
STATES OF JERSEY



REGULATION OF INVESTIGATORY POWERS (JERSEY) LAW 2005 AND POLICE PROCEDURES AND CRIMINAL EVIDENCE (JERSEY) LAW 2003: REPORT OF THE INVESTIGATORY POWERS COMMISSIONER 1ST JANUARY TO 31ST DECEMBER 2016

Presented to the States on 6th April 2017

STATES GREFFE

FOREWORD

In accordance with the requirement in Article 44(6) of the Regulation of Investigatory Powers (Jersey) Law 2005 and Article 104(4) of the Police Procedures and Criminal Evidence (Jersey) Law 2003, I am pleased to lay before the States the attached Annual Report for 2016 of the Commissioner appointed under those Laws.

Article 44(6) of the Regulation of Investigatory Powers (Jersey) Law 2005 requires the report to contain a statement indicating whether any matters have been omitted from it. Article 44(7) allows the Bailiff to exclude any matter from the report laid before the States if it appears to him, after consultation with the Commissioner, that the publication of any matter in an annual report would be contrary to the public interest or prejudicial to national security, the prevention or detection of serious crime, the economic well-being of Jersey; or the continued discharge of the functions of any public authority whose activities include activities that are subject to review by the Commissioner. I am able to inform members that, on the advice of the Commissioner, I have omitted the confidential Annex referred to in the report.

Article 104(4) of the Police Procedures and Criminal Evidence (Jersey) Law 2003 contains a similar provision, requiring the report laid before the States to contain a statement indicating whether any matters have been omitted from it. Article 104(5) allows the Bailiff to exclude any matter from the report laid before the States if it appears to him, after consultation with the Commissioner, that the publication of any matter in an annual report would be prejudicial to the security of the British Islands or to the detection of crime. I am similarly able to inform members that, on the advice of the Commissioner, I have omitted the confidential Annex referred to in the report.

I would like to add this. Sir David Calvert-Smith has been a judge of the Jersey Court of Appeal since September 2012, having had a most distinguished career in England as First Treasury Counsel (the most senior prosecutor), Director of Public Prosecutions and a judge of the High Court. We have been very lucky to have had the benefit of his skill and experience as a judge of our Court of Appeal and as Commissioner appointed under the Regulation of Investigatory Powers (Jersey) Law 2005 and Police Procedures and Criminal Evidence (Jersey) Law 2003. I am pleased to take this opportunity of thanking him most warmly for his work in this capacity.

BAILIFF OF JERSEY

REPORT

1ST JANUARY – 31ST DECEMBER 2016

The Regulation of Investigatory Powers (Jersey) Law 2005 (the “2005 Law”) and the Police Procedures and Criminal Evidence (Jersey) Law 2003 (the “2003 Law”) together provide a comprehensive statutory framework for the use of investigatory powers by public authorities in the Bailiwick. They are designed to provide safeguards for the investigation of crime and to be compliant with the European Convention on Human Rights (“ECHR”). Together they regulate:

- The interception of communications,
- The acquisition and disclosure of communications data,
- Intrusive surveillance,
- Directed surveillance,
- Interference with property,
- The use of covert human intelligence sources,
- Those entitled to use these techniques,
- The use that may be made of material gained as a result of that use, and
- The mechanism for oversight of these powers.

A THE 2003 LAW SUMMARISED¹

The relevant articles for this purpose are Articles 101–4.

Articles 101–3 define the circumstances in which the Attorney General, or in his absence, the Solicitor General (the Law Officers), may authorize the taking of action in respect of property (“property interference”) or wireless telegraphy if he believes that the action is:

- necessary for detecting or preventing serious crime or,
- in the interests of the security of Jersey, and in either case,
- proportionate to what it seeks to achieve.

Serious crime is conduct which:

- constitutes an offence which involves the use of violence, or results in substantial financial gain or is committed by a “large number of persons in pursuit of a common purpose”, or any other offence for which a person over 21 with no previous convictions could reasonably be expected to be sentenced to imprisonment for 3 years or more.

Authorization is to be written save in cases of urgency. If verbal it must be followed by written authorization. The Attorney General must provide the Commissioner with a written report in respect of all authorizations in a calendar year. (I have received the required report for 2016). The Commissioner, who must be an Ordinary Judge of the

¹ To note. This summary is set out simply to provide the reader with a broad picture of the legal framework behind this report.

Court of Appeal, must review the powers exercised by the Attorney General and report to the Bailiff.

The Bailiff must lay the Commissioner's report before the States but he may, after consultation with the Commissioner, exclude from it any matter the publication of which would be prejudicial to the security of the British Islands or the detection of crime.

B THE 2005 LAW SUMMARISED

The 2005 Law, which is supplemented by The Regulation of Investigatory Powers (Codes of Practice) (Jersey) Order 2006 (the "Codes"), is in four parts.

Part 1 contains definitions of:

- interception in relation to communications,
- the territorial extent of the law and of the conduct which constitutes interception,
- traffic data (see below).

Part 2

Chapter 1 of Part 2 is concerned with the interception of communications. It:

- Makes unlawful interception an offence punishable with a maximum of 2 years imprisonment (Article 5).
- Deals with cases where Jersey authorities wish to obtain intercept material from abroad (Article 5).
- Differentiates between public and private telecommunications systems (Article 5).
- Sets out the rare situations in which interception may be lawfully carried out without a warrant (Article 8).
- Authorizes the Attorney General, Solicitor General, or, in the absence of both, a Crown Advocate appointed as Acting Attorney General by the Bailiff or Deputy Bailiff under Articles 5(2) and 7(2) of the Department of the Judiciary and the Legislature (Jersey) Law 1965, to issue interception warrants (Article 10).
- Sets out the persons who may apply for a warrant, namely the Chief of Police, Agent of the Impôts and Chief Immigration Officer in Jersey, certain Heads of Security Services and the Armed Forces in the UK and competent authorities of foreign states with whom Jersey has a mutual assistance agreement (Article 11).
- Sets out the obligatory contents of a warrant (Article 12).
- Sets the reasons for which a warrant may be granted by the Law Officers, namely:

- National Security,
- The prevention or detection of serious crime (defined as in the 2003 Law – see above) within Jersey or to assist a foreign state (see Article 11 above) in that objective,
- The economic well-being of Jersey (Article 10).
- Sets out the maximum periods for warrants, and regulations concerning their modification and renewal, and
- Requires their cancellation if the grounds for interception cease to exist. (Articles 13 and 14).
- Provides for the implementation of warrants, the duties of those to whom they are directed, and creates an offence of failing to comply with those duties (Article 15).
- Requires the Attorney General² to ensure that intercepted material is distributed, copied and disclosed to the minimum number of people and destroyed when there are no longer grounds for retaining it (Article 19).
- Compels compliance with the terms of a warrant and creates a criminal offence of failure to comply. If necessary the Attorney General may enforce compliance by injunction. In addition the Home Affairs Committee may make Orders requiring service providers to maintain an interception capability (Articles 15 and 16).
- Prohibits reference, save in exceptional circumstances, in ordinary civil or criminal proceedings, to the fact that a warrant has been issued, or that a person may have assisted in giving effect to a warrant, or that a communication has been intercepted (Articles 21 and 22).
- Creates an offence of disclosure by persons who are aware of the existence of a warrant or of the contents of any intercepted communication of disclosing either (Article 23).

Chapter 2 of Part 2 is concerned with the acquisition and disclosure of communications data. This may be subdivided into “subscriber data” and “traffic data”. It:

- Defines communications data and permits the obtaining of such data under authority granted by the Chief of Police, the Agent of the Impôts, the Chief Immigration Officer (or delegated officers of all 3), and the Attorney General. (Articles 24 and 25, Schedule 1, and Article 8 of the Regulation of Investigatory Powers (Miscellaneous Provisions)(Jersey) Order 2006).
- Defines the reasons and conditions which must exist before an authorization is granted.
These include:

² References to the Attorney General throughout this report include reference to the Solicitor General and Crown Advocates appointed Acting Attorney General under the 1965 Law referred to earlier in this section.

- National Security,
 - Prevention or detection of crime or disorder,
 - The economic well-being of Jersey,
 - Public safety,
 - Assessment or collection of any tax, duty etc.,
 - The prevention of injury or damage to any person,
 - The proportionality of the acquisition of data to the purpose for which it is sought, including the possibilities of collateral intrusion (Article 26).
- Defines the period during which the authorization is effective (1 month), allows for authorized extensions of it for a month at a time, and requires its cancellation if the purpose for which it was obtained no longer exists (Article 27).
 - Allows for payment of those required to provide data (Article 28).

Part 3

This deals with directed and intrusive surveillance and the use of covert human intelligence sources (CHIS).

The distinction between directed and intrusive surveillance is set out. Broadly speaking surveillance is “directed” unless it involves being carried out inside a house or vehicle when it is “intrusive” (Articles 30 to 32).

Directed surveillance

It may only be carried out if authorized by the same persons as may authorize the acquisition of communications data. However a large number of government departments and agencies may apply for such authorization to the Attorney General (Article 34).

The purposes for which authorization may be obtained are also similar to those necessary for communications data, save that they do not include the prevention of injury or damage (Article 34).

The proportionality requirements are similar (Article 34).

Intrusive surveillance

This may only be carried out if authorized by the Attorney General on the application of persons such as:

- the Chief of Police,
- the Agent of the Impôts,
- the Chief Immigration Officer, or
- members of the Intelligence Services, the Ministry of Defence or the Armed Forces.

The grounds upon which authorizations may be granted are:

- National Security,
- the prevention or detection of serious crime, or
- the interests of the economic well-being of Jersey (Article 37).

An authorization may be combined with an authorization under the 2003 Act (See above) (Article 38).

The Attorney General is required to submit a report on the operation of intrusive surveillance annually (Article 39).

Covert Human Intelligence Sources (CHIS)

The grounds for, and the persons who may authorize, the use of CHIS are the same as for directed surveillance. There are additional requirements to an authorization. In particular:

- An officer must have day-to-day responsibility for contact with the CHIS and for his/her welfare.
- Another officer must oversee the use of the CHIS.
- A record must be kept of such use, and
- There must be restricted access to details of the source's identity.
- Certain more specific provisions apply to CHIS under the age of 18. (Article 35).

General

Any Part 3 authorization must be cancelled if the grounds for it no longer exist and also, in the case of CHIS, if the necessary supporting conditions are no longer in place (Article 41).

Part 4

My role is defined in this Part. I am to keep under review the exercise and performance of the powers and duties conferred on the Attorney General in Part 2 and 3 and on the other persons on whom powers and duties are conferred by Part 2 or 3. The Attorney General is to inform me of all warrants and intrusive authorizations during the calendar year. I am to produce a report as soon as practicable at the end of that calendar year and to bring to the Bailiff's attention any breaches of the law which have come to my attention. The Bailiff may direct that part of my report not be published if in his opinion publication would be contrary to the public interest or would prejudice:

- national security,
- the prevention or detection of serious crime,
- the economic well-being of Jersey, or

- the continued discharge of the functions of any public authority whose activities include activities that are subject to review by the Commissioner.
(Articles 43 and 44).

In addition this part creates the Investigatory Powers Tribunal which may be set up to hear proceedings in which a person complains, for instance, that he has been injured by the use of these powers (Article 46).

My investigation generally

I am grateful to all those who have assisted me to go through the voluminous documentation necessary.

I have received reports from Police and Customs concerning the operation of both Laws for the period 1st January to 31st December 2016 and have discussed them and other matters with senior officers of Police and Customs and with the Attorney and Solicitor General.

I am grateful to those in both agencies who provided full and well-ordered reports and supporting documents and to those in the Law Officers' Department who compiled similar documentation for me and provided me with the facilities to examine all the relevant papers. I am satisfied that I have had access to all the relevant documentation and paperwork to discharge my functions under Article 43(2).

It is clear that the information gathered as the result of the conscientious and effective use of the powers contained within the Laws has contributed significantly to the prevention and detection of crime, particularly serious crime, within the Bailiwick during 2016.

During 2016 the use of one or more of the powers contained in the 2 Laws has, directly or indirectly, contributed to the following results:

- The recovery of nearly £700,000 worth³ of dangerous drugs, cash and other property the proceeds of crime.
- Sentences of imprisonment totalling more than 60 years and a number of non-custodial penalties.
- The prevention of other serious offences.

The 2003 Law

Property interference

I have considered the material created in connexion with applications under the 2003 Law and the report required by Article 103 and am satisfied that the applications made and granted in 2016 were properly considered and only granted when it was appropriate to do so within the terms of the Law.

³ Street value.

The 2005 Law

Interception warrants

Although it is important in all areas of the 2005 Law that the proper consideration is given to applications, the interception warrant represents the most significant infringement of the right to privacy of the individuals concerned.

I am satisfied that those responsible for applications for such warrants, and all those concerned with the grant, refusal, renewal and cancellation of them have conscientiously applied the criteria laid down by the Law and the Codes made under it during 2016.

In particular all applications demonstrated that the considerations of proportionality, the possibility of collateral intrusion, and the possible use of other means to obtain the information needed had been conscientiously and properly applied.

The proper procedures for the safeguarding of the material obtained have been carried out and there were no breaches of those procedures.

There is in place in the relevant agencies an effective system for the vetting and supervision of those responsible for interceptions.

Communications data

I have examined the material relating to this topic and am satisfied that the obligations of necessity and proportionality in applying for authorizations under the Law have been properly carried out. All such authorizations were granted in both form and duration accordance with the requirements set out in Part 1, Chapter 2 of the Law. The significant number of occasions on which applications were refused or had to be resubmitted is a clear indication that the scrutiny process is thoroughly and properly applied.

There was a small number of errors committed by Communication Service Providers in processing applications. The 3 errors which resulted in the obtaining of some information (billing data, wrong subscriber details and text messages) beyond the terms of the authorization concerned were dealt with by the immediate deletion of that information. On two other occasions there were errors made within the agency applying for the data. On one occasion no information of any kind was obtained. On the other the information was deleted before it was accessed.

Part 3 of the Law

Directed Surveillance

I have examined the material submitted and spoken to responsible officers in connexion with these applications. It is clear that those concerned in the various agencies are fully conscious of the requirements of necessity and proportionality and that a proper testing procedure was applied in each case in which an application was made and granted.

Intrusive Surveillance

I have considered the material supplied in respect of these applications and the necessary report of the Attorney General in respect of them.

I am satisfied that the applications were properly made and granted, and cancelled appropriately.

Covert human intelligence Sources (CHIS)

The use of such persons to assist in the gathering of evidence and information which may enable the gathering of such evidence is fraught with obvious risks. I have carefully examined the use of CHIS during 2016, both in respect of the recruitment of new CHIS, the monitoring and care of CHIS when they are being used, and the constant checking needed to assess whether their deployment is still necessary. I am satisfied that that necessary scrutiny was applied in all cases during the year.

THE CONFIDENTIAL APPENDIX

I am satisfied that there are matters which I need to communicate to the Bailiff in the proper discharge of my functions under both the 2003 and 2005 Laws, the publication of which would be contrary to the public interest and prejudicial, in particular, to the prevention and detection of serious crime and to the continued discharge of the functions of certain public authorities.

On the assumption that the Bailiff will agree that the criteria for exclusion are met, I have included such information in a Confidential Appendix which I attach to this Report.

Sir David Calvert-Smith
April 2017