

Data Retention And Investigatory Powers Bill

Delegated Powers Memorandum

Memorandum By The Home Office

1. This memorandum identifies the provisions in the Data Retention and Investigatory Powers Bill that contain delegated powers. It explains the purpose of the provisions, describes why matters are left to delegated legislation, and explains the procedure selected for each power and why it has been chosen.

The Bill

2. The Bill makes provision for the retention of communications data by telecommunications service providers, replacing the regime contained in the Data Retention (EC Directive) Regulations 2009 ('the 2009 Regulations'). It also amends Part 1 of the Regulation of Investigatory Powers Act 2000 (RIPA) to clarify that certain powers in respect of the interception of communications and the acquisition of communications data are exercisable in relation to providers located outside the UK.
3. Clause 1(1) of the Bill contains measures enabling the Secretary of State, by notice, to require providers of telecommunications services to retain certain types of communications data generated or processed by them in the course of supplying their services. The types of data to be retained are those set out in the Schedule to the 2009 Regulations. Clause 1(3) contains a regulation-making power to set out further details of notices and impose safeguards relating to the security of, access to and destruction of the retained data. A notice may require the retention of data for a maximum period to be set out in the regulations, which may not exceed 12 months. Retained data must only be disclosed in accordance with the procedures under Chapter 2 of Part 1 of RIPA, a court order or other judicial authorisation or warrant or any other purposes set out in the regulations.
4. A draft of the regulations which it is intended to make under the power in clause 1(3) regulations will be made available to Parliament.
5. Clause 4 makes provision to clarify that the power of a person to whom an interception warrant is addressed to serve an interception warrant on a person who may provide assistance in giving effect to the warrant¹ may be exercised in respect of a person outside the UK. Similarly, the power of the Secretary of State to give a notice requiring a public telecommunications service provider to

¹ Section 11(2) of RIPA.

maintain a permanent interception capability² may be exercised in respect of a public telecommunications provider outside the UK. Additionally, it makes provision to clarify that a requirement to provide communications data may be exercised in respect of a public telecommunications provider outside the UK.³ Further amendments make provision in respect of the practicalities of service on, or giving a notice to, such a provider. The definition of ‘telecommunications service provider’ is clarified to make explicit that it is intended to capture those providers whose services are internet-based (such as web-based email) as well as those providing infrastructure for connection to the internet.

6. Communications data is the context not the content of a communication. It can be used to demonstrate who was communicating; when; from where; and with whom. It can include the time and duration of a communication, the number or email address of the originator and recipient, and sometimes the location of the device from which the communication was made. It does not include the content of any communication: for example the text of an email or a conversation on a telephone.
7. The interception of the content of communications is governed by Chapter 1 of Part 1 of RIPA. The clauses of the Bill amending that Chapter do not contain any delegated powers.

Clause 1(1): power to require the retention of data

Power conferred on:	The Secretary of State
Power exercisable by:	Notice
Parliamentary procedure:	None

Introduction

8. Clause 1(1) of the Bill provides a power for the Secretary of State to give a notice to a public telecommunications operator requiring the operator to retain relevant communications data.
9. The Secretary of State must consider that the requirement to retain data is necessary and proportionate for one or more of the purposes set out in section 22(2) of the Regulation of Investigatory Powers Act 2000. Those purposes are:
 - a. in the interest of national security,
 - b. for the purpose of preventing or detecting crime or of preventing disorder,

² Section 12(1) of RIPA; The Regulation of Investigatory powers (Maintenance of Interception Capability) Order 2002 (S.I. 2002/1931).

³ Section 22(3) & (4) of RIPA

- c. in the interests of the economic well-being of the United Kingdom,
- d. in the interests of public safety,
- e. for the purpose of protecting public health,
- f. for the purpose of assessing or collecting any tax, duty, levy or other imposition, contribution or charge payable to a government department,
- g. for the purpose, in an emergency, of preventing death or injury or any damage to a person's physical or mental health, or of mitigating any injury or damage to a person's physical or mental health,
- h. for any purpose specified by an order made by the Secretary of State

The Secretary of State has added the following additional purposes⁴:

- i) to assist investigations into alleged miscarriages of justice, or
- ii) where a person ("P") has died or is unable to identify themselves because of a physical or mental condition-
 - a) to assist in identifying P, or
 - b) to obtain information about P's next of kin or other persons connected with P or about the reason for P's death or condition.

10. Clause 1(2) contains further provision about the requirements that may be imposed by a notice. A notice may:

- a. relate to a particular operator or any description of operators,
- b. require the retention of all data or any description of data,
- c. specify the period or periods for which data is to be retained,
- d. contain other requirements, or restrictions, in relation to the retention of data,
- e. make different provision for different purposes,
- f. relate to data whether or not in existence at the time of the giving, or coming into force of the notice.

Effect of the Provision

10. A public telecommunications operator is defined in clause 2(1) as a person who controls or provides a public telecommunication system, or who provides a public telecommunications service.

11. The concepts of 'public telecommunication system' and 'public telecommunications service' are defined in section 2 of the Regulation of Investigatory Powers Act 2000. A 'public telecommunications service' is one that is provided to the public, or a section of the public, in the UK. A 'public

⁴ Regulation of Investigatory Powers (Communications Data) Order 2010 (S.I. 2010/480).

telecommunication system' is defined as the parts of a system by which a public telecommunications service is provided which are located in the UK.

12. A 'telecommunications service' is a service that consists in the provision of access to, and of facilities for making use of, any telecommunication system. A 'telecommunication system' is any system which exists for the purpose of facilitating the transmission of communications by any means involving the use of electrical or electro-magnetic energy.
13. Clause 5 of the Bill makes further provision in respect of the RIPA definition of 'telecommunication service' to clarify that it is intended to capture those providers whose services are internet-based as well as those providing infrastructure for connection to the internet (for example a broadband service).
14. The persons to whom the Secretary of State may give a notice, accordingly, include those providing a fixed line or mobile telephone service, a broadband service an email service or other internet communications services to the public in the UK.
15. 'Relevant communications data' is defined in clause 2(1) of the Bill as the categories of data set out in the Schedule to the 2009 Regulations, so far as that data is generated or processed in the UK by public telecommunications operators, in the process of supplying the telecommunications services concerned.
16. So the effect of the provision is that the Secretary of State may, by notice, require a person providing communication services to persons in the UK to retain the relevant communications data they generate or process within the UK in supplying that service.
17. The notice may be given to one individual service provider, or to a description of operators. The extent of the requirement to retain data will be set out in the notice, which may require the retention of all communications data related to a particular service or all services offered by the operator, or a sub-set of that data.
18. The notice may also set out security or other requirements with which the provider is required to comply in relation to the retained data, or restrictions on how the data may be stored.
19. The notice may provide for different requirements in relation to different types of data, so an operator may be required to retain a certain type of data for 12 months (the maximum period permitted by clause 1(5)), but another type of data for only 3 months.

20. The notice may, accordingly, be tailored to the specific circumstances of the provider and what is considered necessary and proportionate having regard to the purposes.

Justification of the Delegation

21. The power to give a notice, the types of communications data that may be subject to a notice, and the persons who may be given a notice, are all specified on the face of the Bill. Further provisions about the giving of a notice will be contained in regulations subject to the affirmative procedure (see the explanation of clause 1(3) below). The specific details of the requirements to be imposed on a particular operator to retain data are left to the discretion of the Secretary of State.

22. It is appropriate that the Secretary of State should be able to determine the precise retention requirements to be placed on a particular operator, taking into account that operator's particular circumstances, the necessity of retaining the communications data processed by that particular operator for one or more of the relevant purposes, and the proportionality of doing so. The power to impose these requirements by notice means that these requirements can be tailored to the specific circumstances of the case, ensuring that only that communications data which it is necessary and proportionate to retain is subject to a retention notice. Decisions can be taken on the advice of experts who work closely with the providers in question and are familiar with the services they provide. This allows for a more flexible approach than would be the case if uniform requirements for all providers were contained in primary or secondary legislation.

Justification of the level of Parliamentary Scrutiny

23. The scope of the Secretary of State's discretion is set out in primary legislation and in secondary legislation subject to the affirmative resolution procedure. It is appropriate that, within that framework, decisions as to the precise requirements to be placed on providers should be taken by the Secretary of State.

24. The retention regime in the Bill replaces that in the 2009 Regulations, which provided for the Secretary of State to give notices requiring the retention of data.

Clause 1(3): power to make further provision about the retention of relevant communications data

Power conferred on:	The Secretary of State
Power exercisable by:	Regulations
Parliamentary procedure:	Affirmative

Introduction

25. Clause 1(3) of the Bill provides that the Secretary of State may by regulations make further provision about the retention of relevant communications data.
26. Clause 1(4) provides that the regulations may make provision in respect of:
- a. requirements before giving a retention notice;
 - b. the maximum period for which data is to be retained under a retention notice;
 - c. the content, giving, coming into force, review, variation or revocation of a retention notice;
 - d. the integrity, security or protection of, access to, or the disclosure or destruction of, retained data;
 - e. the enforcement of, or auditing compliance with, relevant requirements or restrictions;
 - f. a code of practice in relation to relevant requirements or restrictions or relevant powers;
 - g. the reimbursement of expenses incurred by public telecommunications operators in complying with relevant requirements or restrictions;
 - h. the 2009 Regulations ceasing to have effect and the transition to the retention of data under the Bill.
27. Clause 1(5) provides that the retention period provided for in the regulations must not exceed 12 months.
28. Clause 2(3) provides for the regulations to replicate the Schedule to the 2009 Regulations, for ease of reference and so the position is clear once the 2009 Regulations have been revoked.
29. Clause 2(4) provides that the regulations may confer or impose functions on any person, including the Secretary of State, may make supplementary, incidental, consequential transitional, transitory or saving provision, and make different provision for different purposes. It may, in relation to making provision for codes of practice, be exercised by modifying the effect of sections 71 and 72 of the Regulation of Investigatory Powers Act 2000.

Effect of the Provision

30. The provision allows the Secretary of State, by regulations subject to the affirmative procedure, to make additional provision in respect of the retention of communications data in accordance with the Bill.
31. A draft of the regulations which it is intended will be made under clause 1(3) will be made available to Parliament, so that the Committee's consideration can be

informed by the proposals. The Home Office understands that the Committee will consider the potential exercises of the power in future.

32. The power allows regulations to make further detailed provision in respect of requirements on the Secretary of State before giving a notice to a provider requiring the retention of communications data, the procedures for giving a notice, the format of a notice and the Secretary of State's ability to revoke or vary such a notice.
33. They may also set out further requirements concerning the integrity of retained data, the level of security that must be applied to it, the measures that must be in place for the protection of the data, and the destruction of the data once it is no longer required to be retained.
34. The regulations may make provision for the enforcement of the requirements placed on telecommunications providers in respect of the retained data, and for the auditing of compliance with the legislative requirements. The draft regulations envisage that the Information Commissioner will perform this audit function.
35. The regulations may also provide for a code of practice, to set out practical guidance to telecommunications providers on their obligations in respect of the retention of data, and for the reimbursement of expenses incurred by telecommunications operators in complying with the new legislation.
36. The regulations may also make provision in respect of arrangements for the transition between the retention provisions of the 2009 Regulations, and the new regime.

Justification of the Delegation

37. The matters to be dealt with in the regulations are matters which apply in respect of all telecommunications operators and all retained communications data, but the detail of the provisions is such that it is appropriate for it to be contained in secondary legislation rather than on the face of the Bill. For example, the regulations will include such matters as the matters to be taken into account by the Secretary of State before serving a notice and transitional provisions between the 2009 Regulations and the new regime.
38. This is particularly the case given that the Bill is to be taken through Parliament under the fast track procedure so time for consideration of the detail of the provisions is shorter than would otherwise be the case. The regulations will be subject to the affirmative procedure and accordingly will be given proper Parliamentary consideration (not least given the early publication of the regulations in draft).

39. The existing regime for the retention of communications data is contained in secondary legislation (the 2009 Regulations).

Justification of the level of Parliamentary Scrutiny

40. The regulations are subject to the affirmative procedure. As made clear by the European Court of Justice judgment in respect to the Data Retention Directive, the retention of communications data constitutes an intrusion into the privacy of individuals. It is accordingly appropriate that regulations made under this power and setting out the detailed safeguards and protections to be put in place in respect of retained data to should be subject to detailed Parliamentary scrutiny.

Clause 1(7): power to make further provision about communications data retained under other legislation

Power conferred on:	The Secretary of State
Power exercisable by:	Regulations
Parliamentary procedure:	Affirmative

Introduction

41. Clause 1(7) provides that the Secretary of State may by regulations make provision in respect of data retained by telecommunications service providers on the basis of the voluntary code of practice under section 102 of the Anti-terrorism, Crime and Security Act 2001.

42. The regulations may make provision corresponding to that made in regulations under clause 1(3) in respect of:

- (a) the integrity, security or protection of, access to, or the disclosure or destruction of such data;
- (b) the enforcement of, or auditing compliance with, relevant requirements or restrictions;
- (c) a code of practice in relation to relevant requirements or restrictions or relevant powers;
- (d) the reimbursement of expenses incurred by public telecommunications operators in complying with relevant requirements or restrictions;

43. The regulations may also make provision equivalent to that in clause 1(6) of the Bill which restricts the circumstances in which operators may disclose retained data.

44. Section 102 of the 2001 Act provides for a voluntary code of practice on the retention of communications data. Some, but by no means all, communications providers in the UK retain communications data on the basis of the voluntary code. The code provides for the retention of communications data for a period ranging from a matter of days for some categories of data, up to 12 months for other categories.

Effect of the provision

45. The provision accordingly allows the Secretary of State to make equivalent provision in respect of the security of communications data retained under the voluntary code of practice and the enforcement of the requirements in respect of that data, as well as oversight by the Information Commissioner. Access to data retained under the code can similarly be restricted. The Secretary of State will be able to provide for the code of practice in respect of data retained in accordance with clause 1 to apply in respect of data retained under the voluntary code of practice, and to make provision for the reimbursement of expenses.

46. The effect will be that data retained under the voluntary code will be subject to the same safeguards as data retained in accordance with a notice under the Bill.

Justification of the Delegation

47. The regulations in question will make provision very similar to that in regulations under clause 1(3). For the reasons set out in relation to that power, relating to the detail of the provisions, it is appropriate for them to be contained in secondary legislation rather than to be contained in the Bill.

Justification of the level of Parliamentary Scrutiny

48. The regulations will be subject to the affirmative procedure. It is appropriate for them to be subject to the same parliamentary procedure as regulations under clause 1(3), given the similar subject matter.

Devolution Arrangements

49. The provisions of the Bill, including delegated powers, relate to reserved matters.

Home Office
[] July 2014