

Report of the Intelligence Services Commissioner for 2012

The Rt Hon Sir Mark Waller

Presented to Parliament pursuant to
Section 60(4) of the Regulation of
Investigatory Powers Act 2000

Ordered by the House of Commons to
be printed on 18 July 2013

Laid before the Scottish Parliament by
the Scottish Ministers July 2013

HC 578
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Any enquiries regarding this publication should be sent to us at the office of the Intelligence Services Commissioner via 2 Marsham Street, London SW1P 4DF

You can download this publication from www.isc.intelligencecommissioners.com

ISBN: 9780102986440

Printed in the UK by The Stationery Office Limited on behalf of the Controller of Her Majesty's Stationery Office

PO ID 2573535

07/13

Printed on paper containing 75% recycled fibre content minimum.

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July 2013

I enclose my second Annual Report covering the discharge of my functions as Intelligence Services Commissioner between 1 January 2012 and 31 December 2012.

I have taken the course of writing my report in two parts, the Confidential Annex containing those matters which in my view should not be published. I hope that you find this convenient.

It is for you to decide, after consultation with me, how much of the report should be excluded from publication on the grounds that any such publication 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 those public authorities subject to my review.

The Rt Hon Sir Mark Waller

INTELLIGENCE SERVICES COMMISSIONER



Foreword

My Appointment

I was appointed by the Prime Minister to the post of Intelligence Services Commissioner on 1 January 2011 under section 59 of the Regulation of Investigatory Powers Act 2000 (RIPA). Under section 59 of RIPA the Prime Minister appoints an Intelligence Services Commissioner who must be a person who holds or has held high judicial office within the meaning of the Constitutional Reform Act 2005.

My appointment is for three years and I am required by section 60(2) of RIPA to report 'as soon as practicable after the end of each calendar year' with respect to the carrying out of my functions. This is therefore my second report and covers the period 1st January to 31st December 2012.

My Legislative Responsibility

My legislative responsibility is to keep under review the issue of warrants by the Secretary of State authorising intrusive surveillance and interference with property and other authorisations (such as for covert human intelligence source) which designated officials can grant, in order to ensure that these were issued on a proper basis. My role is set out in full later in my report but I would like to emphasise that my role is tightly outlined in RIPA and I do not have blanket oversight of all the activities of the intelligence services. At the same time, I feel a responsibility not only to check the paperwork but to delve beyond this into how the activity specified in the warrant or authorisation is put into practice during operational activity. I also undertake some extra-statutory oversight which I, or my predecessors, agreed to take on. These extra-statutory roles could soon be placed on a statutory footing when the Justice and Security Act 2013 comes into force.

My First Year

During my first year in post I attempted to provide greater openness whilst still maintaining the secrecy necessary in the interest of national security. This involves achieving a fine balance because my inclination is towards greater openness but I recognise that revealing some information would not be in the best interest of the UK and its citizens.

My Objectives in my Second Year

During my second year my objectives have been firstly for greater focus on the way in which authorisations have been carried out and secondly on ensuring that the issue of privacy is given specific consideration as a separate issue within the concept of proportionality. During each of my visits I have discussed privacy as a separate matter and looked at ways to highlight this in the applications for warrants and authorisation. Intelligence gathering is often intrusive and this intrusion into privacy must be outweighed by the intelligence which is sought to be achieved.

Government Communications Headquarters (GCHQ)

This report is being finalised at a time of considerable media comment about the legality of GCHQ's activities. The Intelligence and Security Committee are, quite properly, investigating and it is for them to comment further if they wish to do so.

In so far as matters related to my area of oversight, which is the only area where it is appropriate for me to comment, I have discussed matters fully with senior officials within GCHQ and I am satisfied that they are not circumventing the legal framework under which they operate.

Olympics

The Olympic and Paralympic Games were a significant event during the summer of 2012. The intelligence services discussed with me their security preparations to help ensure the safety and security of the Games. They were not only involved in advising on the physical design and security of the sites, but also in the accreditation of those working at the venues.

As you will observe from the dates of my inspections, I made sure to steer clear of this busy period to allow for greater operational efficiency but I remained on hand if the agencies wished to discuss anything with me.

“The Olympics dominate much of our thinking in the security world at present.”

Sir Jonathan Evans, MI5

Discovery of an Error

As I explained in my previous report the likelihood of finding errors on my inspections is low because the intelligence services have been very open with me in self reporting and because each warrant or authorisation passes through a number of hands before it is signed. Unfortunately I must report that this year I did discover an error. Errors can and do occur during fast-paced and complex investigations but this was a simple administrative oversight. I stress that no unlawful activity occurred but I still viewed this as extremely serious because it was missed by so many people. I have set out as much detail as I am able later in my report.

I believe that the intelligence services have a strong culture of reporting errors and officers are willing to hold their hands up and admit possible errors. I encourage this and believe that officers should not be nervous about reporting errors.

Challenging the Intelligence Services

On my inspections and other visits I have sought to probe as if I was someone who had no confidence in the intelligence services and who was willing to believe the worst. Members of the intelligence services at all levels gave up a lot of their time providing answers to my questions and providing me with assurances and documents to support whenever I

requested it. The staff I have met are conscientious and professional and there is an audit trail through a number of people in relation to everything they do. I remain convinced that, because of the layers of checks, assurances and oversight, it would take an enormous conspiracy at all levels to undertake unlawful activity.

Overall I have been impressed with the care taken to ensure compliance with the legislative framework and with the levels of internal governance and supervision once a warrant or authorisation is signed. Staff have been very open with me and showed full and frank examples of peer review, supervision and internal oversight to ensure that operational activity is necessary and proportionate and that risks have been addressed.

Openness

I will continue to question the necessity for secrecy and push for greater openness so that the public can be reassured that the necessary secrecy is in the best interest of the UK.

The Rt Hon Sir Mark Waller

The Intelligence Services Commissioner

MY STATUTORY FUNCTIONS

In my previous report I attempted to set out the structure of my oversight visits and the legal tests and principles applied. I do not intend to repeat that here but I have attached as an appendix a summary of:

- the statutory objectives of the intelligence services
- the types of warrants and authorisations

It is worth highlighting again that my role is essentially that of a retrospective auditor of authorisations. I enjoy a constructive relationship with the agencies I oversee and I have given my advice freely and without prejudice when asked. However it is also important to clarify that I am not the legal adviser of the intelligence services, who have their own legal advisers.

I deal with matters under the following headings:

- My statutory and extra-statutory functions upon which I accepted the role as Intelligence Services Commissioner. Where my predecessors have been asked, and agreed, to perform extra-statutory functions I have continued to provide such oversight on an extra-statutory basis
- The Method of my review
- The discharge of my functions and an assessment of my statutory and extra statutory visits
- Consolidated Guidance to Intelligence Officers and Service Personnel on Detention and Interviewing of Detainees, and on the Passing and Receipt of Intelligence Relating to Detainees
- Errors reported to me
- International Intelligence Review Agency Conference
- The Intelligence and Security Committee
- A success story
- Statistics
- Conclusion

MY STATUTORY AND EXTRA-STATUTORY FUNCTIONS

My role is essentially to keep under review the exercise by the Secretaries of State of their powers to issue warrants and authorisations to enable the intelligence services to carry out their functions. It is also to keep under review the exercise and performance of the powers and duties imposed on the intelligence services and MOD/Armed Services personnel in relation to covert activities which are the subject of an internal authorisation procedure. These powers (Figure 1 & 2) are set out in the Regulation of Investigatory Powers Act 2000 (RIPA) and the Intelligence Services Act 1994 (ISA).

Figure 1: Statutory Functions of the Intelligence Services Commissioner

Function:	What this means:	Issued by:
Keeping under review the exercise by the Secretary of State of his powers to issue, renew and cancel warrants under sections 5 and 6 of ISA.	Warrants for entry on or interference with property (or with wireless telegraphy).	The Secretary of State. In practice issued mainly by the Home Secretary or the Secretary of State for Northern Ireland.
Keeping under review the exercise by the Secretary of State of his powers to give, renew and cancel authorisations under section 7 of ISA.	Authorisations for acts done outside the United Kingdom.	The Secretary of State. In practice issued by the Foreign Secretary.
Keeping 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 MOD officials and members of the armed services	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.	The Secretary of State. In practice issued mainly by the Home Secretary or the Secretary of State for Northern Ireland.

Keeping under review the exercise and performance by members of the intelligence services, and in relation to officials of the MOD and members of the armed services in places other than Northern Ireland, of their powers and duties under Parts II and III of RIPA.	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.	A Designated Officer through Internal Authorisation.
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Figure 2: Statutory Functions Continued:

Keeping under review the adequacy of the Part III safeguards of RIPA arrangements in relation to the members of the intelligence services and in relation to officials of the MOD and members of the armed services in places other than Northern Ireland.

Giving the Investigatory Powers 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.

Making an annual report to the Prime Minister on the discharge of my functions, such report to be laid before Parliament.

Extra-Statutory Functions:

Where my predecessors have been asked, and agreed, to perform extra-statutory functions (Figure 3) I have continued to provide such oversight on an extra-statutory basis.

Figure 3: Extra-Statutory Functions:

Overseeing the intelligence services' compliance with the Consolidated Guidance to Intelligence Officers and Service Personnel on the Detention and Interviewing of Detainees Overseas, and on the Passing and Receipt of Intelligence Relating to Detainees (Consolidated Guidance), in accordance with the parameters set out by the Prime Minister to the Intelligence Services Commissioner.

Any other extra-statutory duties that the Prime Minister may from time to time ask me, as Commissioner, to take on, providing I am willing to undertake these.

Justice and Security Act 2013

When the Justice and Security Act 2013 comes into force my remit will be expanded to include a requirement to oversee any aspect of the functions of the Agencies as directed by the Prime Minister, on his own motion or following a recommendation from me. I will for example, be formally directed to monitor the agencies' compliance with the Consolidated Guidance which I currently do on an extra-statutory basis.

The Method of my Review

I have continued to carry out at least two inspection visits per year with each of the intelligence services and with the MOD. The structure of these visits is:

- To sample randomly i.e. to select a certain number of examples from each area of activity.
- To pre read the selected papers relating to those chosen samples.
- To undertake a formal inspection visit and ask questions of the persons involved as to the approach adopted by them.
- To follow up with "under the bonnet" visits to review how the test of necessity and proportionality is applied with particular emphasis on privacy.

In addition I have paid visits to in-country stations and areas of MOD activity in various parts of the world to review the work and authorisation process from their own point of view.

I am provided with access to the necessary information around the intelligence, resource and legal cases governing executive actions, and it continues to be the case that I am provided with more information than is strictly necessary for the purposes of adding context. I can then conclude with some confidence that, as far as those activities I oversee, officials and Secretaries of State do comply with the necessary legislation in so far as they are bound to do so.

Discharge of my Functions

During 2012 I undertook formal oversight inspections and non statutory inspections of the Security Service (MI5), the Secret Intelligence Service (SIS), Government Communications Headquarters (GCHQ) and the Ministry of Defence (MOD). I also inspected the warrantry departments for the Secretary of State in the Home Office, Foreign Office, MOD and Northern Ireland Office.

Selection Stage

In this section I have referred to RIPA and ISA warrants but it should be read to include internal authorisations under RIPA which are subject to my oversight.

Some weeks before each bi-annual inspection the intelligence services and the warrantry units provide me with lists of all current warrants and authorisations and any that have been cancelled since the previous list. The intelligence services also provide me with any lists required to support my extra-statutory oversight and provide me with details of their internal authorisations undertaken since my last inspection. I am satisfied that the intelligence services and the warrantry units provide me with a full list of warrants. Often the agencies highlight particularly challenging warrants for review, in addition to making available paperwork related to errors if required.

Pre-reading

Pre-reading days are an important part of my scrutiny function. Here I am able to review more warrants and authorisations than I can on the inspection visit alone and then I can focus on key matters of legal and policy significance at the inspection day itself. During the pre-read I work through files of signed warrants and authorisations, intelligence cases, examples of Ministerial submissions on detainee guidance and other matters.

Inspection Visit

I seek to satisfy myself that the intelligence that is sought to be achieved is sufficiently strong to warrant the undertaking of what is often a significant intrusion into the private life of a citizen. I check whether the tests of necessity and proportionality have been applied in constructing the case for this intrusion and if the act is necessary to meet one of the statutory aims of the intelligence services. I will question the officers and their managers to ensure that the question of proportionality is considered or that there are no other less intrusive means to gather the intelligence the agency seeks to gather and that it has a specific focus on justifying the invasion of privacy and collateral intrusion. For example, if a listening device is going to be placed into a family home, I will question people concerned to ensure that the privacy of family members is protected and given separate consideration to other aspects of proportionality such as resources.

Under the Bonnet

Many warrants and authorisations contain assurances which would, for example, limit the intrusion into privacy. I believe that it is important to make an assessment of how these assurances are put into practice and my “under the bonnet” visits are designed to test the way in which these assurances have been followed. During these visits, I questioned staff across a range of grades as to how they will apply the tests of necessity and proportionality in operational planning stages or when carrying out the acts specified under any warrant or authorisation. I can and will ask challenging questions of the operational staff to ensure that they are aware of these conditions and understand why they have been applied.

ASSESSMENT OF MY INSPECTION VISITS

I have disclosed, as far as is not detrimental to national security, matters discussed during the inspections themselves. It is important to note that my overall assessment of compliance in those I oversee is only partially informed by the scrutiny of warrants. As indicated I undertake random visits to discuss compliance, in addition to following up when necessary on errors reported to me during and outside of formal scrutiny visits.

Security Service (MI5)

My oversight of MI5 in 2012 occurred as follows:

Pre-reading days: 21 – 23 February and 27 - 29 November

Inspection Days: 4/5 May and 6 December

‘Under-the-bonnet’ visit: 28 November

During my formal inspection visits to the Security Service, I was given a current threat assessment by the Deputy Director General before discussing the cases highlighted by me in my pre-read. I also discussed my extra-statutory oversight including the consolidated guidance.

One of the cases I selected for pre-read contained an anomaly in the wording of the warrant. Full details are given in my confidential annex but I can disclose that one paragraph did not relate to the named individual subject to the warrant.

The Security Service showed concern that a warrant of theirs contained the wrong wording. They explained that the format of the warrant is constructed by the Home Office and they do not cross reference this against the original application. I reiterated the importance of compliant joint working and they stressed that, if they had noticed the error when the paperwork was returned to them, they should have consulted with the Home Office at the earliest opportunity to resolve it. I should clarify that this anomaly did not make the warrant unlawful but it is still unacceptable. I raised this case during my formal inspection visit. My Private Secretary ensured that the same paperwork would be available to me when I inspected the Home Office (more on which below).

I appreciate that these visits are very time consuming for MI5 and despite the error, I continue to believe that compliance with legislation is an integral part of the organisation and that they welcome my oversight. Very senior staff give up a great deal of time to ensure that my questions are answered and that I have access to everything I need.

Home Office

When the Security Service wants to undertake property interference or intrusive surveillance, it must seek the prior approval of the Secretary of State. Once it has set out the necessity and proportionality for the action, they must pass this on to the National Security Unit (NSU) at the Home Office. NSU look at the proposal again and might

question MI5 on behalf of the Home Secretary before constructing the warrant and presenting this to the Home Secretary for her final approval. If she is satisfied then she will sign the warrant but if she says no, the activity does not take place.

I undertook formal visits to the Home Office on 21 May and 28 November. Lists of warrants were provided to my office in good time to allow me to select cases for review and I could then question the relevant officers about their consideration of the cases.

I spoke to the relevant Home Office staff about the error I discovered at MI5 and I was given a full and detailed explanation of how the error occurred. The error is unacceptable but I am satisfied that it was a simple omission – an initial failure to update details on the warrant template from a previous warrant and then a failure by the supervisor to pick this up. The Home Office agreed to look into how this could be prevented from occurring again in time for my meeting with the Home Secretary.

Meeting with Home Secretary

I met with the Home Secretary on 19 December as part of my formal oversight function. The meeting was informal, allowing me the opportunity to question her about the rather significant role she plays in approving warrants, sometimes at inconvenient hours. I am satisfied that the Home Secretary takes a significant amount of care before signing warrants that potentially infringe on the private lives of citizens. However, I did raise with her the error in the warrant she had signed and I was satisfied that she had already been briefed on it and received assurance that systems were being put in place to ensure that this could not happen again. I will follow this up with the Home Office.

That aside, I am satisfied that the Home Secretary takes significant time to read submissions, and that she often requests further information and updates from officials. While she relies on the papers presented to her, she makes her own assessment and takes her responsibility seriously.

Secret Intelligence Service (SIS)

My oversight of SIS in 2012 occurred as follows:

Pre-reading days: 15 May and 7 December

Inspection Days: 22- 23 May and 13 and 19 December

Station visits: 9-11 January (Middle East) and 9-12 December (Africa)

During my inspection visits I discussed Intelligence Services Act (ISA) warrants and RIPA authorisations (ISA s.5 Property warrants, s.7 authorisations and internal RIPA authorisations). I also discussed separately my extra-statutory oversight including the consolidated guidance. During the non-statutory portion of my oversight visits I explored in some depth the levels of compliance at desk officer level in relation to sensitive

intelligence techniques. Once again, I was assured that officers working for the SIS were conducting themselves in accordance with high levels of ethical and legal compliance.

My “under the bonnet” inspections took place during my visits to stations overseas. As well as receiving a briefing on liaison relationships I was able to discuss with officers how they applied the assurances contained in the documentation I see when I visit SIS HQ in Vauxhall Cross, London. I have been impressed with the integrity of the staff I met.

I believe that my scrutiny of selected warrants, combined with the level of discussion I was able to have with a cross-section of staff on the subject of legalities is sufficient for me to conclude that compliance at SIS is robust. I was again impressed by the attitude of all those to whom I have spoken who work for SIS.

Government Communications Headquarters (GCHQ)

My inspection visits to GCHQ were carried out on 19 – 20 March and 4 – 5 December. I undertook my pre-reading in GCHQ prior to starting my formal oversight and I conducted an “under-the-bonnet” visit on 20 January 2012.

I scrutinised those RIPA and ISA warrants and authorisations I had previously selected from a list provided to my Private Secretary. In addition, I scrutinised the internal approval documents supporting operations authorised under section 7 of ISA. During the same two day visit, I discussed my extra-statutory oversight functions in relation to GCHQ.

GCHQ reported three errors to me in 2012, two of which had occurred the previous year, so I discussed this with them. I was satisfied that, as an organisation, they have a culture of reporting errors. As you might expect, GCHQ have automated systems in place which enforce procedural checks and these help to reduce the number of errors that occur. One of these errors was reported in early 2012 and was included in my 2011 annual report.

Based on my scrutiny of GCHQ warrants and authorisations, it is my belief that the activity that GCHQ undertakes is carried out under appropriate authorisation and is necessary for GCHQ’s statutory purposes. In addition, I have sought, and received, assurances that considerations of the proportionality of any operations includes an assessment of whether the expected intelligence gained justifies the level of intrusion into privacy. During my December visit I agreed with GCHQ how this privacy element of proportionality could be more clearly set out in the formal submissions for warrants and authorisations.

I reiterate my comment made last year that it is my belief, based on what I have seen during my scrutiny inspections and under-the-bonnet visits, that GCHG staff conduct themselves with the highest level of integrity and legal compliance.

Foreign and Commonwealth Office (FCO)

I also undertook inspection visits to the FCO because the Foreign Secretary signs warrants for SIS and GCHQ. The purpose of these visits is to meet with those senior officials at the Department of State (Head of Intelligence Policy Department, Director of National Security and Director-General Defence and Intelligence) who advise the Secretary of State. I have also used the opportunity to undertake an additional scrutiny of submissions.

In relation to the FCO, lists of relevant material were sent to my office in good time. My formal inspection visits were on 18 June, 23 November and 14 December respectively. Once again, I was satisfied with both the information provided to me at the FCO and the levels of oversight and compliance shown by those officials I met.

Meeting with the Foreign Secretary

I met with the Foreign Secretary on 17 December to discuss the discharge of my oversight role in relation to the intelligence services (GCHQ and SIS) for whom he is responsible. In broad terms we were able to have a fruitful discussion on SIS and GCHQ compliance with RIPA and ISA, his views on the level and depth of information outlined within submissions for warrants that he signs and my oversight in relation to the consolidated guidance.

The Foreign Secretary was pleased to see that my first annual report contained more open information and encouraged me to continue along those lines. He was reassured that my oversight of SIS extended to staff posted overseas.

Northern Ireland Office (NIO)

As part of my oversight function I also visit the Northern Ireland Office in order to inspect authorisations signed by the Secretary of State for Northern Ireland. In relation to NIO. Lists of relevant material were sent to my office in good time. My formal inspection visits took place on 21 May and 18 November.

Meeting with Secretary of State for Northern Ireland

I met the Northern Ireland Secretary on 3 December 2012. We covered a wide range of topics during the discussion, including the NI political and security situation and her assessment of the quality of authorisations submitted to her for signature. This was her first year in post and she had a number of questions for me about how I conduct my oversight which I was happy to answer. I was satisfied that her approach was very much to question if the proposed invasion of privacy is justified by the intelligence which is being sought.

Ministry of Defence (MOD)

I visited the MOD on 12 June and 21 November 2012 to inspect their paperwork. It is not accepted that RIPA applies to activities outside the United Kingdom, but the MOD seeks to comply with the obligations RIPA would import if it did. Lists of authorisations were provided to my office for my selection in good time and I undertook reading prior to starting my formal inspection. I noted two delays in completing paperwork. The MOD

agreed to put in place procedures to prevent such happenings and reported these to me as procedural breaches. But otherwise compliance was good.

We discussed in some detail MOD compliance mechanisms in relation to oversight of the consolidated guidance.

I met the Defence Secretary on 20 December 2012 and he was pleased that points noted at my inspection were to be addressed.

ASSISTANCE TO THE INVESTIGATORY POWERS TRIBUNAL (IPT)

It is not my function to consider or investigate complaints made by members of the public. However, there is a Tribunal, the IPT, which exists to investigate complaints made by members of the public regarding, amongst other things, the conduct of the intelligence services in relation to the areas over which I have oversight. Further details regarding their jurisdiction can be found on their website: www.ipt-uk.com

It is one of my functions to provide the IPT with assistance, when requested, in connection with a complaint or human right act claim made before them.

I provided my formal advice to the IPT in relation to paragraph 2.29 of the Covert Surveillance and Property Interference Code of Practice which states:

“The following specific activities also constitute neither directed nor intrusive surveillance:

- The recording, whether overt or covert, of an interview with a member of the public where it is made clear that the interview is entirely voluntary and that the interviewer is a member of a public authority. In such circumstances, whether the recording equipment is overt or covert, the member of the public knows that they are being interviewed by a member of a public authority and that information gleaned through the interview has passed into the possession of the public authority in question.”

The question put to me was whether or not authorisation under RIPA was required when covertly recording an interview with anyone who knows they are being interviewed, and consents to being interviewed, by a member of a public authority.

My view is that the recording does not constitute surveillance. Section 48(2) of RIPA is concerned with breaching an individual’s privacy by “monitoring, observing or listening to persons, their movements, their conversations...” My view is that this is not what happens when an officer conducts a voluntary interview, and thus section 48(2)(a) does not apply. It then follows that if s48(2)(b) is only concerned with making a recording “in the course of surveillance” and s48(2)(c) is related to surveillance “by or with the assistance of a surveillance device”, if what is happening is not surveillance neither sub-section has any application.

These arguments lead me to agree with the code of practice that an authorisation is not necessary.

I should point out that The Chief Surveillance Commissioner, Sir Christopher Rose has taken a contrary view. In his guidance issued to all those public authorities subject to oversight by him, he says:

“No matter that the status of the officer is obvious, this would be surveillance under s48(2)(b) and (c) and covert since the person is unaware that it is taking place..”

The Tribunal considered legal arguments in this matter in open court and it is for them to determine which interpretation is correct in law.

CONSOLIDATED GUIDANCE TO INTELLIGENCE OFFICERS AND SERVICE PERSONNEL ON DETENTION AND INTERVIEWING OF DETAINEES, AND ON PASSING AND RECEIPT OF INTELLIGENCE RELATING TO DETAINEES (CONSOLIDATED GUIDANCE)

My predecessor agreed to monitor compliance by the intelligence services and MOD with the Consolidated Guidance which was published on 6 July 2010.

This oversight is limited to occasions where members of the intelligence services or MOD:

- Have been involved in the interviewing of a detainee held overseas by a third party such as requesting detention or feeding in questions
- Have received information from a liaison service where there is reason to believe it originated from a detainee (even if the information is unsolicited)
- Have passed information in relation to a detainee to a liaison service.

In my previous report, I set out in detail the method I agreed for monitoring compliance with the guidance. In summary this consists of the production of a “detainee grid” which allows me to select cases for review and contextual visits to stations within countries of particular interest in relation to detainee matters.

During 2012, I developed my methodology further in the belief that compliance with the guidance must:

1. Provide auditable evidence that operational staff engaged on detainee matters are following the guidance to which their respective intelligence service or Government Department has signed up.
2. Provide appropriate levels of assurance, including to the Commissioner and Ministers, that the guidance is being followed.
3. Seek to achieve 1 and 2 without placing significant additional administrative or resource burden on those subject to oversight.

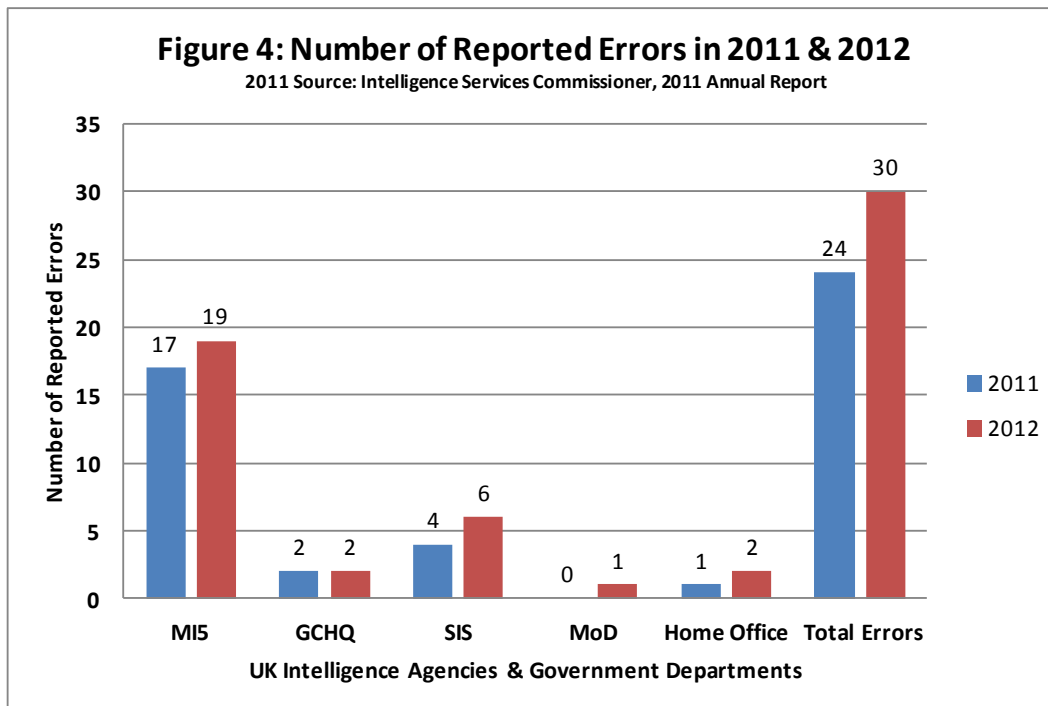
My office undertook a “health-check” of my methodology and I am assured that (a) the detainee grid provides me with the range of information necessary for me to oversee the guidance and (b) those responsible for compiling the grids are providing full and frank information to the extent to which it is available or provided to them by relevant colleagues within their organisation. I am grateful for information provided by the intelligence services and MOD to enable this health-check to take place.

Based on the information provided to me, and to the extent set out in my remit, I am not aware of any failure by a military or intelligence officer to comply with the consolidated guidance in the period between 1 January and 31 December 2012.

ERRORS REPORTED TO ME

There has been some questioning in the past as to why the commissioner rarely picks up errors within his selection of warrants for review. The answer to this is that during inspections I have available to me, should I wish to see them, warrants and authorisations related to the errors reported to me by each respective intelligence service since the last inspection visit. All errors identified by the intelligence services are fully disclosed to me upon discovery, and as a result it is unlikely I will identify a new error, although this is not impossible as in fact occurred last year as I have described earlier. In essence, I am given the opportunity to scrutinise all erroneous warrants and authorisations. This enables me to explore during the formal inspection days why errors occurred and what measures have been taken to minimise the risk of errors being repeated in the future.

27 errors were reported to me during the course of 2012. The error I discovered and two MOD procedural breaches takes the total to 30. Although the error I discovered did not result in any unlawful activity I view this error as serious because it was signed by the Home Secretary and was not spotted during any of the stringent checks which take place beginning with the desk officer and ending with the Secretary of State. The vast majority of these errors were due to human fallibility. A breakdown of the reported errors for 2011 and 2012 can be seen in Figure 4:



MI5 have reported significantly more errors than other organisations. However, as the holder of the highest number of warrants, and authorisations this is proportionate to the number of warrants and authorisations held and their error rate remains low.

There are certain errors details of which I am unable to give without prejudicing safeguards around national security and techniques of the intelligence services. However, I have provided below examples of typical errors reported to me in 2012.

Examples of Errors

Security Service Error

Following the introduction of a new IT system, there was a requirement to transfer paper-based Directed Surveillance Authorisations (DSA) onto the new system. This required staff to obtain a new IT-based DSA before cancelling the paper-based authorisation. In a small number of cases, as a result of an administrative oversight, the paper-based DSA was cancelled before the new IT-based application had been fully authorised. In response, staff were reminded of the correct sequence of actions when migrating authorisations.

GCHQ Error

This error related to a technical operation authorised under ISA. It was caused by a minor, but critical oversight by an analyst when conducting validation checks before passing the information on to a colleague conducting the operation in question. The oversight related to failing to take into account a known but rarely encountered glitch in the system used for validation. The error was flagged up by an automated system shortly after the operation commenced and the activity was stopped immediately and investigations began. Since this incident the team involved has amended its procedures to introduce an additional validation process before initiating an operation. Subsequent operations have demonstrated that this extra procedural step is effective and reduces to an absolute minimum the possibility that an error of this kind could occur again. The system used for the initial validation check has since been upgraded and the known glitch has been addressed, further reducing the likelihood of this particular type of error recurring.

SIS Error

The renewal of an authorisation for an SIS agent to act as a Covert Human Intelligence Source (CHIS) was not re-authorised until 38 days after the expiry of the previous authorisation. SIS failed to renew the authorisation on time due to an absence in the team during the authorisation process. In order to avoid a repeat of this incident, SIS has put in place a mechanism to monitor the progress of their RIPA applications to ensure timely reauthorisation.

MOD Procedural Breach

An urgent oral authorisation for a Covert Human Intelligence Source was not followed up within the required 72 hours by a formal written authorisation. Instead, this process was not completed for ten days. MOD has put in place further procedures to ensure that the chain of command has visibility of all oral authorisations and is able to ensure timely completion of follow-up paperwork.

INTERNATIONAL INTELLIGENCE REVIEW AGENCY CONFERENCE (IIRAC)

27 May 2012 - 30 May 2012

I attended the 8th IIRAC in Canada in May 2012 which was titled “Strengthening Democracy Through Effective Review”. It covered a range of interesting topics such as “Engaging the Public on Review/Oversight” and “Balancing National Security and Individual Rights”.

These conferences are a very useful way to share good practice. It highlighted to me that the international community faces the same difficulty, not in undertaking effective oversight but in demonstrating effective oversight in a secret environment.

At the end of the conference, Canada handed over to the host for the 9th IIRAC which is the UK.

THE INTELLIGENCE AND SECURITY COMMITTEE (ISC)

25 April 2012

Along with the Interception of Communications Commissioner, Sir Paul Kennedy, I met with the members of the ISC for an informal discussion. Lord Justice Mummery, the President of the Investigatory Powers Tribunal, was also present at the meeting. During this meeting we exchanged views regarding key developments throughout the year

The Intelligence and Security Committee have a vital role to play in providing parliamentary oversight of the policy, administration and expenditure of the intelligence services. In view of our respective areas of oversight within the intelligence community I believe it is useful to hold these informal exchanges of ideas on an annual basis.

CONFIDENTIAL ANNEX

Due to the necessity of keeping many operational details of the warrants and authorisations I oversee secret and out of the annual report, the full extent of the Commissioner's review cannot be fully disclosed. It remains necessary for me to draft a separate confidential annex to this report containing information not for public disclosure. I can assure readers of two things; firstly, that any reasonable member of the public would be convinced that the operational detail contained in this annex is just that, operational detail, comprising target names and techniques utilised by intelligence services, which must be protected in the interests of national security. Secondly, that the principles and impact of my oversight of the intelligence services have been outlined in the open report.

“Agents take serious risks and make sacrifices to help our country. In return, we give them a solemn pledge: that we shall keep their role secret.”
Sir John Sawers, Chief of SIS

OPERATIONAL SUCCESS

In my report I have focused a lot on the errors reported to me by the intelligence services. This is an important part of my function but I also believe it is important not to lose sight of the important work they do, often unrecognised, to keep the UK safe. I am not free to publish or provide statistics relating to success. I can however remind people of one success the details of which are in the public domain.

In 2011, a joint Security Service and Police operation investigated a number of Birmingham based individuals planning a bombing campaign in the UK (Operation EXAMINE).

Those involved were led by two individuals, Irfan NASEER and Irfan KHALID who had travelled to Pakistan in late 2010 where they received training for terrorism. Following their return the pair together with others collected money for terrorism. In addition Irfan NASEER assisted four others to travel to Pakistan for training in terrorism, albeit three of the four returned to the UK within a matter of days of their arrival in Pakistan and the fourth remained in Pakistan, with family, for a number of months.

Following the purchase of a chemical and experimentation with it by Irfan NASEER, Irfan KHALID and Ashik ALI they were assessed to be moving towards UK attack planning.

Twelve people were arrested and charged with terrorist related offences, and 11 have been convicted. Six pleaded guilty to terrorist offences; three - namely Irfan Naseer, Irfan Khalid and Ashik Ali - were convicted following a trial on 21 February 2013 of offences of preparing acts of terrorism, contrary to section 5 of the Terrorism Act 2006. Following their trial, a further two subsequently pleaded guilty. The final individual was acquitted.

The case against these individuals relied heavily upon warranted material, including eavesdropping product which captured detailed conversations between those charged and surveillance which provided further evidence in support of their offences.

STATISTICS

In my 2011 report I disclosed the total number of RIPA and ISA warrants and authorisations I oversee for the first time. I continue to believe that this is a useful exercise and I am able to disclose further detail in my confidential annex.

The total number of warrants and authorisations that were approved across the intelligence services and MOD in 2012 was **2,838**. It is worth pointing out that, because of a migration onto an electronic system, a number of authorisations were cancelled and authorised again. This total number is not therefore a true representation.

I remain confident that such disclosure gives an indication of the total number of authorisations from which I could potentially sample during inspection visits, whilst not disclosing information that could be detrimental to national security.

CONCLUSION

In conclusion, I can report that I am satisfied that the intelligence services and MOD are fully aware of their obligations. My dealings with staff at all levels of the organisations have shown them to have integrity and honesty and they actively welcome oversight of the system.

In particular, the intelligence services are aware that intelligence can only be sought

- If it is necessary in discharge of one or more of their statutory function, eg in the interest of national security
- The action in question has appeared to be necessary for obtaining information which could not be obtained by less intrusive means
- If it is proportionate to what is being sought to be achieved.

The intelligence services do not choose what they want to do. However, their operational independence and functions are set out in statute and are exercised in accordance with Government policy including as determined by the National Security Council. They are accountable to Government, to the Intelligence and Security Committee, to the Interception of Communications Commissioner, and to me in my role as Intelligence Services Commissioner. In today's open society there has to be a balance between operational security and public accountability but this, in my opinion, is a thorough form of constraint and accountability.

Naturally human errors can occur, and have occurred. However, such errors are few in number and the vast majority are due to human fallibility such as a failure to renew an authorisation in time. This year a number of errors were linked to the implementation of a new IT system which is now established and improvements have already been made. I have set out in this report details of which intelligence services reported errors to me throughout the year, and where possible details of such errors. I have provided details of one error that I found, which again was an administrative error. I am clear that everyone involved takes any error very seriously and take steps to prevent it recurring.

I met with the Secretaries of State who normally issue warrants and authorisations. Our discussions have been both constructive and informative and it is clear to me that the Secretaries of State do not simply accept and sign what is put in front of them, but take their obligations seriously. I conclude that the respective Secretaries of State have acted properly in the exercise of their statutory powers.

I am also satisfied that in 2012 the various members of the intelligence services have acted properly in exercising their powers. I am satisfied that the MOD and armed services in so far as they come within my remit have acted properly in exercising their powers.

I have made it clear to the agencies that I oversee that they can be open with me about errors and, if necessary, we can work together to ensure that a similar error does not happen again.

I remain convinced that operational details within the warrants and authorisations I oversee must remain secret.

Finally, 2012 was the final year of work for my colleague, Sir Paul Kennedy, the Interception of Communications Commissioner. I would like to wish him a happy retirement and also to welcome his successor, Sir Anthony May.

ANNEX

Useful Background Information

By way of background to my oversight role, I believe it is useful to be aware of the functions imposed upon each of the intelligence services and certain constraints to which all are subject.

I have in this annex set out

- The statutory objectives of the Intelligence Services
- A summary of Warrants and Authorisations under the Intelligence Services Act 1994 (ISA)
- A summary of Warrants and Authorisations under the Regulation of Investigatory Powers Act 2000 (RIPA)

THE STATUTORY OBJECTIVES OF THE INTELLIGENCE SERVICES

There are three specialist services who form the UK intelligence community:

The Security Service MI5	The Secret Intelligence Service SIS	The Government Communications Headquarters, GCHQ
Works to protect the UK and UK interests overseas from national security threats such as terrorism	Operates abroad to protect the UK, dealing with threats overseas and gathering intelligence	Produces intelligence from communications, and takes the lead in the cyber world

SECURITY SERVICE (MI5)

The functions of MI5 are:

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;
Safeguarding the economic well-being of the UK against threats posed by the actions or intentions of persons outside the British Islands; and
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)

The function of SIS is to obtain and provide information and to perform other tasks relating to the actions or intentions of persons outside the British Islands either:

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

GOVERNMENT COMMUNICATIONS HEADQUARTERS (GCHQ)

GCHQ's functions are:

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;
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.

“All of this takes place under close Ministerial oversight and appropriate authorisation by the Secretary of State. There is judicial oversight from the Intelligence Services and Interception Commissioners. Parliamentary oversight comes through the Intelligence and Security Committee.”

Sir Iain Lobban GCHQ

WARRANTS AND AUTHORISATIONS UNDER THE INTELLIGENCE SERVICES ACT 1994 (ISA)

Section 7 Authorisations

What is a section 7 authorisation?

Under section 7 of ISA the Secretary of State (in practice normally the Foreign Secretary) may authorise SIS or GCHQ to undertake acts outside the United Kingdom which are necessary for the proper discharge of one of its functions. Authorisations may be given for acts of a specified description.

The purpose of section 7 is to ensure that certain SIS or GCHQ activity overseas, which might otherwise expose its officers or agents to liability for prosecution in the UK, is, where authorised by the Secretary of State, exempted from such liability. A section 7 authorisation would of course have no effect on the law in the country where the act is to be performed. I would however emphasise that the Secretary of State, before granting each authorisation, must be satisfied of the necessity and reasonableness of the acts authorised.

How is it authorised?

Before the Secretary of State gives any such authority, he must first be satisfied of a number of matters:

That the acts being authorised (or acts in the course of an authorised operation) will be necessary for the proper discharge of an SIS or GCHQ function;
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 or GCHQ function;
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; and
That satisfactory arrangements are in force to secure that SIS or GCHQ shall not obtain or disclose information except insofar as is necessary for the proper discharge of one of its functions.

What does this mean?

These authorisations may be given for acts of a specified description and these are known as class authorisations. In practice this could mean acts related to agent operations overseas.

Section 5 Warrants

What is a section 5 warrant?

Section 5 warrants are often referred to as property warrants. Under Section 5 of ISA the Secretary of State may issue warrants authorising Security Service, SIS or GCHQ entry on or interference with property or with wireless telegraphy. Again these must be necessary for the proper discharge of one of its functions.

How is this authorised?

Before the Secretary of State gives any such authority, he must first be satisfied of a number of matters:

That the acts being authorised are necessary for the purpose of assisting the particular intelligence agency to carry out any of its statutory functions (as previously described);

That the activity is necessary and proportionate to what it seeks to achieve and it could not reasonably be achieved by other (less intrusive) means; and

That satisfactory arrangements are in place to ensure that the agency shall not obtain or disclose information except insofar as necessary for the proper discharge of one of its functions.
--

What does this mean?

Section 5 warrants are often combined with a warrant for intrusive surveillance. Typically this would involve entering a property and implanting a listening device.

WARRANTS AND AUTHORISATIONS UNDER THE REGULATION OF INVESTIGATORY POWERS ACT 2000 (RIPA)

Part II of RIPA provides for authorisations of covert surveillance by a public authority where that surveillance is likely to result in obtaining private information about a person. It also provides for authorisation of the use or conduct of covert human intelligence sources (CHIS).

Directed Surveillance Authorisation (DSA)

What is directed surveillance?

Surveillance is defined as being directed if the following are all true:

It is covert, but not intrusive surveillance;
It is conducted for the purposes of a specific investigation or operation;
It is likely to result in the obtaining of private information about a person (whether or not one specifically identified for the purposes of the investigation or operation);
It is conducted otherwise than by way of an immediate response to events or in circumstances the nature of which is such that it would not be reasonably practicable for an authorisation under Part II of the 2000 Act to be sought.

How is it authorised?

Under RIPA designated persons within each of the intelligence services and armed services may authorise surveillance which is covert but not intrusive surveillance in a manner likely to reveal private information about someone. The authoriser must believe:

That the DSA is necessary for a specific human rights purpose (for the intelligence agencies this is in the interests of national security, for the purpose of preventing or detecting crime or preventing disorder, or in the interests of the economic well-being of the UK; for the armed services it is, in addition, for the purpose of protecting public health or in the interests of public safety;
That the surveillance is undertaken for the purposes of a specific investigation or operation;
And that it is proportionate to what it seeks to achieve and cannot be achieved by other (less intrusive) means.

What does this mean in practice?

A typical example would be surveillance of a terrorist suspect's movements in public to establish pattern of life information.

Intrusive Surveillance

What is intrusive surveillance?

Intrusive surveillance is covert surveillance that is carried out in relation to anything taking place on residential premises or in any private vehicle, and that involves the presence of an individual on the premises or in the vehicle or is carried out by a means of a surveillance device. The definition of surveillance as intrusive relates to the location of the surveillance. It is not necessary to consider separately whether or not intrusive surveillance is likely to result in the obtaining of private information because of the naturally heightened expectation of privacy in these locations.

How is it authorised?

Under section 42 of RIPA the Secretary of State may authorise a warrant to undertake intrusive surveillance which is necessary for the proper discharge of one of the functions of the intelligence services, armed services or Ministry of Defence.

Before the Secretary of State can authorise such action he must believe;

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;
That the authorised surveillance is necessary and proportionate to what it seeks to achieve;
That the information cannot be obtained by other (less intrusive) means.

What does this mean?

Typically this could involve planting a surveillance device in someone's house or car, normally combined with a property warrant under section 5 of ISA.

Covert Human Intelligence Source (CHIS)

What is a CHIS?

A CHIS is essentially a person who is a member of, or acts on behalf of, one of the intelligence or armed services and who is authorised to obtain information from people who do not know that this information is for the intelligence services or armed service. He may be a member of the public or an undercover officer.

A person is a CHIS if:

- | |
|---|
| a) he establishes or maintains a personal or other relationship with a person for the covert purpose of facilitating the doing of anything falling within paragraph b) or c); |
| b) he covertly uses such a relationship to obtain information or to provide access to any information to another person; or |
| c) he covertly discloses information obtained by the use of such a relationship or as a consequence of the existence of such a relationship. |

How is this authorised?

Under section 29 of RIPA a designated person within the relevant intelligence or armed service may authorise the use or conduct of a CHIS provided that the authoriser believes:

- | |
|---|
| That it is necessary for a specific human rights purpose (for the intelligence agencies this is in the interests of national security, for the purpose of preventing or detecting crime or preventing disorder, or in the interests of the economic well-being of the UK; for the armed services it is, in addition, for the purpose of protecting public health or in the interests of public safety); |
| That the conduct or use of the source is proportionate to what it seeks to achieve; |
| That the information cannot be obtained by other (less intrusive) means |

The legislation requires close management of a CHIS, including in respect of his security and welfare, together with a clear definition of the specific task given to him and the limits of that tasking. All of this must be recorded for accountability purposes and managers are required to ensure that staff comply with the legislation.

What does this mean?

This might be authorisation of a public informant to develop or maintain a relationship with a suspected terrorist in order to provide vital information to an intelligence agency.



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ISBN 978-0-10-298644-0



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