

The Investigatory Powers Act 2016: practical tips in 20 minutes for UKNOF39

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What I'll cover

Where we are now

Handling demands

Your policy / disclosures

Where we are now

Investigatory Powers Act 2016

Passed in November 2016

On the statute book, but not
yet fully in force

Part 1	Privacy
Part 2	Interception
Part 3	Obtaining CD
Part 4	Retaining CD
Part 5	Equipment interference

Part 6	Bulk
Part 7	Bulk personal data sets
Part 8	Oversight
Part 9	Miscellaneous
Schedules	10 schedules

Not much is in force

Basic data retention framework

Payments

Oversight body

The rest is yet to come

Amendments coming?

Independent approval of CD acquisition coming soon?

Would not affect you, as would happen before you got a notice

The framework today

Interception	Part 1 Ch 1 RIPA / s48 WTA 2006
Obtaining CD	Part 1 Ch 2 RIPA and <u>many</u> others
Retaining CD	Part 4 IPA
Removing electronic protection	Part 3 RIPA
National security	s94 Telecoms Act
Equipment interference	A mix

When the IPA is in force

Interception	Part 2 IPA
Obtaining CD	Part 3 IPA and <u>some</u> others
Retaining CD	Part 4 IPA
Removing electronic protection	Part 3 RIPA
National security	Part 9 Chapter 1 IPA
Equipment interference	Part 5 IPA *and others*

Some definitions

Interception

Data retention

CD disclosure / acquisition

Equipment interference

Some definitions

Technical capability notice

National security notice

Handling demands

Is it a voluntary notice?

Some notices look formal but
are actually requests

e.g. s29(3) DPA 1998

If it is a mandatory demand,
what is it?

Strategic notices

Probably not, unless you have
one already

Prior consultation

Have a chat with a lawyer?

Tactical notices

You might get prior warning

More likely for interception

Probably not for CD acquisition

Step 1: verify sender

Step 2: validate it

What legislation?

What is it requiring?

Can it be served on you?

Cannot “look behind” it

Step 3: can you fulfil it?

Statutory duty to assist

Potential for injunction if you do not

Interception: criminal offence

Step 3: can you fulfil it?

It's not an unlimited duty

“reasonably practicable”

Case-by-case determination

Step 4: ask about cost recovery

Perfectly reasonable

Ask the requesting authority

Especially if expensive

Chapter 22, CD Code of Practice

Step 5: keep records

Paras 24.10 - 24.11

24.10: record of the notice

24.10 The records to be kept by a telecommunications operator or postal operator, in respect of each authorisation should include:

- the identity of the public authority⁷⁶;
- the URN of the authorisation;
- the date the relevant details of the authorisation were disclosed to the telecommunications operator or postal operator; and
- the date when the communications data was disclosed to the public authority or, where secure systems are provided by the telecommunications operator or postal operator, the date when the acquisition and disclosure of communications data was undertaken.

24.11: record of the data

“keep sufficient records to be able to provide confirmation of **the exact communications data that has been disclosed** in the event of later challenge in court”

Step 6: witness statements and going to court

Witness statements: rare

Usually Scotland (IME)

E&W tend to write their own

Court: rarer still

Setting your own policy

Disclosing notices, warrant
canaries etc.

Notifying individuals

CJEU: “necessary”

Para 121, C-203/15 (*Tele2*)

(That’s a case law reference, in case you care for such things!)

A requesting authority must ...

“notify the persons affected ... as soon as that notification is no longer liable to jeopardise the investigations being undertaken by those authorities.”

Why?

“necessary to enable the persons affected to exercise, inter alia, their right to a legal remedy ... where their rights have been infringed”

However...

... and it's a big "however"...

“Duty not to make unauthorised disclosures”

Interception warrant: offence, unless excepted (s57)

CD acquisition: offence, unless “reasonable excuse” (s82)

“Duty not to make unauthorised disclosures”

Retention notice: enforceable via injunction (s95)

TCN/NSN: enforceable via injunction (s255)

Official Secrets Act(s)

You'd also want to check these

“Warrant canaries”

IMHO, a risky proposition

If you fail to remove, fraud?

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Questions?

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