

# PROTECTION OF FREEDOMS ACT 2012

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## EXPLANATORY NOTES

### THE ACT

#### *Commentary on Sections*

#### **Part 2: Regulation of surveillance**

#### **Chapter 2 of Part 2: Safeguards for certain surveillance under RIPA**

#### **Section 38: Judicial approval for directed surveillance and covert human intelligence sources**

174. *Subsection (1)* inserts new sections 32A and 32B into RIPA which provide a procedure by which local authority authorisations in England, Wales and Northern Ireland for the use of directed surveillance and the conduct and use of covert human intelligence sources (“CHIS”) can only come into effect if approved by a relevant judicial authority. In England and Wales the judicial authority is a justice of the peace (Magistrates’ Court). In Northern Ireland it is a district judge (magistrates’ court). The requirements also apply to renewals of authorisations. The section further provides a mechanism by which the requirement for judicial approval may be applied to authorisations granted by officials in other public authorities by order made by the Secretary of State.
175. Directed surveillance is defined in section 26(2) of RIPA as covert surveillance otherwise than by way of an immediate response to events or circumstances for the purpose of a specific investigation which is likely to obtain private information and which is not intrusive surveillance (that is, it is not surveillance carried out in relation to anything taking place on residential premises or in any private vehicle). A CHIS is defined in section 26(8) of RIPA as a person who establishes or maintains a personal or other relationship with another for, amongst other things, the covert purpose of using such a relationship to obtain or disclose information to others.
176. Under Part 2 of RIPA, directed surveillance or the conduct and use of a CHIS is rendered lawful if it is authorised and carried out pursuant to an authorisation granted under section 28 of RIPA (for directed surveillance) or section 29 of RIPA (for CHIS). An authorisation may not be granted except by a person designated by order made under section 30(1) of RIPA. The designated person must not grant or renew the authorisation unless they believe that the conduct is necessary on grounds specified in section 28(3) or section 29(3) of RIPA, and that the conduct is proportionate to what is sought to be achieved by carrying it out. By section 30(3), the Secretary of State may by order impose restrictions on the types of authorisations that may be granted by individuals within specified public authorities, and on the circumstances in which and the purposes for which authorisations may be granted or renewed by those individuals. In the case of local authorities, such designated persons must be staff of at least Director, Head of Service or Service Manager grade or equivalent. These designated persons must not grant or renew the authorisations save for the purposes of preventing or detecting serious crime or preventing disorder (see the Regulation of

Investigatory Powers (Directed Surveillance and Covert Human Intelligence Services) Order 2010 (SI 2010/521)).

177. New section 32A(1) provides that new section 32(A) applies where a “relevant person” has granted an authorisation under section 28 (authorisation of directed surveillance) or section 29 (authorisation of CHIS) of RIPA. New section 32A(7) defines a relevant person for these purposes as either a designated person in a local authority in England and Wales, or a designated person in Northern Ireland where the grant relates to an excepted or reserved matter. A relevant person may also be any other person of a description prescribed by order of the Secretary of State. Such an order cannot make provision in relation to a matter that has been transferred to the competence of the Northern Ireland Assembly. An order made by the Secretary of State to prescribe additional relevant persons to whom the judicial approval requirement will apply would be subject to the affirmative resolution procedure (new section 32A(8)). By this mechanism the requirement to obtain judicial approval for the use of the powers in respect of directed surveillance or CHIS will only initially apply to local authorities, but the Secretary of State will subsequently be able to extend the requirement to obtain judicial approval to other public bodies able to exercise these powers.
178. New section 32A(2) provides that an authorisation granted under the relevant provisions in section 28 or section 29 of RIPA will not take effect until the “relevant judicial authority” has given its approval. The relevant judicial authority for these purposes is defined in new section 32A(7).
179. New section 32A(3) sets out the test for the judicial approval of an authorisation in respect of directed surveillance. The relevant judicial authority must be satisfied that not only were there reasonable grounds for the designated person within the local authority to believe that using directed surveillance was necessary and proportionate (subsection (3)(a)(i)), but that there also remain reasonable grounds for believing so (subsection (3)(b)). The relevant judicial authority must also be satisfied that any other “relevant conditions” which relate to the authorisation were met (subsection (3)(a)(ii)).
180. New section 32A(4) lists the relevant conditions which must be met if the relevant judicial authority is to approve the granting of an authorisation in respect of directed surveillance. For local authorities in England and Wales (and in Northern Ireland where the authorisation or notice is granted or given for a purpose relating to an excepted or reserved matter) the conditions are: (a) whether the person making the authorisation was of the correct office, rank or position and was accordingly a designated person for the purposes of section 29 of RIPA; (b) whether the authorisation was in breach of any other restrictions imposed by the Secretary of State by virtue of the power at section 30(3); and (c) whether the authorisation or notice satisfied any other conditions set out in an order (subject to the negative resolution procedure) made by the Secretary of State. In relation to conditions (a) and (b), the Regulation of Investigatory Powers (Directed Surveillance and Covert Human Intelligence Sources) Order 2010 (SI 2010/521) applies. For authorisations granted by public authorities other than local authorities to which the judicial approval requirement may in the future be applied, the relevant conditions are those that will be set out in an order (subject to the negative resolution procedure) made by the Secretary of State.
181. New section 32A(5) sets out the test for the judicial approval of the granting of an authorisation to use CHIS. The relevant judicial authority must be satisfied that there were reasonable grounds for the designated person within the local authority to believe that using a CHIS was necessary and proportionate in that case, and that there remain reasonable grounds for believing so. The relevant judicial authority will also need to be satisfied that when the authorisation was granted there were reasonable grounds for believing, and there remain reasonable grounds for believing, that the arrangements for the source’s case satisfied the requirements of section 29(5) of RIPA (which includes arrangements relating to the oversight of the source, the welfare of the source and record keeping) and any additional requirements that have been imposed by order made by the

Secretary of State under section 29(7)(b) of RIPA were satisfied. The judicial authority must also be satisfied that the “relevant conditions” which relate to the authorisation were met (subsection (5)(a)(ii)).

182. New section 32A(6) lists the other relevant conditions that must be met if the relevant judicial authority is to approve the granting of an authorisation in respect of the use of a CHIS by a local authority. In the case of an authorisation granted by a local authority in England and Wales (and in Northern Ireland where the authorisation is granted in relation to an excepted or reserved matter), the conditions are: (a) that whether the person granting the authorisation was of the correct office, rank or position and was therefore a designated person within the meaning of section 29 of RIPA; (b) whether the authorisation was in breach of any prohibition imposed by an order made under section 29(7)(a) or any restrictions made by the Secretary of State by virtue of the power at section 30(3); and (c) whether the authorisation or notice satisfied any other conditions that may be set out in an order (subject to the negative resolution procedure) made by the Secretary of State. In respect of the second of these conditions, the Regulation of Investigatory Powers (Juveniles) Order 2010 ([SI 2000/2793](#)) imposes certain restrictions where the CHIS is under the age of 18 and the Regulation of Investigatory Powers (Covert Human Intelligence Sources: Matters Subject to Legal Privilege) Order 2010 ([SI 2010/123](#)) imposes certain restrictions to protect information that is legally privileged. In relation to the first and second conditions, the Regulation of Investigatory Powers (Directed Surveillance and Covert Human Intelligence Sources) Order 2010 ([SI 2010/521](#)) applies. For public authorities other than local authorities to which the judicial approval requirement may in the future be applied, the relevant conditions are those to be set out in an order (subject to the negative resolution procedure) made by the Secretary of State.
183. New section 32A(7) defines various terms used in new section 32A.
184. New section 32B sets out the procedure for obtaining judicial approval to use directed surveillance or a CHIS.
185. New section 32B(1) provides that the authority to which the relevant person (authorising officer) belongs may apply for approval of the authorisation of the use of directed surveillance or a CHIS by the relevant judicial authority. The relevant person is not required to apply in person.
186. New section 32B(2) provides that notice of such applications for approval need not be given to either the subject of the authorisation or to their legal representatives; this reflects the covert nature of the exercise of the investigatory powers under RIPA.
187. New section 32B(3) allows the relevant judicial authority on refusing an approval of an authorisation to quash that authorisation.
188. *Subsection (2)* amends section 43 of RIPA to make provision for renewals of authorisations for the conduct or use of a CHIS. The renewal may not be approved by the relevant judicial authority unless it is satisfied that a review has been carried out by the authority of the use made of the source and the tasks given to the source within the meaning of section 43(7) of RIPA. The relevant judicial authority must consider the results of the review before approving the renewal.