

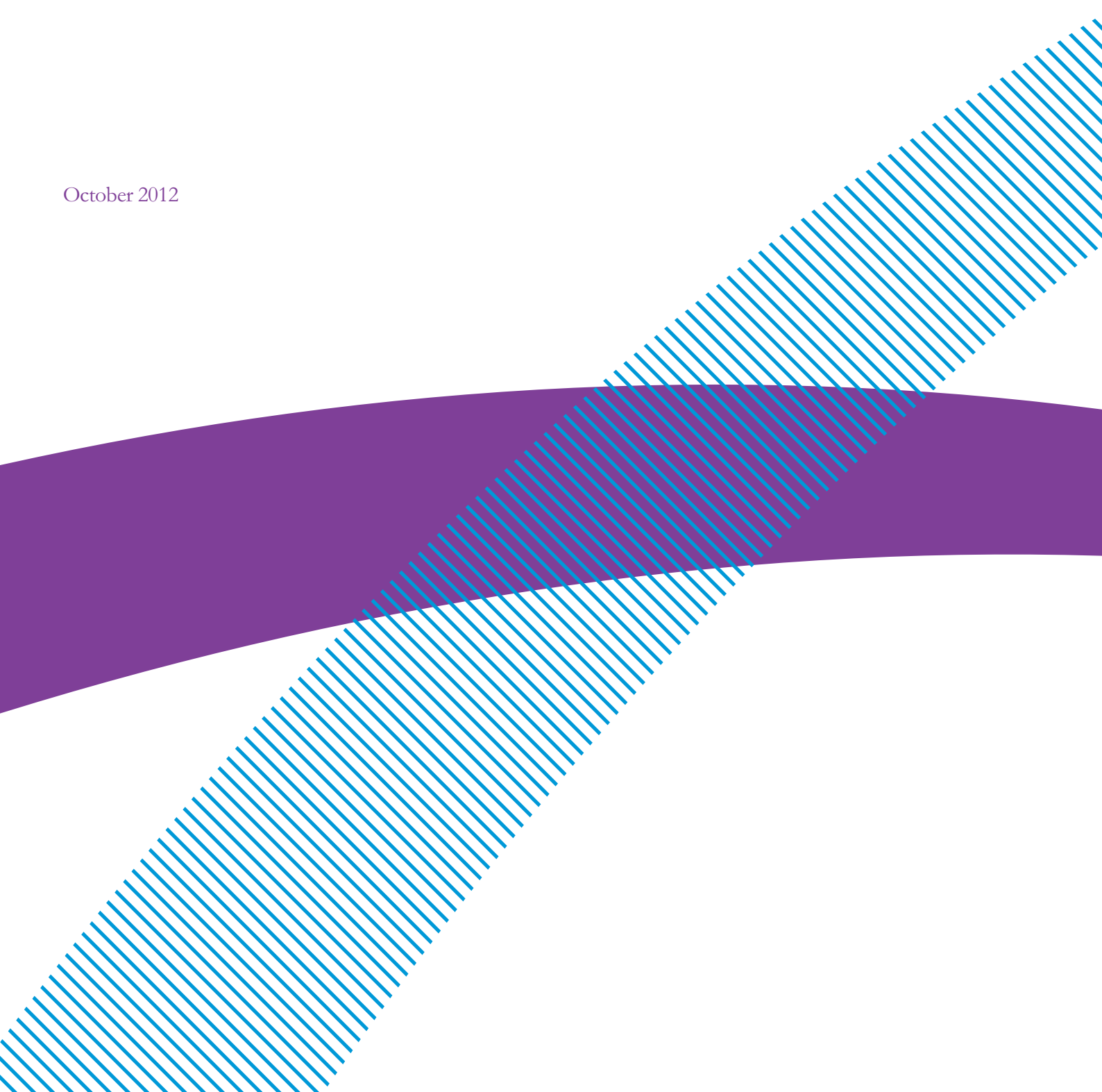
Protection of Freedoms Act 2012 – changes to provisions under the Regulation of Investigatory Powers Act 2000 (RIPA)

Home Office guidance to local
authorities in Scotland on the judicial
approval process for RIPA



Home Office

October 2012



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1. INTRODUCTION: HOW THE LAW HAS CHANGED

1. On 1 November 2012, Scottish local authority RIPA authorisations or notices for communications data will require prior approval by a sheriff.
2. The Protection of Freedoms Act 2012¹ sets out that local authority authorisations and notices or renewals for the use of RIPA will come into effect only on the grant of an order, by a justice of the peace in England and Wales, a sheriff in Scotland or a district judge (magistrates' court) in Northern Ireland.
3. In Scotland the judicial approval mechanism will only apply to **local authority use of communications data** which is regulated under RIPA and is 'reserved' legislation.
4. This guidance is non-statutory but provides advice on how local authorities can best approach these changes in law and the new arrangements that need to be put in place to implement them effectively. It is supplementary to the legislation and to the statutory Codes of Practice. If a local authority has any doubts about the new regime they should consult their legal advisers. This guidance is intended for local authority investigation teams that may use covert techniques, including Trading Standards, Environmental Health and Benefit Fraud Officers. However, it will also be of use to authorising officers and designated persons and to those who oversee the use of investigatory techniques in local authorities including elected members.

¹ Sections 37 and 38 of the Protection of Freedoms Act 2012 amend RIPA and will come into force on 1 November 2012.

2. LOCAL AUTHORITY USE OF RIPA

THE EXISTING REGULATORY FRAMEWORK

5. RIPA sets out a regulatory framework for the use of covert investigatory techniques by public authorities. RIPA does not provide any powers to carry out covert activities. If such activities are conducted by council officers, then RIPA regulates them in a manner that is compatible with the European Convention on Human Rights (ECHR), particularly Article 8, the right to respect for private and family life.
6. RIPA limits local authorities to using covert techniques for the purpose of preventing or detecting crime or preventing disorder.
7. Use of these techniques has to be authorised internally by an authorising officer or a designated person. They can only be used where it is considered necessary (e.g. to investigate a suspected crime or disorder) and proportionate (e.g. balancing the seriousness of the intrusion into privacy against the seriousness of the offence and whether the information can be obtained by other means). The relevant Codes of Practice should be referred to for further information on the scope of powers, necessity and proportionality.²

THE TECHNIQUES WHICH LOCAL AUTHORITIES MAY USE

8. Local authorities in Scotland may use the following covert techniques:
 - Directed surveillance (under Regulation of Investigatory Powers (Scotland) Act (RIPSA) – sheriff approval is not required) - is essentially covert surveillance in places other than residential premises or private vehicles.
 - A covert human intelligence source (CHIS) (under RIPSA – sheriff approval is not required) – includes undercover officers, public informants and people who make test purchases.
 - Communications data (CD) (under RIPA – sheriff approval is required). CD is the ‘who’, ‘when’ and ‘where’ of a communication, but not the ‘what’ (i.e. the content of what was said or written). RIPA groups CD into three types:
 - ‘traffic data’ (which includes information about where the communications are made or received);
 - ‘service use information’ (such as the type of communication, time sent and its duration); and
 - ‘subscriber information’ (which includes billing information such as the name, address and bank details of the subscriber of telephone or internet services).
9. Under RIPA a local authority can only authorise the acquisition of the less intrusive types of CD: service use and subscriber information. Under **no circumstances** can local authorities be authorised to obtain traffic data under RIPA.
10. Local authorities are **not** permitted to intercept the content of any person’s communications and it is an offence to do so without lawful authority.

² See section 4 for links to the relevant legislation and codes of practice.

RANK OF LOCAL AUTHORITY AUTHORISING OFFICERS/DESIGNATED PERSONS

11. Local authority designated persons will remain as designated by RIPA consolidating orders SI 2010 Nos.480 and 521:
 - Director, Head of Service, Service Manager³ or equivalent.
12. If there is any doubt regarding sufficiency of rank you should contact your Local Authority Monitoring Officer who will be able to advise.

TIME LIMITS

13. The current time limits for an authorisation or notice will continue. Authorisations and notices for CD will be valid for a maximum of one month from the date the sheriff has approved the grant. This means that the conduct authorised should have been commenced or the notice served within that month.
14. A renewal must be authorised prior to the expiry of the original authorisation, but it runs from the expiry date and time of that original authorisation. Authorisations may be renewed more than once if still considered necessary and proportionate.
15. Applications for renewals should not be made until shortly before the original authorisation period is due to expire. It is impossible to give a definitive period prior to expiry when an application for renewal should be made, but local authorities must take account of factors which may delay the renewal process (e.g. intervening weekends or the availability of the relevant local authority authorising officer and a sheriff to grant approval).

³ For CD RIPA applications, the Interception of Communications Commissioner's Office have advised that a Principal Trading Standards Officer is not considered to be of sufficient seniority to act as the Designated Person.

3. JUDICIAL APPROVAL

WHAT THE CHANGES MEAN FOR LOCAL AUTHORITIES

16. From 1 November 2012, sections 37 and 38 of the Protection of Freedoms Act 2012 will commence. This will mean that a Scottish local authority who wishes to acquire CD under RIPA will need to obtain an order approving the grant or renewal of an authorisation or notice from a sheriff before it can take effect. If the sheriff is satisfied that the statutory tests have been met and that the use of the technique is necessary and proportionate he/she will issue an order approving the grant or renewal for the use of the technique as described in the application. If the local authority does not obtain such approval, they cannot acquire the CD.
17. The new judicial approval mechanism is intended to be in addition to the existing authorisation process under the relevant parts of RIPA as outlined in the Codes of Practice⁴. The current local authority process of assessing necessity and proportionality, completing the RIPA authorisation or notice and seeking approval from an authorising officer/designated person will remain the same.
18. In Scotland, use of both directed surveillance and CHIS is devolved and regulation sits under RIPA. Therefore, Scottish local authority use of directed surveillance or CHIS will **not** require sheriff approval. Neither will use of directed surveillance be subject to a crime threshold, which is being introduced on 1 November 2012 in England, Wales and Northern Ireland. The Scottish Government does not intend to apply the judicial approval mechanism or the crime threshold to local authority use on directed surveillance or CHIS.
19. The inspection regimes of the independent RIPA oversight Commissioners will continue to apply to local authorities and the frequency and nature of their independent inspections of local authorities is not expected to change.
20. The judiciary is independent and it is not the role of the Interception of Communications Commissioner to inspect the decision of the sheriff.⁵ However the Commissioner will continue to have an important oversight role and will continue to inspect local authority use of RIPA. If the Commissioner identifies an error in the authorisation process they will, as now, need to consider the best course of action. This may include asking the local authority to cancel the authorisation in question and, if appropriate, complete a new authorisation addressing their concerns which will need to be approved by the sheriff in the usual way. When an error is brought to the attention of a local authority they should cease the activity authorised.
21. The Commissioners will continue to advise local authorities of the procedures and training to adopt, on what is best practice and will continue to report to Parliament on relevant trends and findings.

4 Further information on CD can be found in the Home Office: 'Acquisition and Disclosure of Communications Data Code of Practice Pursuant to section 71 RIPA'.

5 See section 57(4A) RIPA.

PROCEDURE FOR APPLYING FOR A SHERIFF'S APPROVAL

Making the Application

22. The flowchart at Annex B outlines the procedure for applying for judicial approval. Following approval by the designated person the first stage of the process is for the local authority to contact the Sheriff Clerk's Office at their nearest sheriff court to arrange a hearing.
23. The local authority will provide the sheriff with a copy of the original RIPA authorisation or notice and the supporting documents setting out the case. The original should be retained by the local authority so that it is available for inspection by the Interception of Communications Commissioner's office and in the event of any legal challenge or investigations by the Investigatory Powers Tribunal (IPT). This forms the basis of the application to the sheriff and **should contain all information that is relied upon**. For CD requests the RIPA authorisation or notice may seek to acquire consequential acquisition of specific subscriber information. The necessity and proportionality of acquiring consequential acquisition will be assessed by the sheriff as part of his/her consideration (see Annex A for considerations relating to CD authorisations and notices).
24. In addition, the local authority will provide the sheriff with a completed form of application for judicial approval. This form will be issued as a Scottish Statutory Instrument by the Lord President⁶. The form is supplementary to and does not replace the need to supply the original RIPA authorisation or notice as well. The sheriff will sign a form of order to reflect his / her decision. This will be the official record of the sheriff's decision. The form of order will be retained for the court's records and an extract of the final court order will be provided to the applicant. This should be retained by the local authority. Any documentary evidence produced in support of the application will be returned to the applicant.
25. The local authority will need to obtain judicial approval for all RIPA authorisations/notices and renewals for the acquisition of CD. There is no requirement for the sheriff to consider either cancellations or internal reviews.

Arranging a Hearing

26. It will be important for each local authority to establish contact with the Sheriff Clerk's Office at the sheriff court. The sheriff clerk will be the first point of contact for the local authority when seeking a sheriff's approval. The local authority will inform the sheriff clerk as soon as possible to request a hearing. The sheriff clerk will make arrangements for the local authority to see the sheriff in chambers.
27. In most emergency situations it is likely that the local authority would pass the responsibility for obtaining a RIPA authorisation to the police. The police have power to authorise activity under RIPA without prior sheriff approval. No RIPA authority is required in immediate response to events or situations where it is not reasonably practicable to obtain it (for instance when criminal activity is observed during routine duties and officers conceal themselves to observe what is happening).

⁶ Available at www.legislation.gov.uk/ssi.

Attending a Hearing

28. The form of application for judicial approval is to be completed by a solicitor working on behalf of the Local Authority.
29. The hearing is a 'legal proceeding' and therefore local authority officers need to be formally designated to appear, be sworn in and present evidence or provide information as required by the sheriff.
30. The hearing will be in private and heard by a single sheriff who will consider the RIPA authorisation or notice and the form of application for judicial approval. He/she may ask questions to clarify particular points or request additional reassurance on particular matters.
31. Local authorities will want to consider who is best able to answer the sheriff's questions on the policy and practice of conducting covert operations and detail of the case itself. It is envisaged that the case investigator will be able to fulfil this role. The investigator will know the most about the case and will have determined that use of a covert technique is required in order to progress a particular investigation. The local authority may consider it appropriate for the SPoC (single point of contact for CD RIPA authorisations or notices) to attend (see Annex A for considerations relating to CD authorisations and notices). This does not however remove or reduce in any way the duty on the authorising officer/designated person to determine whether the RIPA authorisation meets the necessity and proportionality tests.
32. Designation under section 189 of the Local Government (Scotland) Act 1973 by way of the local authority Standing Orders will enable investigation staff or SPoCs to appear before a sheriff even though he/she is not a practising solicitor. It is not envisaged that the skills of legally trained personnel will be required to make the case, although this will be a matter for individual sheriffs. The requirement for a solicitor to appear would be likely to increase the costs of local authority applications. Section 189, 'Legal Proceedings', states:
 - “(1) Where a local authority consider it expedient for the promotion or protection of the interests of the inhabitants of their area or any part thereof, they may institute, defend or appear in any legal proceedings or represent the inhabitants at any local inquiry held by or on behalf of any Minister or public body under any enactment.
 - (2) Any member or officer of a local authority, who is authorised in that behalf by the authority, shall be entitled to institute, defend or appear in proceedings before a court of summary jurisdiction although he is not a practising solicitor.”

Decision

33. The sheriff will consider whether he or she is satisfied that at the time the authorisation was granted or renewed or the notice was given or renewed, there were reasonable grounds for believing that such authorisation or notice was necessary and proportionate. They will also consider whether there continue to be such reasonable grounds. In addition they must be satisfied that the person who granted the authorisation or gave the notice was an appropriate designated person within the authority and in accordance with any applicable legal restrictions.

34. **The forms and supporting papers must by themselves make the case. It is not sufficient for the sheriff to rely on oral evidence where this is not reflected or supported in the papers provided.** If more information is required the sheriff will refuse the authorisation. If an application is refused the local authority can reapply if there was information to support the application which was available to the local authority, but not included in the papers provided at the hearing. The sheriff will record his/her decision on the form of order.
35. The local authority will need to provide a copy of the order to the SPoC for all CD requests. SPoCs must not acquire the CD requested, either via the CSP or via automated systems, until the sheriff has signed the order approving the grant.

Outcomes

36. Following their consideration of the case the sheriff will complete the form of order reflecting his/her decision. The various outcomes are detailed below and reflected on the flowchart at Annex B.
37. The sheriff may decide to:

- **Approve the grant or renewal of an authorisation or notice**

As a result, the RIPA authorisation or notice will then take effect and the local authority may proceed to acquire CD in that particular case.

In relation to CD, the local authority will be responsible for providing a copy of the order to the SPoC.

- **Refuse to approve the grant or renewal of an authorisation or notice**

As a result, the RIPA authorisation or notice will not take effect and the local authority may **not** acquire CD in that particular case.

Where an application has been refused the local authority may wish to consider the reasons for that refusal. For example, a technical error in the form may be remedied without the local authority going through the internal authorisation process again. The local authority may then wish to re-apply for judicial approval once those steps have been taken.

- **Refuse to approve the grant or renewal and quash the authorisation or notice**

This applies where, under section 23B⁷, the relevant judicial authority refuses to approve the grant or renewal of the authorisation concerned or (as the case may be) the giving or renewal of the notice concerned, the relevant judicial authority may make an order quashing the authorisation or notice. If the sheriff decides to quash this means the basis for the RIPA authorisation or notice is fundamentally flawed. No amount of new information would succeed without reconsidering and starting the authorisation again.

⁷ See sections 23B(3) RIPA.

Complaints/Judicial Review

38. If the local authority is dissatisfied with the sheriff's decision on a principle of law, the local authority should consult their legal advisers.
39. The IPT will continue to investigate complaints by individuals about the use of RIPA techniques by public bodies, including local authorities. If, following a complaint to them, the IPT does find fault with a RIPA authorisation or notice it has the power to quash the sheriff's order which granted use of the technique.

4. OTHER SOURCES OF REFERENCE

- The Regulation of Investigatory Powers Act 2000
<http://www.legislation.gov.uk/ukpga/2000/23/contents>
- RIPA Explanatory Notes
<http://www.legislation.gov.uk/ukpga/2000/23/notes/contents>
- RIPA statutory codes of practice
 - Covert Surveillance and Property Interference
<http://www.homeoffice.gov.uk/publications/counter-terrorism/ripa/forms/code-of-practice-covert>
 - Covert Human Intelligence Sources
<http://www.homeoffice.gov.uk/publications/counter-terrorism/ripa/forms/code-of-practice-human-intel>
 - Acquisition & Disclosure of Communications Data
<http://www.homeoffice.gov.uk/publications/counter-terrorism/ripa/forms/code-of-practice-acquisition>
- SI 2000 No.2793 (The Regulation of Investigatory Powers (Juveniles) Order 2000)
<http://www.legislation.gov.uk/uksi/2000/2793/made>
- SI 2010 No.480 - Regulation of Investigatory Powers (Communications Data) Order 2010
<http://www.legislation.gov.uk/uksi/2010/480/contents/made>
- SI 2010 N0.521 - Regulation of Investigatory Powers (Directed Surveillance and Covert Human Intelligence Sources) Order 2010
<http://www.legislation.gov.uk/uksi/2010/9780111490365/contents>
- SI 2010 No.461 (The Regulation of Investigatory Powers (Extension of Authorisation Provisions: Legal Consultations) Order 2010)
<http://www.legislation.gov.uk/uksi/2010/461/contents/made>
- SI 2012 No.1500 (The Regulation of Investigatory Powers (Directed Surveillance and Covert Human Intelligence Sources) (Amendment) Order 2012)
<http://www.legislation.gov.uk/uksi/1500/contents>

5. HOME OFFICE POINT OF CONTACT

Further information is available on request from:

Home Office
5th Floor Peel Building
2 Marsham Street
London SW1P 4DF
Email: commsdata@homeoffice.x.gsi.gov.uk

ANNEX A

COMMUNICATIONS DATA RIPA AUTHORISATIONS OR NOTICES

Single Point of Contact (SPoC)

1. For CD requests, a Single Point of Contact (SPoC) undertakes the practical facilitation with the communications service provider (CSP) in order to obtain the CD requested. They will have received training specifically to facilitate lawful acquisition of CD and effective co-operation between the local authority and communications service providers.
2. Local authorities unable to call upon the services of an accredited SPoC should not undertake the acquisition of CD.
3. For CD requests the Home Office envisages that the local authority may also choose to authorise, under section 189 of the Local Government (Scotland) Act 1973, their SPoC in order that they may appear in front of the sheriff if required. In cases where the type of CD or its retrieval is technically complex and the sheriff wants to satisfy him/herself that the CD sought meets the test, then the SPoC may be best placed to explain the technical aspects.

The National Anti Fraud Network (NAFN)

4. The National Anti-Fraud Network provides a SPoC service to local authorities, preventing each authority from the requirement to maintain their own trained staff and allowing NAFN to act as a source of expertise. Local authorities using the NAFN SPoC service will still be responsible for submitting any applications and a designated person in the local authority is still required to scrutinise and approve any applications. The accredited SPoCs at NAFN will examine the applications independently and provide advice to applicants and designated persons to ensure the local authority acts in an informed and lawful manner.
5. The local authority investigator (i.e. the applicant) will then submit the relevant form of application for judicial approval, the RIPA application (authorisation or notice) and any supporting material to a sheriff. As above, following a private hearing, the sheriff will complete an order reflecting their decision. The local authority investigator will then upload a copy of this order to the NAFN SPOC.
6. The NAFN SPoC will then acquire the CD on behalf of the local authority in an efficient and effective manner.

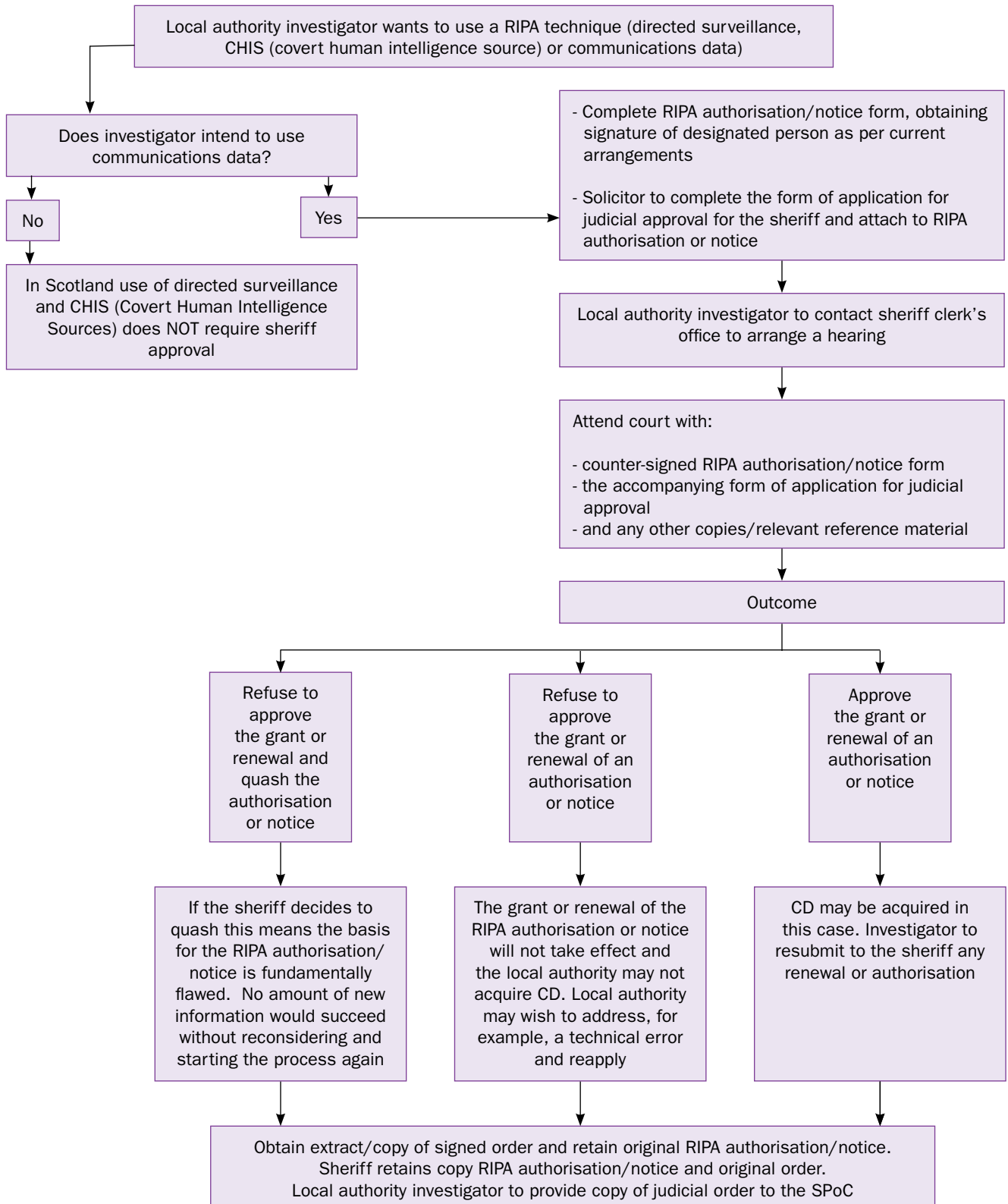
Consequential Acquisition

7. Section 3.31 of the Code of Practice for the Acquisition and Disclosure of CD outlines that a designated person may, at the time of granting an authorisation or notice for service usage data, also authorise the consequential acquisition of specific subscriber information. The designated person may only do so to the extent where it is necessary and proportionate. The consequential acquisition may only be for subscriber data, **not** traffic data, which local authorities may not acquire nor service usage data. Where a SPoC has been authorised to engage in conduct to obtain details of a person to whom a service has been provided and concludes that data is held by a CSP from which it cannot be acquired directly, the SPoC may provide the CSP with details of the authorisation granted by the designated person in order to seek disclosure of the required data⁸.
8. In cases where an authorisation or notice seeks to acquire consequential acquisition of specific subscriber information the sheriff will assess this as part of his/her consideration. The local authority investigator should be prepared to explain to the sheriff the reasoning behind the request for consequential acquisition and be able to show how it meets the necessity and proportionality tests.
9. In cases where consequential acquisition is approved, but where a notice is required (which must specify the name of the CSP to whom it is given, and be signed by the designated person), a further grant of a notice will be required. This is a new legal instrument and therefore will require a further visit to the designated person and the sheriff, despite authority for the human rights interference having already been given.

⁸ Acquisition and Disclosure of Communications Data Code of Practice, paragraph 3.30.

ANNEX B

LOCAL AUTHORITY PROCEDURE: APPLICATION TO A SHERIFF SEEKING AN ORDER TO APPROVE THE GRANT OF A RIPA AUTHORISATION OR NOTICE FOR OBTAINING OR DISCLOSING COMMUNICATIONS DATA



ANNEX C

FORM OF APPLICATION FOR JUDICIAL APPROVAL

(The form is currently being approved as part of the annual update to the Scottish Rules of Court and will be provided separately in due course).



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