Home Office

The Home Office response to the thirteenth report from the Joint Committee on Human Rights, Session 2022-2023 (HC 1264, HL Paper 210): Proposal for a Draft Investigatory Powers Act 2016 (Remedial) Order 2023

October 2023

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Presented to Parliament pursuant to paragraph 3(2) of Schedule 2 to the Human Rights Act 1998

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STATEMENT OF SUMMARY OF REPRESENTATIONS ON THE INVESTIGATORY POWERS ACT 2016 (REMEDIAL) ORDER 2023

Introduction

1. This Act paper presents a further draft proposal for a Remedial Order to Parliament, together with the Government's response to the Joint Committee on Human Rights' (JCHR) report of 13 June 2023, and a summary of representations received from both the Investigatory Powers Commissioners Office (IPCO) and the Security and Intelligence Agencies.

2. On 20 March 2023, the Government laid a draft proposal for a Remedial Order in accordance with section 10(2) and paragraph 1(1) of Schedule 2 to the Human Rights Act 1998. The purpose of the Order is to correct incompatibilities in the Investigatory Powers Act 2016 (IPA) with the European Convention on Human Rights (ECHR), as identified by the Courts in the case of Big Brother Watch and Others v UK (BBW).

3. This summary of representations is made in accordance with the requirements of paragraph 3(2) of Schedule 2 to the Human Rights Act 1998.

Representations from the Investigatory Powers Commissioners Office (IPCO) and the UK Intelligence Community (UKIC)

4. During the first 60 days following the laying of the unnumbered Act Paper both Houses, we received representations from both IPCO and UKIC.

5. Those representations questioned whether the proposed new section 154 should contain a process for the approval of the use of certain criteria for the selection for examination, or retention of material, in urgent circumstances. We consulted with IPCO and UKIC and agreed that the addition of an urgency provision would be consistent with existing urgency procedures elsewhere within the IPA. The draft SI has been amended, and we have created new s.154A which is titled 'Approval of senior official approvals of the use of search criteria in urgent cases'.

Other changes to the SI

6. We are amending the wording at the end of s.154 IPA so that it is consistent with the wording that was in the previous version of s.154 so that it points to section 150 since we consider this is helpful to the reader.

7. We are making a consequential amendment to section 229(8) to exclude the Investigatory Powers Commissioner from the obligations mentioned in s.229(6) and s.229(7) when exercising their new functions under the amended s.154 and new s.154A. This change brings the Commissioner's functions under s154 and 154A into line with their other functions in

respect of which considerations they may take into account when exercising those functions.

Response to the recommendations in the JCHR's report of 13 June 2023

8. The Home Office is grateful to the Committee for undertaking its review of the proposed draft Investigatory Powers Act 2016 (Remedial) Order 2023.

9. The Committee highlighted several areas for our attention and this response sets out how we intend to address these. We welcome the report and thank the Committee for the recommendations they have made.

Recommendation 1 (page 19)

10. **We recommend that the proposed draft be amended to reflect that the Investigatory Powers Commissioner must order the relevant material to be destroyed unless the public interest test is met. The Commissioner must not be empowered to authorise the retention of the relevant material—even with conditions—where the public interest test has not been met.**

Home Office Response:

11. The Government accepts this recommendation. Judicial Commissioners support the Investigatory Powers Commissioner in his oversight duties by providing independent authorisation of applications for the use of certain investigatory powers. Whilst in practice Judicial Commissioners would not permit the retention of journalistic materials if the public interest test was not met, due to their obligations under the Human Rights Act to act in accordance with the European Convention on Human Rights, we recognise that the previous drafting created ambiguity.

12. The draft SI has been amended so that it is explicit that Judicial Commissioners have the power to impose conditions only where it is in the public interest that the journalistic material be retained. The new draft will impose an obligation on Judicial Commissioners to order deletion if there is no public interest in retention.

Recommendation 2 (page 20)

13. **We recommend that the Government proceeds to lay a draft order before both Houses once the Remedial Order has been modified in accordance with our recommendation concerning retention.**

Home Office Response:

14. The draft statutory instrument will be amended in line with the recommendation made by the JCHR in the report. We are planning to re-lay the Remedial Order before both Houses as soon as Parliamentary time allows.

Recommendation 3 (page 20)

15. **We recommend that the Home Office and the security agencies engage with the Investigatory Powers Commissioner so they can**

review any journalistic material which has been retained and remains retained before this Remedial Order is made to ensure that it meets the public interest test.

Home Office Response:

16. The Home Office has engaged with the IPCO to determine whether a review of any journalistic materials which has been retained or remains retained is required to ensure it meets the public interest test.

17. Section 154 of the Investigatory Powers Act 2016 and paragraph 9.89 of the Interception of communications Code of Practice already require that an intelligence service which retains, following its examination, confidential journalistic material (CJM) for a purpose other than destruction must inform the Investigatory Powers Commissioner as soon as reasonably practicable. Where an intelligence service informs IPCO of such retention, the notification is placed before a Judicial Commissioner for consideration. The Judicial Commissioner will scrutinise the application to consider whether the retention is necessary, proportionate and in accordance with the law. This includes consideration of whether there is an overriding public interest in retention that outweighs the public interest in protecting journalistic freedoms.

18. It therefore follows that a Judicial Commissioner has already scrutinised the retention of all CJM and considered whether it is necessary and proportionate. Introducing a requirement for IPCO to review all journalistic material retained by the security agencies from material acquired by bulk interception is unnecessary given they have already reviewed it under the existing process.

19. IPCO also already keeps under retrospective review analysts' decisions regarding the selection of intercepted content for examination. Analysts must complete a necessity and proportionality statement in order to select data for examination. These necessity and proportionality statements are subject to audit during IPCO's bulk interception and data safeguarding inspections. Inspectors will scrutinise a sample of these statements, applying the same approach as a Judicial Commissioner would in relation to the retention of CJM – i.e., ensuring that the selection for examination was necessary, proportionate and in accordance with the law. In cases where the purpose of the selection for examination is to acquire CJM, this will include consideration of whether there was an overriding public interest justifying this.

20. In the light of the rigorous process that already exists for considering the retention of CJM, we do not propose to institute another review by IPCO of relevant material given all of the relevant material will already have been subject to review by a Judicial Commissioner.

Annex A: The Remedial Order

Draft Order laid before Parliament under paragraph 2(a) of Schedule 2 to the Human Rights Act 1998 (c. 42) for approval by resolution of each House of Parliament.

D R A F T S T A T U T O R Y I N S T R U M E N T S

2023 No.

INVESTIGATORY POWERS

The Investigatory Powers Act 2016 (Remedial) Order 2023

Made - - - -	***
Coming into force - -	***

It appears to the Secretary of State, following a finding of the European Court of Human Rights in proceedings against the United Kingdom(**1**), that section 154 of the Investigatory Powers Act 2016(**2**) is incompatible with an obligation of the United Kingdom arising from the Convention(**3**).

The Secretary of State considers that there are compelling reasons for proceeding by way of a remedial order(**4**) to make such amendments to section 154 of the Investigatory Powers Act 2016 as the Secretary of State considers necessary to remove the incompatibility.

In accordance with paragraph 2(a) of Schedule 2 to the Human Rights Act 1998(**5**), a draft of this instrument was laid before Parliament and was approved by resolution of each House of Parliament, a document containing a draft of this instrument having previously been laid before Parliament in accordance with paragraph 3(1) of that Schedule.

Accordingly, the Secretary of State makes this Order, in exercise of the powers conferred by section 10(2) of, and paragraph 1(1)(a), (2)(a) and (3) of Schedule 2 to, the Human Rights Act 1998.

Citation, commencement and extent

1.—(1) This Order may be cited as the Investigatory Powers Act 2016 (Remedial) Order 2023 and comes into force on the day after the day on which it is made.

(2) This Order extends to England and Wales, Scotland and Northern Ireland.

(**1**) *Big Brother Watch and Others v the United Kingdom* (application numbers 58170/13, 62322/14 and 24960/15) 25th May 2021.
(**2**) 2016 c. 25.
(**3**) See section 21(1) of the Human Rights Act 1998 (c.42) for the meaning of "the Convention".
(**4**) See section 21(1) of the Human Rights Act 1998 for the definition of "remedial order".
(**5**) 1998 c. 42. There are amendments to Schedule 2, none of which are relevant to this Order.

Substitution of section 154 of the Investigatory Powers Act 2016

2. For section 154 of the Investigatory Powers Act 2016, substitute—

"154 Additional safeguards for confidential journalistic material etc

(1) Subsection (2) applies if, in a case where intercepted content or secondary data obtained under a bulk interception warrant is to be selected for examination—

(a) the purpose, or one of the purposes, of using those criteria to be used for the selection of the intercepted content or secondary data for examination ("the relevant criteria") is to identify any confidential journalistic material or to identify or confirm a source of journalistic information, or

(b) the use of the relevant criteria is highly likely to identify such material or identify or confirm such a source.

(2) The intercepted content or secondary data may be selected for examination using the relevant criteria only if the use of those criteria has been approved by—

(a) the Investigatory Powers Commissioner; or

(b) in a case where a senior official acting on behalf of the Secretary of State considers there is an urgent need to do so, the senior official.

(3) The Investigatory Powers Commissioner or a senior official may give an approval under subsection (2) only if the Commissioner or official considers that—

(a) the public interest in obtaining the information that would be obtained by the selection of the intercepted content or secondary data for examination outweighs the public interest in the confidentiality of confidential journalistic material or sources of journalistic information, and

(b) there are no less intrusive means by which the information may reasonably be obtained.

(4) Subsection (5) applies where—

(a) intercepted content or secondary data obtained under a bulk interception warrant ("the relevant material") is retained, following its examination, for purposes other than the destruction of the relevant material, and

(b) the person to whom the warrant is addressed considers that the relevant material contains confidential journalistic material or material that would identify or confirm a source of journalistic information.

(5) The person to whom the warrant is addressed must inform the Investigatory Powers Commissioner of the retention of the relevant material as soon as reasonably practicable.

(6) Unless the Investigatory Powers Commissioner considers that subsection (8) applies to the relevant material, the Commissioner must direct that the relevant material is destroyed.

(7) If the Investigatory Powers Commissioner considers that subsection (8) applies to the relevant material, the Commissioner may impose such conditions as to the use or retention of the relevant material as the Commissioner considers necessary for the purpose of protecting the public interest in the confidentiality of confidential journalistic material or sources of journalistic information.

(8) This subsection applies to material containing—

(a) confidential journalistic material, or

(b) material identifying or confirming a source of journalistic information,

if the public interest in retaining the material outweighs the public interest in the confidentiality of confidential journalistic material or sources of journalistic information.

(9) The Investigatory Powers Commissioner—

(a) may require an affected party to make representations about how the Commissioner should exercise any function under subsections (6) and (7), and

(b) must have regard to any such representations made by an affected party (whether or not as a result of a requirement imposed under paragraph (a)).

(10) "Affected party" has the meaning given by section 153(14).

(For provision about the grounds for retaining material obtained under a warrant, see section 150.)

154A Section 154: procedure where use of criteria approved by senior official

(1) This section applies where intercepted content or secondary data is selected for examination using criteria the use of which was approved by a senior official under section 154(2).

(2) The Secretary of State must, as soon as reasonably practicable, inform the Investigatory Powers Commissioner that the approval has been given.

(3) The Investigatory Powers Commissioner must, as soon as reasonably practicable—

(a) consider whether the relevant condition is met as regards the use of the criteria for the selection of the intercepted content or secondary data for examination, and

(b) notify the Secretary of State of their decision.

(4) For this purpose, "the relevant condition" is that—

(a) the public interest in obtaining the information that would be obtained by the selection of the intercepted content or secondary data for examination outweighs the public interest in the confidentiality of confidential journalistic material or sources of journalistic information, and

(b) there are no less intrusive means by which the information may reasonably be obtained.

(5) On the giving of a notification of a decision that the relevant condition is not met, the senior official's approval ceases to have effect.

(6) Nothing in subsection (5) affects the lawfulness of—

(a) anything done by virtue of the approval before it ceases to have effect, or

(b) if anything is in the process of being done by virtue of the approval when it ceases to have effect—

(i) anything done before that thing could be stopped, or

(ii) anything done which it is not reasonably practicable to stop.".

Amendment to section 229 of the Investigatory Powers Act 2016

3.—(1) Section 229(**6**) of the Investigatory Powers Act 2016 is amended as follows.

(2) After subsection (8)(f), insert—

"(fa)deciding whether—

(i) to approve the use of criteria under section 154(2)(a),

(ii) subsection 154(8) applies for the purposes of subsection 154(6) and (7),

(iii) the relevant condition is met for the purposes of subsection 154A(3)(a).".

Minister of State
Home Office

Date

(**6**) Section 229 was amended by section 7(1) and (2) of the Covert Human Intelligence Sources (Criminal Conduct) Act 2021 (c. 4); S.I. 2018/1123 and by S.I. 2020/1009.

EXPLANATORY NOTE

(This note is not part of the Order)

This Order replaces section 154 of the Investigatory Powers Act 2016 (c. 25) ("the IPA") with a new section 154 and a new section 154A, following a judgment from the European Court of Human Rights that certain aspects of the Regulation of Investigatory Powers Act 2000 (c. 23) ("RIPA") were in breach of Article 10 of the European Convention on Human Rights (freedom of expression). RIPA was the predecessor legislation to the IPA.

In the case of *Big Brother Watch and Others v the United Kingdom* (Application numbers 58170/13, 62322/14 and 24960/15) delivered on 25th May 2021, the European Court of Human Rights held that RIPA and the associated code of practice did not protect sufficiently Article 10 rights relating to confidential journalistic material ("CJM") or sources of journalistic material ("SJM").

The IPA has now replaced the relevant parts of RIPA and makes express provision for bulk interception. Existing section 154 of the IPA requires that where a security and intelligence agency wishes to retain a communication which they know contains CJM intercepted under a bulk interception warrant, that agency must inform the Investigatory Powers Commissioner ("the Commissioner").

Article 2 inserts new sections 154 and 154A which include additional protections in relation to CJM and SJM.

New section 154(1) and (2) requires the approval of the Commissioner before criteria are used for certain purposes to select for examination material acquired under a bulk interception warrant. Where there is an urgent need for an approval of such criteria, a senior official acting on behalf of the Secretary of State may give such approval instead of the Commissioner.

New section 154(3) provides that the Commissioner or senior official may only give approval for the use of criteria if a public interest test is met.

New section 154(4) specifies that subsection (5) will apply to material obtained under a bulk interception warrant which contains CJM or SJM, where that material is retained by the agency concerned. New subsection (5) requires that the agency inform the Commissioner about that retention.

New section 154(6) provides that, unless the Commissioner considers that the public interest in retaining the material outweighs the public interest in its confidentiality, the Commissioner must direct that such material be destroyed.

New section 154(7) provides that, if the Commissioner considers that the public interest in retaining the material outweighs the public interest in its confidentiality, the Commissioner may impose conditions as to its use or retention.

New section 154(8) specifies the public interest test the Commissioner must consider.

New section 154(9) gives the Commissioner the power to require the Secretary of State or the intelligence agency concerned to make representations about how the Commissioner should exercise their functions under subsections (6) and (7). The Commissioner must have regard to any representations received from those persons.

New section 154A provides for the situation in which material is selected for examination following the giving of approval by a senior official under s154(2). In such circumstances, new section 154A(2) requires the Secretary of State to inform the Investigatory Powers Commissioner of that approval.

New section 154A(3) requires the Investigatory Powers Commissioner to decide whether to approve the senior official's decision and to notify the Secretary of State as soon as reasonably practicable. The Investigatory Powers Commissioner may approve the senior official's decision if they consider it to be in the public interest to do so and there is no less intrusive means of obtaining the

information. New section 154A(5) provides that where the senior official's decision is not approved by the Investigatory Powers Commissioner, that decision ceases to have effect.

New section 154A(6) provides that, where the decision of a senior official ceases to have effect because of the Investigatory Powers Commissioner's decision not to approve it, things done in reliance on the senior official's approval remain lawful. Similarly, anything done in reliance on a senior official approval which the Commissioner refuses to approve will remain lawful if it is not reasonably practicable to stop that thing.

Article 3 makes a consequential amendment to section 229 in relation to the exercise of the Investigatory Powers Commissioner's functions under new sections 154 and 154A.

A full impact assessment has not been produced for this instrument as no, or no significant, impact on the private or voluntary sector or community bodies is foreseen.

EXPLANATORY MEMORANDUM TO

THE INVESTIGATORY POWERS ACT 2016 (REMEDIAL) ORDER 2023

2023 No. [XXXX]

1. Introduction

1.1 This explanatory memorandum has been prepared by the Home Office and is laid before Parliament by command of His Majesty.

1.2 This memorandum contains information for the Joint Committee on Human Rights.

2. Purpose of the instrument

2.1 This statutory instrument (SI) replaces section 154 of the Investigatory Powers Act 2016 (IPA) and creates a new s.154A to introduce enhanced safeguards relating to the use of criteria for the selection for examination of, and retention of, items subject to protections for confidential journalistic material (CJM) and sources of journalistic material (SJM) derived from material acquired through bulk interception. The permission of the Investigatory Powers Commissioner (IPC) is now required before criteria can be used to select such material for examination or knowingly retained for a purpose other than destruction. This is in response to the May 2021 judgment in *Big Brother Watch and Others v UK* (*BBW*), handed down by the Grand Chamber of the European Court of Human Rights (ECtHR), which found a violation of Article 10 of the European Convention on Human Rights (ECHR) in the previous bulk interception regime under the Regulation of Investigatory Powers Act 2000 (RIPA) due to the lack of prior independent authorisation.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Human Rights

3.1 This Remedial Order is laid pursuant to the power in section 10 of the Human Rights Act 1998 (HRA). A first draft proposal was laid on 20 March 2023 and the Remedial Order has been updated in line with the Committee's recommendations.

4. Extent and Territorial Application

4.1 The extent of this instrument (that is, the jurisdiction(s) which the instrument forms part of the law of) is England and Wales, Scotland and Northern Ireland.

4.2 The territorial application of this instrument (that is, where the instrument produces a practical effect) is England and Wales, Scotland and Northern Ireland.

5. European Convention on Human Rights

5.1 The Secretary of State for the Home Department, the Rt Hon. Suella Braverman, has made the following statement regarding Human Rights:
"In my view the provisions of the Investigatory Powers Act 2016 (Remedial) Order 2023 are compatible with the Convention rights."

6. Legislative Context

6.1 In May 2021, the Grand Chamber ECtHR handed down its judgment in *BBW*, a challenge to the bulk interception regime under RIPA (predecessor to the IPA), finding various violations of Article 8 (right to respect for private and family life) and Article 10 (freedom of expression) ECHR. Many of the incompatibilities found in that regime had already been removed by the time of the judgment, following the introduction of the IPA. This SI makes a legislative change to the IPA to resolve one remaining incompatibility. The Grand Chamber found that, where an intelligence agency seeks to select for examination CJM obtained under a bulk interception warrant or identify SJM, the selection criteria used should be subject to prior independent authorisation. Similarly, where material acquired under a bulk interception warrant is retained following its examination, and where it is known to contain CJM or SJM, it may only continue to be retained for a purpose other than its destruction where this has been independently authorised.

6.2 Presently, s.154 IPA requires that where a communication is retained which contains confidential journalistic material, following its examination, for a purpose other than its destruction, the IPC must be informed. This SI replaces s.154 IPA with the effect that the new s.154 requires prior approval from the IPC before criteria are used where the purpose of using those criteria is to select communications for examination which contain CJM or SJM or where the use of those criteria make it highly likely that such material would be selected for examination. This SI additionally introduces a new s.154A setting out urgency provisions. S.229(8) has been amended consequentially so that it expressly mentions the new functions of the Judicial Commissioner (JC) under the amended s.154 and s.154A.

6.3 Section 10 HRA provides that if it appears to a Minister of the Crown that, having regard to a finding of the ECtHR, a provision of legislation is incompatible with an obligation of the UK arising under the ECHR, and there are compelling reasons for doing so, the Minister may amend the legislation with the use of a Remedial Order to remove the incompatibility.

7. Policy background

What is being done and why?

7.1 The judgment in *BBW* provided that there must be prior independent authorisation for the Security and Intelligence agencies to use criteria in order to select for examination communications acquired under a bulk interception warrant where it was either the intent, or where it was highly likely, to result in the examination of CJM or SJM. The Court also found that independent authorisation should be sought where such material is knowingly retained. The judgment in this case is final, and UK law must be brought into compliance to ensure that the legislation under which the Security and Intelligence Agencies operate is compatible with the ECHR. This change has been made following an appropriate period of consultation with the relevant organisations including the security and intelligence agencies and the Investigatory Powers Commissioner's Office (IPCO).

7.2 This SI is a remedial order under section 10 of the HRA with the express purpose of bringing the IPA into compliance with the ECHR, as specified in the *BBW* judgment. This SI makes clear in the new s.154 that the independent body that will consider applications for the selection and retention of CJM and SJM is the IPC and the other JCs who are supported by IPCO. The IPC is best placed to discharge this function as he and the other JCs already provide oversight of the use of investigatory powers as well as authorisations for other powers under this Act. The new s.154A creates an urgency process for dealing with requests for clearance to use certain criteria to select data for examination which needs to be approved out of hours. The amendment to s.229(8) is a consequential amendment and includes the new functions of the JCs which have been created under s.154 and s.154A in that subsection in order to disapply the duties on JCs under s229(6) and (7) just as those duties are disapplied for other JC functions.

7.3 The use of a remedial order is the most efficient way to make the necessary change to the IPA because it allows the relevant amendments to be made to primary legislation by way of a statutory instrument. Otherwise, primary legislation would have been required which would have taken significantly longer. The use of a remedial order therefore enables us to make the IPA compliant with the ECHR faster than any other alternative.

8. European Union Withdrawal and Future Relationship

8.1 This instrument does not relate to withdrawal from the European Union / trigger the statement requirements under the European Union (Withdrawal) Act.

9. Consolidation

9.1 This instrument is limited to making changes that are necessary to remove an incompatibility with the ECHR and it is not considered to be an appropriate point to consolidate the legislation.

10. Consultation outcome

10.1 Consultation took place between the Home Office, Foreign Commonwealth and Development Office, Security and Intelligence Agencies, and IPCO on how to implement the judgment. It was decided to follow existing approaches already in the IPA as closely as possible (such as section 153) in the interests of consistency with existing safeguards.

10.2 The Remedial Order lay in Parliament for 60 sitting days after it was first laid on 20 March 2023. We received two representations during this time, one from the Joint Committee on Human Rights (JCHR) and the other from the United Kingdom Intelligence Committee (UKIC). A summary of the representations received and responses to those representations will be laid in a Statement alongside this draft Remedial Order.

11. Guidance

11.1 Appropriate changes to the interception code of practice will be made in due course to reflect the changes made by this SI.

12. Impact

12.1 There is no, or no significant, impact on business, charities or voluntary bodies.

12.2 There is no, or no significant, impact on the public sector.

12.3 An Impact Assessment has not been prepared for this instrument because of the low level of any potential operational impact on those affected by the changes made by the SI.

13. Regulating small business

13.1 The legislation does not apply to activities that are undertaken by small businesses.

14. Monitoring & review

14.1 The effect of this legislation will be kept under review by the Home Office, the policy owners, the security and intelligence agencies through their use of this provision, and the IPCO through their inspections of the security and intelligence agencies.

15. Contact

15.1 Interception and Equipment Interference Policy at the Home Office can be contacted with any queries regarding the instrument via 03001046066 or InterceptionandEquipmentInterferencePolicy@homeoffice.gov.uk.

15.2 Lucy Montgomery-Pott, the Deputy Director for Investigatory Powers Unit at the Home Office can confirm that this explanatory memorandum meets the required standard.

15.3 Tom Tugendhat, the Minister for Security at the Home Office can confirm that this explanatory memorandum meets the required standard.

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