



25<sup>th</sup> November 2015

### **Statement by the Interception of Communications Commissioner**

During the last few months my office carried out a review of conduct of the Police Service of Scotland (hereafter "Police Scotland") in order to determine whether there had been any contravention of the Acquisition and Disclosure of Communications Data Code of Practice 2015 ("the Code"). Having considered the review's findings I made a determination in accordance with my oversight function under Paragraph 8.3 of the Code.

I concluded that there had been contraventions of the Code in respect of 5 applications for communications data submitted by Police Scotland relating to one investigation. It is evident from these applications that Police Scotland sought communications data in order to determine either a journalist's source or the communications of those suspected to have been acting as intermediaries between a journalist and a suspected source. In contravention of Paragraph 3.78 of the Code, judicial approval was not obtained to acquire this communications data.

I also considered the content of the five applications, focusing primarily on whether the statutory tests of necessity and proportionality had been addressed and satisfied. I concluded that they failed to satisfy adequately the requirements of necessity and proportionality or to give due consideration to Article 8 or Article 10 of the European Convention on Human Rights (ECHR). In addition, two of the applications had been approved by a Designated Person (DP) who was not independent of the investigation: this was a breach of Paragraph 3.12 of the Code.

I am satisfied that four individuals were adversely affected by these contraventions and that the failures identified can properly be viewed as reckless. I have written to those individuals and provided them with sufficient information to enable them to engage the Investigatory Powers Tribunal ("the Tribunal") effectively should they wish to do so.

The primary concern throughout this investigation was to protect the privacy of individuals who may have been adversely affected and to ensure that those individuals are able to seek effective remedy. I also recognise the public interest in these matters and the importance of the provisions passed by Parliament in March 2015 to protect the confidentiality of journalistic sources.

I should like to thank Police Scotland for their co-operation and assistance with IOCCO's detailed investigation into this matter.

I recognise the comprehensive review that Police Scotland conducted and wish to emphasise that Police Scotland has put in place significant measures in order to prevent any recurrence of such contraventions. I should also like to thank Police Scotland for their patience with our inquiry which could not be completed until I had been appointed.

The Rt Hon. Sir Stanley Burnton  
Interception of Communications Commissioner

## Background

In February 2015 IOCCO published findings<sup>1</sup> concerning its inquiry into the use of Chapter 2 of Part 1 of the Regulation of Investigatory Powers Act (RIPA) to identify journalistic sources (“the IOCCO inquiry”). The recommendation, as a consequence of the inquiry, was that judicial authorisation should be obtained in cases where communications data is sought to determine the source of journalistic information.

Section 83 of the Serious Crime Act 2015, implementing the recommendation from the IOCCO inquiry, amended s.71 of RIPA to require the Code of Practice (“the Code”) relating to Chapter 2 of Part I of RIPA to include provision designed to protect the public interest in the confidentiality of journalistic sources.

The revised Code came into force on 25 March 2015 and contained such provisions in Paragraphs 3.78 to 3.84. In particular, paragraph 3.78 of the Code provides that:

*“In the specific case of an application for communications data, which is made in order to identify a journalist’s source, and until such time as there is specific legislation to provide judicial authorisation for such applications, those law enforcement agencies, including the police, National Crime Agency and Her Majesty’s Revenue and Customs, in England and Wales with powers under the Police and Criminal Evidence Act 1984 (PACE) must use the procedures of PACE to apply to a court for a production order to obtain this data. Relevant law enforcement agencies in Northern Ireland must apply for a production order under the PACE (Northern Ireland Order) 1989. Law enforcement agencies in Scotland must use the appropriate legislation or common law powers to ensure judicial authorisation for communications data applications to determine journalistic sources.”*

Paragraph 8.3 of the Code provides that:

*“Should the Commissioner establish that an individual has been adversely affected by any wilful or reckless failure by any person within a relevant public authority exercising or complying with the powers and duties under RIPA in relation to the acquisition or disclosure of communications data, he shall, subject to safeguarding national security, inform the affected individual of the existence of the Tribunal and its role. The Commissioner should disclose sufficient information to the affected individual to enable them to engage the Tribunal effectively.”*

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<sup>1</sup> <http://www.iocco-uk.info/docs/IOCCO%20Communications%20Data%20Journalist%20Inquiry%20Report%204Feb15.pdf>