

## EXERCISE OF POWERS UNDER SECTION 1A AND SCHEDULE A1 OF THE REGULATION OF INVESTIGATORY POWERS ACT 2000

### PART 1 – OVERVIEW

#### Introduction

1.1 The Regulation of Investigatory Powers (Monetary Penalty Notices and Consents for Interceptions) Regulations 2011 (SI 2011 No.1340) includes amendments to the Regulation of Investigatory Powers Act 2000 ('RIPA') which insert provisions regarding monetary penalty notices for certain unlawful interceptions of communications (section 1A and Schedule A1). This guidance, from the Office of the Interception of Communications Commissioner, provides information about how the Interception of Communications Commissioner ('the Commissioner') will discharge his responsibilities under section 1A and Schedule A1 RIPA, including the circumstances in which the Commissioner will consider it appropriate to issue a monetary penalty notice, how he will determine the amount of the penalty and the mechanism for handling complaints.

*What kinds of unlawful interceptions are the monetary penalties for?*

1.2 Section 1 of RIPA makes it a criminal offence intentionally and without lawful authority to intercept, at any place in the UK, a communication in the course of its transmission by means of a public postal service or a public telecommunication system. The meaning of 'interception' of a communication in the course of its transmission by means of a telecommunication system is set out in section 2(2) RIPA. This provides that a person intercepts a communication in the course of its transmission by means of a telecommunication system if he modifies or interferes with the system or its operation, or monitors transmissions made by means of the system, or monitors transmissions made by wireless telegraphy to or from apparatus comprised in the system, so as to make some or all of the contents of the communication available, while being transmitted, to a person other than the sender or intended recipient of the communication.

1.3 This guidance deals with section 1A of RIPA which creates a civil sanction for certain kinds of unlawful interception of electronic communications. The sanction may be imposed by the Commissioner if he is satisfied that a communication has been intercepted at any place in the United Kingdom, without lawful authority, in the course of its transmission by means of a public telecommunication system. The

Commissioner may not impose the sanction if he considers that the person has committed a criminal offence of intentional unlawful interception under section 1(1) RIPA, or where it appears to the Commissioner that the unlawful interception occurred when the person was making an attempt to act in accordance with an interception warrant.

*How is the monetary penalty for unlawful interceptions to be administered?*

1.4 Schedule A1 of RIPA sets out how the monetary penalty is to be administered by the Commissioner. The Commissioner is given powers to serve a monetary penalty notice requiring payment of up to £50,000 where he is satisfied that an unlawful interception within the meaning of section 1A has occurred. The Commissioner has the power to require persons to give information to assist in deciding whether or not to serve a notice, and the power to impose a monetary penalty under Part 2 where that information is not provided. The Commissioner is also able to require a person on whom he serves a monetary penalty notice to cease the interception concerned within a specified time (an 'enforcement obligation').

1.5 Before any penalty or enforcement obligation is imposed by the Commissioner, the Commissioner must consult the person concerned and consider any representations received from that person within a specified time. In the limited circumstances set out below, there will be an entitlement to request an oral hearing (in front of the Commissioner) before the decision to impose a penalty is made. The Commissioner has certain powers to cancel or vary monetary penalty notices, enforcement obligations or information notices whether in response to representations received or otherwise. A person who is the subject of a monetary penalty notice, an enforcement obligation or a notice requiring information will have the right to appeal the notice or obligation to the First-tier Tribunal.

1.6 The Commissioner has the power to enforce the payment of penalties and the duty to comply with an enforcement obligation via proceedings in the civil courts.

*What types of unlawful interception may be referred to the Commissioner*

1.7 The intentional and unlawful interception of communications (whether communications transmitted by means of a public postal service or a public telecommunication system) remains a criminal offence. Where a person's conduct amounts to or is considered to amount to intentional unlawful interception (the offence in section 1(1) RIPA), that conduct should continue to be referred to the police.

1.8 The Commissioner only has the power to impose a monetary penalty notice where he is satisfied that:

- a person has unlawfully intercepted a communication at a place in the UK;
- the communication was intercepted in the course of its transmission by means of a public telecommunication system;

- the person was not, at the time of the interception, making an attempt to act in accordance with an interception warrant which might explain the interception concerned;
- the person has not committed an offence under section 1(1) RIPA (intentional unlawful interception).

1.9 Complaints about conduct which does not appear to be intentional unlawful interception, and which falls within the Commissioner's remit as set out above, may be referred to the Interception Commissioner. The Commissioner may be contacted at the following address:

The Interception of Communications Commissioner  
c/o 2 Marsham Street  
London SW1P 4DF.

1.10 In order for the Commissioner to investigate such a complaint, the complainant should provide a signed and dated letter setting out the following information:

- their name, date of birth and address (or in the case of a registered company the name of the complainant representing the company and the registered address of the company);
- the name of the organisation or individual they are complaining about;
- the telephone numbers, e-mail addresses or other telecommunications concerned;
- details of the circumstances of the unintentional unlawful interception and when this is believed to have been carried out;
- whether it is believed or can be shown that the unlawful interception has ceased or is continuing;
- details of any damage caused to the complainant.

1.11 The Commissioner shall provide the complainant in return an acknowledgement and a case reference number.

1.12 The Commissioner may at any time invite the complainant to supply further information.

1.13 Although his consideration may be affected by external factors outside his control, the Commissioner shall in all cases aim to conclude his investigations or otherwise determine what action he will take within three months of receiving a complaint.

1.14 When the Commissioner has concluded his consideration of a complaint, he shall inform the complainant of any further action that he has decided to take. Where, as a result of a complaint made to the Commissioner, the Commissioner ultimately goes on to impose a monetary penalty notice in respect of the interception that was the subject of the complaint, the Commissioner shall inform the complainant and provide details of any sanction imposed.

## **PART 2 – Imposition of monetary penalty notices, enforcement obligations and information notices**

### *Consultation requirement before service of a monetary penalty notice*

2.1 Before the Commissioner decides to serve a monetary penalty notice on a person, he must serve a notice of intent on that person. The object of the notice of intent is to inform the person that the Commissioner is proposing to serve a monetary penalty notice, the reasons for the intended amount of the penalty and to give the person the opportunity to make representations in response.

### *Contents of the notice of intent*

2.2 The notice of intent must set out the matters prescribed in paragraph 3(4) of Schedule 1A, which include the grounds on which the Commissioner proposes to serve the monetary penalty notice and the amount of the penalty that he proposes to impose.

2.3 The notice must also set out that the person concerned may make written representations within a time specified by the Commissioner (which will not be less than 21 days following service of the notice).

### *Duty to consider representations*

2.4 Before deciding whether or not to serve a monetary penalty notice, the Commissioner must consider any representations that he has received.

2.5 In limited circumstances, a person may request that the Commissioner should conduct an oral hearing in order to make representations in response to the notice of intent. The Commissioner will conduct an oral hearing where the person making representations in response to a notice of intent requests it and where:

- the representations are to the effect that the person was making an attempt to act in accordance with an interception warrant under Part I Chapter I of RIPA; or
- the person would not be able to make those representations on any appeal against a monetary penalty notice because of the effect of section 17 RIPA (exclusion of matters from legal proceedings).

2.6 The Commissioner may vary or cancel a notice of intent, whether in the light of either written or oral representations received or otherwise. The notice of intent may not be varied in a way which is detrimental to the person. It may be varied only to extend the time by which representations must be submitted or any request for an oral hearing made. The Commissioner also has the power to serve a new notice of intent, which for example he may choose to do instead of varying the notice.

2.7 Where as a result of written or oral representations the Commissioner decides not to serve a monetary penalty notice he shall inform the person of his decision.

## Information provisions

2.8 The Commissioner may issue an information notice requesting that a person on whom he is considering serving a notice of intent or a monetary penalty notice shall provide such information as the Commissioner reasonably requires in order to assist in deciding whether to serve such a notice.

2.9 In the information notice, the Commissioner must specify or describe the information to be provided, the manner in which it is to be provided, specify when it is to be provided and explain why the Commissioner considers that the information is reasonably required. The Commissioner may not require the information to be provided less than 28 days after the service of the information notice. The person's rights of appeal must also be set out in the notice (see below). The Commissioner may vary the information notice only by extending the time within which information is to be provided. The Commissioner may cancel the information notice.

2.10 A person may appeal to the First-tier Tribunal against any provision of the information notice or any refusal by the Commissioner to vary or cancel it. Lodging an appeal against the information notice will not affect the need to comply with the information notice. The Commissioner does, however, have the power to extend the time for compliance with the information notice if the person on whom the information notice appeals against it. This could include extension of the time for compliance with the notice pending the outcome of any appeal.

2.11 The Commissioner may serve a Part 2 monetary penalty notice on a person if that person fails without reasonable excuse to comply with the information notice or knowingly or recklessly provides false information.

2.12 The penalty for failing to comply with an Part 2 information notice shall be a fixed amount of not greater than £10,000. When assessing the amount to be paid, the Commissioner may apply a penalty with reference to a daily rate or to a mixture of fixed amount and daily rate, provided that maximum amount of the penalty does not exceed £10,000.

## Monetary penalty notice

2.13 Having served a notice of intent, and having considered any representations that may have been received in response, the Commissioner may decide to serve a monetary penalty notice.

2.14 Where a Part 1 monetary penalty notice is served in respect of an unlawful interception, the Commissioner must serve the penalty notice in respect of an unlawful interception within three months of serving a notice of intent in respect of that same interception. In such a case, the Commissioner may only serve a monetary penalty notice if he is satisfied that the person has unlawfully intercepted a communication within the meaning of section 1A RIPA. The maximum monetary penalty that can be imposed by a monetary penalty notice is £50,000.

*When can it be issued - Circumstances in which it is appropriate to issue a Part 1 monetary penalty notice in respect of unlawful interception*

2.15 The Commissioner shall consider serving a monetary penalty notice on a person only if, after investigation, he is satisfied that:

- the person has without lawful authority intercepted a communication;
- the conduct cannot be explained by an attempt to carry out an interception warrant; and
- the person has not committed an offence under section 1 of RIPA.

#### *Enforcement obligations*

2.16 The Commissioner may additionally include one or more enforcement obligations in the Part 1 monetary penalty notice. An enforcement obligation is an obligation to stop the interception concerned on a specified day or period, or to take specified steps with a view to ceasing the interception in question. If one or more enforcement obligations are included, the monetary penalty notice must set out what those obligations are and the grounds on which they are imposed. No enforcement obligation may be imposed to have effect less than 7 days following service of the notice.

2.17 The Commissioner will notify the complainant that a monetary penalty notice has been served at the same time as it is served on the person who is the subject of the complaint.

#### *Basis for the level of penalty to be imposed*

2.18 When deciding the appropriate level of monetary penalty to impose, factors for which the Commissioner may have regard include:

- the extent of the interception and the likely effect on the person, company or authority to whom the penalty applies;
- the wider public interest;
- the co-operation afforded to the Commissioner by the person who is the subject of the notice, including any action taken to ensure no further unintentional unlawful interception takes place;
- the extent to which the unlawful interception was a result of reckless or negligent action;
- previous compliance or non-compliance with RIPA or the Regulations made under RIPA.

2.19 When deciding whether to issue a Part 2 monetary penalty notice, the Commissioner shall have regard to what extent, if any, a person:

- has made attempts to provide the required information; and
- has provided some, but not all, of the required information.

#### *Payment of penalty notice – Time to pay*

2.20 The monetary penalty notice will specify the time the person has to pay it. This will normally be 28 days from the day after the date of the notice. That period must be at least 28 days following service of the notice.

*Commissioner's power to vary or cancel a penalty notice - When can this be exercised*

2.21 The Commissioner has the power to vary or cancel a monetary penalty notice (which includes the power to vary or cancel an enforcement obligation). The Commissioner may not vary the monetary penalty notice or enforcement notice where the effect would be to the detriment of the person on whom it was served. Nor may the Commissioner serve another monetary penalty notice in respect of the same interception if the Commissioner has cancelled a previous notice served on the person.

2.22 Where the Commissioner reduces or cancels the amount that the person was liable to pay pursuant to the monetary penalty notice, the Commissioner is required to refund the penalty or the excess (as appropriate).

2.23 Where the Commissioner refuses to vary or cancel the notice, the decision must be notified to the person.

*Ofcom*

2.24 In order to assist the Commissioner in the exercise of his functions under Schedule A1, the Commissioner may consult with the Office of Communications ('Ofcom') for advice on technical or similar matters relating to electronic communications. The Commissioner may disclose to Ofcom information obtained under Schedule A1 for this purpose. Ofcom must comply with any reasonable request made by the Commissioner for such advice.

*Appeals against penalty notices - Circumstances in which an appeal may be made - Consequence of lodging an appeal*

2.25 A person may appeal against a monetary penalty notice or any provision of it or the Commissioner's refusal of a request to vary or cancel it to the First-tier Tribunal at:

The General Regulatory Chamber of the First-tier Tribunal, Arnhem House,  
PO Box 9300, Leicester LE1 8DJ

enquiries e-mail: [informationtribunal@hmcts.gsi.gov.uk](mailto:informationtribunal@hmcts.gsi.gov.uk)

telephone: 0300 1234504

2.26 Until the appeal is withdrawn or determined, the person bringing it shall not be obliged to comply with any aspect of the monetary penalty notice apart from with any enforcement obligations which may have been imposed. Such enforcement obligations must be complied with within the time specified by the Commissioner (which may, if the Commissioner so determines, be subject to variation under paragraph 4 of Schedule A1).

## Enforcement

2.27 The monetary penalty notice (and any enforcement obligation it may include) is enforceable by civil proceedings brought by the Commissioner against the person on whom the notice is served. The penalty is recoverable in England, Wales and Northern Ireland by order of a county court or High Court, and in Scotland by a sheriff. The enforcement obligation may be enforced by proceedings for an injunction, in Scotland for specific performance of a statutory duty under section 45 of the Court of Session Act 1988, or proceedings for any other appropriate relief.

## Reports and publication

*When and to whom the Commissioner must report the outcome of a case - statistics and case outcomes within the Commissioner's annual report to the Prime Minister*

2.28 The Commissioner shall include in an annual report to the Prime Minister information on his work in administering his functions under Section 1A and Schedule A1 of RIPA. That information shall include the number of investigations carried out during the year, the number of notices of intent to serve monetary penalty notices, the number of complaints upheld, the penalties imposed and the number of enforcement proceedings taken out.