

NOTE: REDACTIONS ARE INDICATED [REDACTION] AND GISTS ARE IN BOLD, UNDERLINED AND ITALICS

Designated Persons – Implementing the new Code of Practice for Privileged Communications Data

What is the new Code of Practice?

The Home Office have just published the new Code of Practice for the Acquisition and Disclosure of Communications Data [REDACTION] which all government departments are expected to adhere to. The new Code requires us to give special consideration to the necessity and proportionality of communications data applications that might lead to a **higher than usual degree of intrusion**. It is recognised that the degree of interference with an individual's rights and freedoms may be higher where the communications data being sought relates to a person who is a member of a profession that handles privileged or otherwise confidential information (including medical doctors, lawyers, journalists, Members of Parliament or ministers of religion known as 'sensitive professions' or 'SPs'. [REDACTION]). It may also be possible to infer an issue of sensitivity from the fact someone has regular communications with, for example, a lawyer or journalist.

What does this mean for investigators?

The existence of CD relating to a SP does not preclude applications being made to obtain such data. However, when making an application for CD relating to someone we know or believe (please click this link for guidance you should be following prior to making an application) is a member of a SP, or you otherwise think may lead to higher than usual level of intrusion, you should consider whether the proposed conduct is necessary and proportionate and you must clearly set out those considerations in the application. Furthermore, those CD applications must be approved by an Independent Designated Person (IDP). This have been defined as a **Grade 2 outside of the direct management chain of the investigator** and reporting chain of the investigation. Your staffing hub will provide a list where you can find the IDPs allocated to your team. Where you consider your CD application relates to a member of a SP, you should **re-direct the application to your IDP through the electronic system for processing CD requests** by changing your Designated Person away from the default and to your IDP. You may wish to separately flag this application to the IDP. If you think your application is particularly sensitive, please contact your **senior MIS officials**. Further guidance will be issued in due course on what to do if you identify that the subject of an application is a member of a SP after the application has been made. In the meantime, please contact **a senior MIS official** if this happens. There is no requirement to flag cases where the application was submitted prior to 20 April 15.

What should IDP applications include?

You must draw attention (within the application) to the sensitivity of the request using the following form of words:
"The user of xxx is a [Enter sensitive profession] and may use xxx to contact individuals relating to the latter's spiritual welfare/ private constituency matters/confidential medical matters /it may be possible therefore to infer an issue of sensitivity from the fact that someone has regular contact with him/her on xxx. The request may therefore involve a higher degree of interference with privacy given the users sensitive profession. I have balanced the intrusiveness of the interference against the need for it in operational terms and, given that there is no other less intrusive way in which to gather this information, I am satisfied that the higher degree of interference is necessary for the purposes of protecting national security and proportionate to that aim." Please also ensure your proportionality explanation justifies the higher level of intrusion.

What should IDPs consider?

IDPs must have current working knowledge of human rights principles and legislation and use these to assess the necessity and proportionality of the CD application. IDPs must comment on the CD application if it relates to a SP or involves a higher than usual level of intrusion. The comment **MUST consider and record** the basis upon which they have concluded that the CD to be obtained is necessary and proportionate in the specific circumstances. In urgent cases where a DP is not independent from the investigation or operation, their involvement and their justification for undertaking the role as IDP must be set out in the comments box. If an objective informed observer would consider that you have a vested interest in the application, please return it to the investigator for referral to another IDP. If an IDP authorises an application against a member of a SP without following this new guidance, it is possible that an error may have occurred. An error may occur regardless of whether data has or has not returned from the application. We are obliged to report errors to the Commissioner, failure to do so is a serious breach that could result in criticism of MIS's compliance with the law and the applicable Codes of Practice. If you suspect that an error may have occurred, please contact **the oversight team** who can advise on the steps to be taken. If you are an IDP and have any questions or you would like to discuss this policy further, please contact **a legal adviser**.