

STATES OF JERSEY

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DRAFT REGULATION OF INVESTIGATORY POWERS (JERSEY) LAW 2005 (APPOINTED DAY) ACT 200

**Lodged au Greffe on 21st November 2006
by the Minister for Home Affairs**

STATES GREFFE



Jersey

DRAFT REGULATION OF INVESTIGATORY POWERS (JERSEY) LAW 2005 (APPOINTED DAY) ACT 200

REPORT

The purpose of the Appointed Day Act is to bring the Regulation of Investigatory Powers (Jersey) Law 2005 (hereinafter referred to as RIPL) into force on 10th December 2006. The Law was adopted by the States on 15th March 2005 (P.196/2004).

For the benefit of those States Members who were not elected at the time the Law was adopted by the States, some background to the original Project de Loi follows below:

When the Human Rights Law comes into force, all the Laws in Jersey, whether statutory or customary, will have to be given effect, as far as possible, in a way which is compatible with the Convention Rights. Moreover, all public authorities, including the police, will be under a duty to act compatibly with Convention Rights.

A considerable number of new legislative provisions have been required in the areas of police practices and procedures and the gathering of evidence and intelligence to make the law in Jersey compatible with the rights guaranteed by the European Convention of Human Rights.

One area of concern in this regard is the use of surveillance techniques and the interception of communications. Compliance with the Convention principles requires that any surveillance will only be permitted for purposes specified by the Law and in accordance with Article 8 of the European Convention on Human Rights (i.e. the right to respect for private and family life, home and correspondence). In addition, the surveillance must be believed to be necessary and proportionate to what it aims to achieve. Any contravention of these requirements would be unlawful and subject to challenge in court.

Such investigative methods, which are inevitably intrusive and, by their very nature, take place out of the sight and cognisance of the subject of them and indeed others who may be accidentally affected by them, must be controlled and monitored under a statutory system which, while it does not interfere with or reduce the effectiveness of law enforcement, is and can be seen by the public to be, sufficient to provide confidence that it is operated properly, with a degree of independent scrutiny.

This is not to suggest that the law enforcement agencies currently act improperly or abuse their position, but rather that the advent of effective and enforceable remedies for breach of human rights, requires that the present system is put on a proper legal base.

Bringing RIPL into force will, for the first time, provide a comprehensive regulatory structure to govern intrusive investigatory methods and provide independent scrutiny in the form of the Commissioner and the Investigatory Powers Tribunal. For the first time, all those public authorities who are authorised or may be authorised to use covert surveillance will be identified, their activities regulated and controlled with oversight and authorisation conducted at an appropriate level. The law identifies a scale of the degree of intrusiveness into an individual's private life and ensures that all the more intrusive methods can be lawful only when authorised by the Attorney General and carried out in accordance with strict safeguards. The law ensures that both the regulatory regime is compatible with the terms of the Convention, and that aggrieved individuals know where they may complain.

The need for change in these areas of the law is not, however, wholly driven by human rights considerations. Developments in communications technology in the past 10 years or so made it necessary to make substantial modifications to the current Law relating to interception of communications for law enforcement purposes, the Interception of Communications (Jersey) Law 1993.

The need for replacement of the 1993 Law, due to technical advances, is set out, in detail, in the U.K.

Government's Consultation Paper "Interception of Communications in the United Kingdom". Under the 1993 Law, just as in the U.K. under the Interception of Communications Act 1985, the regulatory régime was limited to interception of communications in the course of their transmission by public postal or telecommunications systems. In the past, this would have covered all such communications. However, since then, telecommunications services have been developed which, whilst available to the public, are not provided by public telecommunications service providers. These include e-mail services provided by some internet service providers. The Consultation Paper made the point that some e-mail service providers are public telecommunications service providers, and subject to the existing legal régime, but others are not. Communications data, that is, data held by communications service providers relating to the use of the service by customers, has also become more significant for law enforcement purposes. Monitoring of mobile telephone calls, for instance, enables law enforcement officials to identify the location of persons making telephone calls whilst the call is in progress, as well as, perhaps, providing valuable evidence in subsequent criminal proceedings. Modern communications technology helps criminals, as well as those fighting crime, and it is essential that law enforcement is not hampered by the lack of a proper legal basis for making the most of the opportunities offered by such technology to prevent crime and track down offenders.

There has been a necessary delay in bringing the law into force owing to the preparatory work required in order to achieve compliance. Firstly, the States of Jersey Police and the Customs and Immigration Service needed time to review procedures, recruit specialist staff and carry out a comprehensive training programme. Secondly, the law requires a number of pieces of subordinate legislation which have required separate consultation periods and subsequent revision.

This Appointed Day Act bringing RIPL into force aims to secure an appropriate balance between law enforcement and individual rights. It provides a proper regulatory framework, externally supervised. Law enforcement agencies will benefit from clear guidance and members of the public will benefit. It represents a significant step forward for the protection of human rights, while recognising how vital investigatory powers are to the protection of society as a whole.

Financial and manpower implications

Preamble

Funding for RIPL implementation was initially dealt with through the Fundamental Spending Review (FSR) process. In preparation for the FSR process, costs were scrutinised to identify a saving of 3 posts and a reduction in annual running costs. As a result, the total manpower and quantifiable annual running costs requirement reduced from £422,300 to £246,900. RIPL implementation costs were deemed to be a high priority and they were funded in the sum of £250,000 (£323,000 at 2008 prices). However, this revenue growth does not take full effect until 2008. As the bringing into force of RIPL is essential to bringing Human Rights legislation into force, the Department has had to fund preparations during 2006 for the introduction of RIPL including the start-up (one-off) costs of around £100,000 to purchase the Charter system – (essential to the safe implementation of the law and to ensure compliance with the minimum standards expected by HMI and the Surveillance Commissioner) – and some manpower costs. Furthermore, Home Affairs has had to set aside further funds to cope in 2007 once the law is brought into force, but only £250,000 is available.

Members will be aware, however, that with the opening-up of the telecommunications market, there are now 3 main telecommunications service providers (TELCOs) operating in Jersey. Consequently, the caveats given in the original 2004 costings paper are now coming to fruition and it is necessary to update the implementation costs to take account of this. These can be grouped into data communications requests, support maintenance costs, number portability costs and grants for interception costs.

Data communications requests

Under Article 18 of RIPL, TELCOs are able to recover costs incurred in providing services to law enforcement from the States of Jersey. Jersey has 3 licensed operators either operating, or due to be operating, before the end of the year (Jersey Telecom, Cable and Wireless (C&W) and Airtel (formerly Bharti)).

Currently, JT have a tariff of charges and produce an invoice to the States of Jersey Police and Customs and Immigration once a month based on the number and nature of the requests they receive. Those requests range from producing an itemised billing for evidence in a court case to actioning a warrant authorised by the Attorney General. Total costs for July 2006 totalled £6,254. Extrapolating these monthly costs over the year, the total cost of enforcement for the 12 month period could be in excess of £75,000 for JT alone. Regarding C&W, there is currently insufficient information upon which to base an accurate assessment of costs. However, based upon

invoices submitted to cover the remainder of 2006, the annual cost could amount to £50,000. Airtel favour an annual set fee for this service which is likely to be similar to that of other operators, i.e. £50,000.

At present, JT are the only company seeking to charge on a 'per request' basis. Should they move to an annual charge, it is likely that costs would be similar to those envisaged by the other providers. At this time, as the market emerges, it is difficult to place an accurate assessment on the final cost in respect of communications data requests; however, based on the best estimate available, the total annual cost for data communications requests could be in the region of £150,000^[1].

Support maintenance costs

Apart from the cost of initial installation and purchase of equipment for lawful intercepts that is chargeable to the States of Jersey, there will be ongoing maintenance and support charges levied by the individual TELCOs.

JT have not identified a figure at this stage as their system is in the early stages of being replaced; however, by mid-2007 it is anticipated that they will be looking to recoup costs and set up a maintenance agreement. C&W have identified that they will be seeking £15,000 per annum split evenly between Jersey and Guernsey. Guernsey has the same requirement for lawful intercept capability making an additional unbudgeted cost of £7,500. Airtel have yet to provide an estimate but it would be realistic to expect that they would seek a similar sum to C&W. This is likely to be split between the 2 Islands as Airtel have a licence to operate in Guernsey. If all 3 providers charge a similar sum the annual charges to Jersey could be in the region of £21,500.

Number portability

The Jersey Competition Regulatory Authority has directed that all TELCOs in Jersey are to subscribe to a number portability system. Number portability is where a subscriber can change between companies and keep their original telephone number rather than take one of the host network's numbers. The system will be administered by an off-Island company.

Again, the costs of this are not yet known as the tendering process for the solution provider is currently taking place. However, based on specialist advice, the potential costs to Jersey authorities are £19,000 based upon the need for a firewall upgrade, additional hardware and system costs.

Grants for interception costs

Article 18 of RIPL imposes a duty on the States to ensure that arrangements are in force for contributions to be paid out of the annual income of the States towards the costs incurred by providers of public postal services and TELCOs in complying with an obligation to maintain an interception capability. There are ongoing revenue costs associated with these equipment purchases which have been included in the attached summary of costs. In the foreseeable future, the equipment costs are estimated to be –

2006/7	£530,000 equipment
2007/8	£125,000 equipment
Total:	£655,000

From the above, grants for interception costs over the next 2 years are likely to be in the region of £655,000. Historically, it has been possible to pay these costs through use of the Drug Trafficking Confiscation Fund (DTCF). Consequently, they have been excluded from the summary of additional funding required.

Costs summary

This report summarises likely costs including the additional costs which can be attributed directly to the opening up of the telecommunications market, i.e.: costs that have arisen since the FSR process was held in 2005. Moreover, it is important to note that interception warrants may be issued in response to applications from the Director General of the Security Service; the Chief of the Secret Intelligence Service; the Director of GCHQ; and the Chief of Defence Intelligence of the Ministry of Defence; as well from authorised agencies in Jersey.

There are clearly significant cost implications associated with the implementation of RIPL which were highlighted, but unquantifiable, in 2005 when initial funding was agreed. The current situation is still developing making it difficult to provide a definitive assessment of the additional funding requirements by the States of Jersey Police and Customs; however, with the assistance of the industry, it is estimated that the following summary provides a more likely best estimate of RIPL implementation costs. Allowing for the £323,000 already awarded through the FSR process from 2008, the net increase in funding required is likely to be £114,500 p.a. However, in 2007 the shortfall will be £187,500 as only £250,000 is available from Department funds. This is

separate from any grants made in respect of interception equipment costs over the next 2 years which are expected to be in the region of £655,000 and the subject of applications to the DTCF.

SUMMARY REVISION OF COSTS

(as at November 2006):-

INITIAL START-UP, ONE-OFF EXPENDITURE

IT SOLUTION	100,000	(already purchased from Home Affairs budget)
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MANPOWER COSTS

8.5 posts restored as in original paper (see Appendix A)

Single Point of Contact Officer	30,100
Dedicated Source Unit	118,400
Technical Support Unit (0.5 FTE)	19,300
Training Officer	53,200

Total = 221,000

QUANTIFIABLE (ADDITIONAL) ANNUAL RUNNING COSTS

Comms Data Acquisition	150,000
TELCO Support Costs	21,500
SoJP/Customs Support Costs	26,000
Number Portability	19,000

Total = 216,500

FULL TOTAL = 437,500 (additional annual on cost)

Less Revenue Growth Awarded

Through 2005 FSR w.e.f. 2008 323,000 (updated to 2008 levels)

NET TOTAL SHORTFALL: 114,500 (see note 1)

Notes:

1. The shortfall in 2007 is £187,500 as only £250,000 is available from Department funds.
2. Grants for interception equipment costs excluded.

Explanatory Note

This Act would bring the Regulation of Investigatory Powers (Jersey) Law 2005 into force on 10th December 2006. The Law was adopted by the States on 15th March 2005 (P.196/2004). However, paragraph 2 of Schedule 4 to the Law is not commenced. This is because it would have made a consequential amendment to the Post Office (Jersey) Law 1969 which, since the repeal of that Law on 1st July 2006 by the Postal Services (Jersey) Law 2004, is no longer required.



Jersey

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Made

[date to be inserted]

Coming into force

[date to be inserted]

THE STATES, in pursuance of Article 59 of the Regulation of Investigatory Powers (Jersey) Law 2005 ^[1], have made the following Act –

1 Law commenced

The Regulation of Investigatory Powers (Jersey) Law 2005, with the exception of paragraph 2 of Schedule 4, shall come into force on 10th December 2006.

2 Citation

This Act may be cited as the Regulation of Investigatory Powers (Jersey) Law 2005 (Appointed Day) Act 200-.

^[1] *Based on all 3 telecom companies setting annual fees at £50,000 per company.*

^[1] *L.17/2005*