

# **Attorney General's Guidelines for Prosecutors: Section 18 of the Regulation of Investigatory Powers Act 2000 (England and Wales)**

## **Section 18 RIPA: Prosecutors' Guidelines**

1. These Guidelines concern the approach to be taken by prosecutors in applying section 18 of the Regulation of Investigatory Powers Act (RIPA) in England and Wales.

### **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 17 of RIPA. Section 17 provides that no evidence shall be adduced, question asked, assertion or disclosure made or other thing done in, for the purposes of, or in connection with, any legal proceedings which discloses the contents of a communication which has been obtained following the issue of an interception warrant or a warrant under the Interception of Communications Act 1985, or any related communications data ("protected information"), or tends to suggest that certain events have occurred.
4. The effect of section 17 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), 7(6), 7A(9) and 9(9) 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**

5. Section 18(7)(a) of RIPA provides,

"Nothing in section 17(1) shall prohibit any such disclosure of any information that continues to be available for disclosure as is confined to... a disclosure to a person conducting a criminal prosecution for the purpose only of enabling that person to determine what is required of him by his duty to secure the fairness of the prosecution"

If protected information is disclosed to a prosecutor, as permitted by section 18(7)(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<sup>1</sup>. 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 section 18(10). In the example given above, such steps could include:
  - (i) putting the prosecution case in such a way that the 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 fact<sup>2</sup>.

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<sup>1</sup> Section 15(1) of RIPA provides that it is the duty of the Secretary of State 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 conducting a criminal prosecution has the information he needs to determine what is required of him by his duty to secure the fairness of the prosecution" (section 15(4)(d)).

<sup>2</sup> This is acceptable as long as to do so would not contravene section 17 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.

There is no requirement for the prosecutor to notify the judge of the action that he or she has taken or proposes to take. Such a course should only be taken by the prosecutor if he 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 he cannot secure the fairness of the proceedings without assistance from the relevant judge. In recognition of this, section 18(7)(b) of RIPA provides that in certain limited circumstances, the prosecutor may invite the judge to order a disclosure of the protected information to him.
8. If the prosecutor considers that he requires the assistance of the trial judge to ensure the fairness of the proceedings, or he is in doubt as to whether the result of taking the steps outlined at para 6 above would ensure fairness, he must apply to see the judge *ex parte*. Under section 18(8), a judge shall not order a disclosure to him except where he 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 his 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 he is of the opinion that **exceptional circumstances** require him to make such a direction (section 18(9)). 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 17(2) has or may have occurred or be going to occur (section 18(10)). 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 section 18(9) 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 17(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 him to appraise the material, but once he has seen the protected information the judge may also conclude that the conditions in section 18(9) 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 him to deal with the issue when the questions are first posed in a way which ensures section 17(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 section 18(10). 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 sections 17 and 18 of the Regulation of Investigatory Powers Act 2000 and the Attorney General's Guidelines on the Disclosure of Information in Exceptional Circumstances under section 18."

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 17 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 section 18 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.

**Reformatted on 29 November 2012**