
Report of the Intelligence Services Commissioner for 2007

Commissioner:

THE RT HON SIR PETER GIBSON

Presented to Parliament by the Prime Minister
pursuant to section 60(4) of the
Regulation of Investigatory Powers Act 2000

Ordered by the House of Commons
to be printed
22 July 2008

Laid before the Scottish Parliament by
the Scottish Ministers
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From: The Right Honourable Sir Peter Gibson



The Intelligence Services
Commissioner
c/o 2 Marsham Street
London SW1P 4DF

27 June 2008

I enclose my second Annual Report on the discharge of my functions under the Regulation of Investigatory Powers Act 2000. The Report covers the period 1 January 2007 to 31 December 2007.

It is for you to decide, after consultation with me, how much of the report should be excluded from publication on the grounds that it is prejudicial to national security, to the prevention or detection of serious crime, to the economic well-being of the United Kingdom, or to the continued discharge of the functions of any public authority whose activities include activities that are subject to my review (section 60(5) of the Act). Following the practice of my predecessors and as I did in my first report, I have again taken the course of writing the report in two parts, the Confidential Annex containing those matters which in my view should not be published. I hope that this is convenient.

Sir Peter Gibson

The Rt. Hon. Gordon Brown MP
10 Downing Street
London SW1A 2AA

Annual Report of the Intelligence Services Commissioner for 2007

Introduction

1. I was appointed the Intelligence Services Commissioner under section 59 of the Regulation of Investigatory Powers Act 2000 (RIPA) with effect from 1 April 2006. My appointment is for a period of three years.
2. I am required by section 60(2) of RIPA as soon as practicable after the end of each calendar year to report with respect to the carrying out of my functions as the Intelligence Services Commissioner. This is my second Report as Commissioner and it covers the period 1 January 2007 until 31 December 2007. In producing my report, I again propose to follow my predecessors' practice of writing the report in two parts, the main part for publication, the other part being a Confidential Annex to include those matters which cannot be fully explained without disclosing sensitive information.

Regulation of Investigatory Powers Act 2000 (RIPA)

3. In my first annual report last year, I outlined the scope of each Part of RIPA. To assist those readers who may not be familiar with RIPA, it is, I think, useful to do so again.
4. **Part I of RIPA** is concerned with interception of communications and the acquisition and disclosure of communications data. The previous Act governing this area, the Interception of Communications Act 1985, was substantially repealed. RIPA incorporated a number of changes, in part to extend the protection for human rights required by the coming into force of the Human Rights Act 1998 simultaneously with RIPA (and the substantive incorporation of the European Convention on Human Rights into domestic law), and in part to reflect the altered nature of the communications industry over recent years. Section 57 of RIPA provided for the appointment of an Interception of Communications Commissioner to review the Secretary of State's role in interception warranting and the operation of the revised regime for acquiring communications data. The current Commissioner is Sir Paul Kennedy and for the period covered by this Report, Part I of RIPA has been essentially his concern rather than mine.
5. **Part II of RIPA** provides a statutory basis for the authorisation and use by the intelligence agencies and certain other public authorities of covert surveillance (which covers both intrusive surveillance and directed surveillance) and also of covert human intelligence sources (undercover officers, agents, informants and the like). Part II regulates the use of these intelligence techniques and safeguards the public from unnecessary invasions of their privacy.
6. **Part III of RIPA** contains provisions designed to maintain the effectiveness of existing law enforcement powers in the face of increasing criminal and hostile intelligence use of encryption, the means of scrambling electronic information into a secret code of letters, numbers and signals. Encrypted information cannot be unscrambled without a decoding key. Specifically, Part III introduces a power to require disclosure of protected (encrypted) data. Parliament has now approved the Code of Practice for the investigation of protected electronic information; Part III came into force on 1 October 2007. It gives power to specified authorities to require disclosure in respect of protected electronic information. The Code of Practice

provides guidance for the authorities to follow. In a case where (1) a direction that the disclosure requirement can be complied with only by the disclosure of the key itself, and (2) the direction is given by a member of Her Majesty's forces who is not a member of a police force and otherwise than in connection with activities of members of Her Majesty's forces in Northern Ireland, notification of the direction must be given to me.

7. **Part IV of RIPA** provides for independent judicial oversight of the exercise of the various investigatory powers. My appointment under section 59 came within this part of the Act. Part IV also established a Tribunal, the Investigatory Powers Tribunal, as a means of redress for those who complain about the use of investigatory powers against them. This Part also provides for the issue and revision of codes of practice relating to the exercise and performance of certain of the powers and duties provided for in Parts I to III of RIPA and in section 5 of the Intelligence Services Act 1994. These codes are available to the general public and are informative as to the workings of RIPA in practice.

8. **Part V of RIPA** deals with miscellaneous and supplemental matters. Perhaps most relevant for present purposes is section 74 which amended section 5 of the Intelligence Services Act 1994 as to the circumstances in which the Secretary of State may issue property warrants, in particular by introducing a criterion of proportionality.

Functions of the Intelligence Services Commissioner

Intelligence Services Act 1994 and Regulation of Investigatory Powers Act 2000

9. My statutory functions are as follows:

- a. to keep under review the exercise by the Secretary of State of his powers to issue, renew and cancel warrants under sections 5 and 6 of the Intelligence Services Act 1994 (ISA), i.e., warrants for entry on or interference with property or with wireless telegraphy, warrants in practice mainly issued by the Home Secretary or the Secretary of State for Northern Ireland;
- b. to keep under review the exercise by the Secretary of State of his powers to give, renew and cancel authorisations under section 7 of ISA, i.e., authorisations for acts done outside the UK, authorizations in practice issued by the Foreign Secretary;
- c. to keep under review the exercise and performance by the Secretary of State of his powers and duties under Parts II and III of RIPA in relation to the activities of the intelligence services and (except in Northern Ireland) of Ministry of Defence officials and members of the armed forces, in practice the Secretary of State's powers and duties with regard to the grant of authorisations for intrusive surveillance and the investigation of electronic data protected by encryption;
- d. to keep under review the exercise and performance by members of the intelligence services of their powers and duties under Parts II and III of RIPA, in particular with regard to the grant of authorisations for directed surveillance and for the conduct and use of covert human intelligence sources and the investigation of electronic data protected by encryption;
- e. to keep under review the exercise and performance in places other than Northern Ireland by Ministry of Defence officials and members of the armed forces of their powers and duties under Parts II and III of RIPA, in particular with regard to the grant of authorisations for directed surveillance and the conduct and use of covert human intelligence sources and the investigation of electronic data protected by encryption;
- f. to keep under review the adequacy of the Part III safeguards arrangements in relation to the members of the intelligence services;

- g. to keep under review the adequacy of the Part III safeguards arrangements in relation to officials of the Ministry of Defence and members of the armed forces in places other than Northern Ireland;
- h. to give the Tribunal all such assistance (including my opinion on any issue falling to be determined by it) as it may require in connection with its investigation, consideration or determination of any matter; and
- i. to make an annual report to the Prime Minister on the carrying out of my functions, such report to be laid before Parliament.

Identity Cards Act 2006

10. By virtue of section 24 of the Identity Cards Act 2006, as the Intelligence Services Commissioner I am required to keep under review:
- a. the acquisition, storage and use made by the intelligence services of information recorded in the National Identity Register;
 - b. the provision of such information to members of the intelligence services in accordance with any provision made by or under the Identity Cards Act 2006; and
 - c. arrangements made by the Secretary of State or any of the intelligence services for the purposes of anything mentioned in paragraph (a) or (b).
11. I indicated in my Annual Report last year that such provisions had yet to be brought into force. That remained the position in 2007.

Prevention of Terrorism Act 2005

12. Under section 13(3)(b) of the Prevention of Terrorism Act 2005 the Home Secretary is required to consult, amongst others, the Intelligence Services Commissioner before asking Parliament to extend the control order provision for a further period. I was duly consulted by the Home Office and on 26 January 2007 I advised officials there that I did not object, in principle, to the extension of the control order regime for a further period of 12 months.

Functions of the Intelligence Services

13. In my first Annual Report last year I outlined the functions of the three intelligence services. I think it appropriate and helpful to re-state the specific statutory functions imposed upon each of the intelligence agencies and certain constraints to which all are subject.

The Security Service

14. The Security Service's functions are:
- a. the protection of national security, in particular against threats from espionage, terrorism and sabotage, from the activities of agents of foreign powers, and from actions intended to overthrow or undermine parliamentary democracy by political, industrial or violent means;
 - b. safeguarding the economic well-being of the UK against threats posed by the actions or intentions of persons outside the British Islands; and
 - c. to act in support of the activities of police forces and other law enforcement agencies in the prevention and detection of serious crime.

Secret Intelligence Service (SIS)

15. The functions of SIS are to obtain and provide information and to perform other tasks relating to the actions or intentions of persons outside the British Islands either

- a. in the interests of national security, with particular reference to the UK Government's defence and foreign policies, or
- b. in the interests of the economic well-being of the UK, or
- c. in support of the prevention or detection of serious crime.

Government Communications Headquarters (GCHQ)

16. GCHQ's functions are:

- a. to monitor or interfere with electromagnetic, acoustic and other emissions and any equipment producing such emissions and to obtain and provide information derived from or related to such emissions or equipment and from encrypted material, but only in the interests of national security, with particular reference to the United Kingdom Government's defence and foreign policies, or in the interests of the UK's economic well-being in relation to the actions or intentions of persons outside the British Islands, or in support of the prevention or detection of serious crime;
- b. to provide advice and assistance about languages (including technical terminology) and cryptography (and other such matters) to the armed services, the Government and other organisations as required.

17. The Security Service operates under the control of its Director General, SIS under the control of its Chief and GCHQ under the control of its Director. In broad terms each head of service is responsible for the efficiency of his agency and for ensuring that it only obtains and discloses information so far as is necessary for the proper discharge of its functions, and that it takes no action to further the interests of any UK political party. The Director General of the Security Service must ensure also that when it acts in support of others in the prevention and detection of serious crime its activities are co-ordinated with those of the police forces and other law enforcement agencies concerned.

18. In producing intelligence, both SIS and GCHQ respond to the requirements and priorities laid on them by Ministers and the Joint Intelligence Committee (JIC).

19. In the area of preventing and detecting serious crime the intelligence services work in support of the police and other law enforcement agencies to combat the threat of serious and organised crime from abroad. Each service has considerable expertise, experience and skills, which can prove and have proved invaluable in what are often complex operations.

The issue of property warrants

General

20. Section 5 of the Intelligence Services Act 1994 (ISA) as amended provides for the Secretary of State to issue warrants authorising entry on or interference with property or with wireless telegraphy (which for convenience I shall refer to as property warrants). Applications may be made by the Security Service, SIS or GCHQ in respect of their respective statutory functions. Additionally, where assisting the other intelligence services, the Security Service may apply on behalf of SIS and GCHQ, even if the proposed operation is outside the Security Service's own functions. This latter facility reflects the position that the Home Secretary or, in Northern Ireland, the Secretary of State for Northern Ireland, and the Security Service, should normally have responsibility for operations which may affect people in the United Kingdom. In the case of SIS's and GCHQ's anti-crime function, property warrants may not be issued for operations relating to property in the United Kingdom. Property warrants relating to property in the British Islands may, however, be issued to the Security Service in furtherance of

its function under section 1(4) of the Security Service Act 1989 (SSA) as amended to act in support of the police or other enforcement agencies in the prevention and detection (as to the meaning of which see now section 1(5) of SSA and section 81(5) of RIPA) of serious crime (as to the meaning of which see section 81(2) and (3) of RIPA). Property warrants are usually signed by the Secretary of State under whose authority the agency acts, that is the Home Secretary for the Security Service and the Foreign Secretary for SIS and GCHQ. In their absence, however, or where otherwise appropriate such as in Northern Ireland, another Secretary of State can sign a warrant.

21. Section 5 of ISA, as amended first by section 2 of the Security Service Act 1996 and later by section 74 of RIPA, requires that before such a warrant is issued (to legitimise action by way of entry on or interference with property or with wireless telegraphy) the Secretary of State

- (a) must think the proposed action necessary for the purpose of assisting the particular intelligence agency to carry out any of its statutory functions as described above (section 5(2)(a));
- (b) must be satisfied that the action is proportionate to what it seeks to achieve (section 5(2)(b)); and
- (c) must be satisfied that the agency has in place satisfactory arrangements for securing that it shall not obtain or disclose information except insofar as necessary for the proper discharge of one of its functions (section 5(2)(c)); and in deciding whether requirements (a) and (b) are satisfied, the Secretary of State must take into account whether what it is thought necessary to achieve by the action could reasonably be achieved by other means (section 5(2A)).

The giving of Section 7 authorisations

22. Under section 7 of ISA the Secretary of State (in practice the Foreign Secretary) may authorise SIS to carry out acts outside the United Kingdom which are necessary for the proper discharge of one of its functions. As with section 5 warrants, before the Secretary of State gives any such authority, he must first be satisfied of a number of matters:

- (a) that the acts being authorised (or acts in the course of an authorised operation) will be necessary for the proper discharge of an SIS function (section 7(3)(a));
- (b) that satisfactory arrangements are in force to secure that nothing will be done in reliance on the authorisation beyond what is necessary for the proper discharge of an SIS function (section 7(3)(b)(i));
- (c) that satisfactory arrangements are in force to secure that the nature and likely consequences of any acts which may be done in reliance on the authorisation will be reasonable having regard to the purposes for which they are carried out (section 7(3)(b)(ii)); and
- (d) that satisfactory arrangements are in force to secure that SIS shall not obtain or disclose information except insofar as is necessary for the proper discharge of one of its functions (section 7(3)(c)).

23. By virtue of section 7(4)(a) of ISA, authorisations may be given for acts of a specified description. These are known as class authorisations. Examples of the type of act which they could cover are the obtaining of documents which might involve theft, or payment to an agent which might involve bribery.

24. Section 7 was amended at the end of 2001 so as to apply also to GCHQ. The amendment was effected by section 116 of the Anti-Terrorism, Crime and Security Act 2001 and arose from a further consideration of the powers available

to the intelligence services in the light of the events of 11 September 2001. Section 7 as amended allows GCHQ to be authorised to carry out acts outside the United Kingdom for the proper exercise of its functions in the same manner as SIS and (by subsection (9)) makes clear that activities taking place in the UK but intended only to relate to apparatus situated outside the UK are covered by section 7 authorisations.

25. The purpose of section 7 is to ensure that certain of SIS's (and now GCHQ's) activities overseas, which might otherwise expose its officers or agents to liability in the UK, are, where authorised by the Secretary of State, exempt from such liability.

Authorisation of intrusive surveillance

26. Intrusive surveillance is covert surveillance undertaken in residential premises or a private vehicle for the purposes of a specific investigation or operation in a manner likely to reveal private information about someone (including particularly information relating to his private or family life). Typically it would involve a surveillance device in someone's house or car. There is now provision requiring such action on the part of any of the intelligence services to be authorised by the Secretary of State by way of warrant (section 42 of RIPA). The Secretary of State can only authorise such action if he believes

- (a) that it is necessary in the interests of national security, or for the purpose of preventing or detecting serious crime, or in the interests of the UK's economic well-being (sections 32(2)(a) and 32(3)); and
- (b) that the authorised surveillance is proportionate to what it seeks to achieve (section 32(2)(b));

and, in deciding whether these two requirements are satisfied, the Secretary of State must take into account whether the information it is thought necessary to obtain by the surveillance could reasonably be obtained by other means (section 32(4)). Section 42(2) of RIPA allows a single warrant issued by the Secretary of State to combine both the authorisation of intrusive surveillance and a property warrant under section 5 of ISA.

Authorisation of directed surveillance

27. Directed surveillance is covert surveillance but not intrusive surveillance undertaken for the purposes of a specific investigation or operation in a manner likely to reveal private information about someone. Section 28 of RIPA now provides for designated persons within each of the intelligence services (and within other public authorities including for present purposes the Ministry of Defence) to authorise such action but only if the authoriser believes that it is necessary in the interests of national security, for the purpose of preventing or detecting crime, or in the interests of the economic well-being of the UK, and that it is proportionate to what it seeks to achieve.

Authorisation of covert human intelligence sources

28. Covert human intelligence sources are essentially people who are members of or act on behalf of one of the intelligence services to obtain information from people who do not know that this information will reach the intelligence service. Section 29 of RIPA now provides for the conduct or use of a covert human intelligence source to be authorised by designated persons within the relevant intelligence service (or Ministry of Defence) provided that the authoriser believes that the authorisation is necessary in the interests of national security, for the purpose of preventing or detecting crime, or in the interests of the economic well-being of the UK, and that the conduct or use of the source is proportionate to what it seeks to achieve.

Discharge of my functions

Review of the Secretary of State's powers to issue warrants and grant authorisations

29. As I have already explained, property (and/or intrusive surveillance) warrants for the Security Service are generally issued by the Home Secretary and the Secretary of State for Northern Ireland and those for the SIS and GCHQ by the Foreign Secretary. Section 7 authorisations are normally granted by the Foreign Secretary. In carrying out my functions in 2007 I have made visits to the Security Service, SIS and GCHQ as well as the Ministry of Defence, the Home Office and the Foreign and Commonwealth Office (FCO). I have also visited Belfast to examine authorisations relating to Northern Ireland. In the course of all these visits I have sought to satisfy myself that statutory conditions governing the exercise of investigatory powers have been met, in particular that the respective agencies' object in obtaining the information being sought has been in the discharge of one or more of its statutory functions; that the action in question has appeared to be both necessary for obtaining information which could not reasonably be obtained by other less intrusive means and also proportionate to what is sought to be achieved; and that such information is likely to be of substantial value.

30. I have read the files relating to a number of warrants and authorisations issued during the course of the year and some of those where the warrants or authorisations previously issued have been renewed. In so doing, I have also had the opportunity to review the material obtained from the relevant operation. I have questioned those involved in the preparation of the warrant or authorisation application, those who administer the system for issuing warrants and authorisations and those who have implemented the warrant or authorisation once it has been issued and acted on the information obtained under it.

31. In issuing warrants and authorisations the respective Secretaries of State must largely rely on the accuracy of the information contained in the application and the candour of those applying for it. This depends essentially upon the integrity and quality of the personnel involved in the warrantry process both in the agencies and the government departments concerned and the care with which such applications are prepared and scrutinised. Because of the legal requirements governing such warrants and authorisations increasing use is made of the legal advisers in the agencies and departments with a view to ensuring due compliance with such requirements. I regard it as one of my functions to check these matters so far as I can and as a result I am as satisfied as I believe I possibly can be that the applications made during 2007 properly reflected the actual circumstances at the time of submission, and that the respective Secretaries of State have properly exercised their statutory powers. So too I am satisfied that the various members of the intelligence services (and the Ministry of Defence and armed forces insofar as they too come within the ambit of my review) have properly exercised their powers and performed their duties under Part II of RIPA.

32. It is the duty of every member of each intelligence service, every official of the department of each relevant Secretary of State and every member of Her Majesty's forces to disclose or provide to me all such documents and information as I may require to enable me to carry out my oversight functions – see section 60(1) of RIPA. I have enjoyed, therefore, very wide powers to ensure that I obtain maximum assistance from those I saw during my reviews. In exercising these powers I experienced the fullest possible co-operation on the part of all those concerned. Indeed, members of the various agencies at all levels have always appeared keen to confide in me all possibly relevant information and, where appropriate, to share with me their concerns. It is my opinion that all staff in this difficult and challenging area of work continue to be trustworthy, conscientious and dependable.

33. During the period covered by this report I have met the Home Secretary, the Secretary of State for Defence, the Secretary of State for Northern Ireland and the Foreign Secretary. It is quite clear to me from my discussions with the Secretaries

of State that they take considerable care to satisfy themselves that the warrants applied for are necessary for the authorised purposes, and that what is proposed is proportionate. If any of the Secretaries of State felt they needed further information to satisfy themselves that the warrant should be granted then it is requested and given. Outright and final refusal of an application is comparatively rare, because the requesting agencies prepare their submissions with care and senior officials in the Departments of the respective Secretaries of State scrutinise the applications diligently before they are submitted for approval by the Secretary of State. The agencies are fully cognisant of the fact that the Secretary of State does not act as a “rubber stamp”.

Part III of RIPA

34. As I have noted above, Part III of RIPA came into force on 1 October 2007. However, no notification of any directions to require disclosure in respect of protected electronic information has been given to me in 2007 and there has been no exercise or performance of powers and duties under Part III for me to review.

Statistics

35. Consistent with the practice followed since annual reporting by the respective statutory Commissioners began, I do not propose to disclose publicly the numbers of warrants or authorisations issued to the security and intelligence agencies. That is because it would, I believe, assist those unfriendly to the UK were they able to know the extent of the work of the Security Service, SIS and GCHQ in fulfilling their functions. The figures are, however, of interest and I have included them in the confidential annex to this report.

Intelligence and Security Committee

36. Together with Sir Paul Kennedy, I attended the Intelligence and Security Committee on 1 May 2007 for an informal discussion about our respective roles. There was a helpful exchange of views and information on a number of current issues.

International Conference on the Administration of Justice and National Security in Democracies

37. Between 10 – 12 June 2007 I attended the International Conference on the Administration of Justice and National Security in Democracies in Ottawa, Canada. In addition to other delegates from the United Kingdom representatives were invited from Australia, Canada, France, Israel, the Netherlands, Nigeria, Spain and United States of America. Organised by the Canadian Federal Court and the Canadian Centre for Intelligence and Security Studies of the School of International Affairs at Carleton University, the conference addressed issues relating to the administration of justice and human rights in the context of national security threats from an international perspective. As a member of the Panel covering the subject of “The judiciary and national security oversight and review” I addressed the conference on my role as the Intelligence Services Commissioner in the UK. The conference provided a valuable insight into the diverse ways in which other countries have sought to provide independent oversight of their security services.

The Investigatory Powers Tribunal

38. The Tribunal which was established by section 65 of RIPA and came into being on 2 October 2000 assumed responsibility for the jurisdiction previously held by the Interception of Communications Tribunal, the Security Service Tribunal and the Intelligence Services Tribunal and the complaints function of the Commissioner appointed under the Police Act 1997 as well as for claims under the Human Rights Act. The President of the Tribunal is Lord Justice Mummery with Mr. Justice Burton acting as Vice-President. In addition, five senior members of the legal profession served on the Tribunal during 2007.

39. As Lord Brown explained in paragraph 41 of his Annual Report for 2000, complaints to the Investigatory Powers Tribunal cannot easily be “categorised” under the three Tribunal systems that existed prior to RIPA. Consequently, I am unable to detail those complaints that relate to the Security Service, SIS and GCHQ that would previously have been considered by the Security Service Tribunal and Intelligence Services Tribunal. I can only provide the information on the total number of complaints made to the Investigatory Powers Tribunal. The Tribunal received 66 new applications during the calendar year 2007 and completed its investigation of 31 of these during the year as well as concluding its investigation of 52 of the cases carried over from 2007. 41 cases have been carried forward to 2008.

40. Section 57(3) of RIPA requires me to give all such assistance to the Tribunal as the Tribunal may require in relation to investigations and other specified matters. My assistance was not sought by the Tribunal during 2007.

Errors

41. Thirteen errors in respect of RIPA authorisations and ISA warrants and one breach in the handling arrangements of one of the agencies were reported to me during the period of this report. In addition one intelligence agency reported to me a breach of the Terrorism Act 2000. It is not possible for me to say much about these errors without revealing information of a sensitive nature, but I have referred to them in more detail in the Confidential Annex. However, I can report that the majority of the thirteen errors occurred in respect of surveillance and interference with property for which there was for a comparatively short time no valid authorisation or warrant in force. Although any such breach is to be regretted, I think it right to say that all the breaches can properly be categorised as minor. None of the cases involved bad faith or any deliberate departure from established practices. In all cases, following the discovery of the errors, the agencies’ internal procedures have been reviewed and strengthened with a view to preventing a future recurrence.



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