those outlined at (i) and (ii) above.

In practice, no question of taking the action at (i)-(iii) arises if the protected information is already contained in a separate document in another form that has been or can be disclosed without contravening section 56(1), and this disclosure will secure the fairness of the proceedings.

(2) Where the judge requires knowledge of the protected material for some other purpose

This situation may arise where, usually in the context of a PII application, the true significance of, or duty of disclosure in relation to, other material being considered for disclosure by a judge, cannot be appraised by the judge without reference to protected information. Disclosure to the judge of the protected information without more may be sufficient to enable the judge to appraise the material, but once he has seen the protected information the judge may also conclude that the conditions in paragraph 21(3) are satisfied so that an admission of fact by the Crown is required in addition to or instead of disclosure of the non-protected material.

Another example is a case where protected information underlies operational decisions which are likely to be the subject of cross-examination and it is necessary to inform the judge of the existence of the protected information to enable the judge to deal with the issue when the questions are first posed in a way which ensures section 56(1) is not contravened.

What if the actions of the prosecutor and/or the judge cannot ensure the fairness of the proceedings?

9. There may be very rare cases in which no action taken by the prosecutor and/or judge can prevent the continuation of the proceedings being unfair, e.g. where the requirements of fairness could only be met if the Crown were to make an admission, but it cannot do so without contravening paragraph 21(4). In that situation the prosecutor will have no option but to offer no evidence on the charge in question, or to discontinue the proceedings in their entirety.

Responding to questions about interception

10. Prosecutors are sometimes placed in a situation in which they are asked by the court or by the defence whether interception has taken place or whether protected information exists. Whether or not interception has taken place or protected information exists, an answer in the following terms, or similar should be given:

"I am not in a position to answer that, but I am aware of section 56 of and Schedule 3 to the Investigatory Powers Act 2016 and the Attorney General's Guidelines on the Disclosure of Information in Exceptional Circumstances under Schedule 3."

In a case where interception has taken place or protected information exists, an answer in these terms will avoid a breach of the prohibition in section 56 while providing assurance that the prosecutor is aware of his obligations.

11. For the avoidance of doubt, any notification or disclosure of information to the judge in accordance with paragraphs 7-10 must be ex parte. It will never be appropriate for prosecutors to volunteer, either inter partes or to the Court ex parte, that interception has taken place or that protected information exists, save in accordance with paragraph 21(1) of Schedule 3 of IPA as elaborated in these Guidelines.

Further Assistance

12. Should a prosecutor be unsure as to the application of these guidelines in any particular case, further guidance should be sought from those instructing him or her. In those cases where a prosecutor has been instructed by the Crown Prosecution Service, the relevant CPS prosecutor must seek appropriate guidance from the relevant casework division in CPS Headquarters.

Updated on 21 04 2022