

Report of the Intelligence Services Commissioner for 2013

CONFIDENTIAL ANNEX

The Rt Hon Sir Mark Waller

26th June 2014

Excluded from publication under section 60(5) of the Regulation of Investigatory Powers Act 2000

Page 2 and 3 withheld on relevancy grounds

2. EXTRA-STATUTORY FUNCTIONS

[REDACTED]

Under paragraph 59A of RIPA, inserted by the Justice and Security Act, the Prime Minister may direct me to keep under review the carrying out of any aspect of the functions of the intelligence services. I have requested that such directions are given in relation to my extra-statutory functions, but until they are, I will continue to provide oversight on an extra-statutory basis.

In my open report I have set out my statutory functions and one of my extra-statutory functions relating to the Consolidated Guidance to Intelligence Officer and Service Personnel on Detention and Interviewing Detainees and on Passing and Receipt of Intelligence Relating to Detainees (Consolidated Guidance).

In addition to this I have been asked to oversee certain other matters and report in the Confidential Annex on the same:

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

2.3 Agent Participation in Criminality

By letter dated 27th November 2012 from the Prime Minister, I was asked (and I have agreed) to keep under review the Security Service's long standing policy for their agent handlers to agree to agents' participation in crime in circumstances where it is considered such involvement is necessary and proportionate [REDACTED]

[*in order to achieve some of the objectives set out in paragraph 5 of the Guidelines.*]

4

[REDACTED]

[REDACTED]

[REDACTED] For this function again it may be that this too will become the subject of a direction under section 59A.

2.4 Justice and Security Act

As I said in my open Report, my extra-statutory roles could be placed on a statutory footing through a direction from the Prime Minister.

The Prime Minister must publish such directions "except so far as it appears to the Prime Minister that such would be contrary to the public interest or prejudicial to:

- National Security,
- The prevention or detection of serious crime,
- The economic well-being of the United Kingdom, or
- The continued discharge of the functions of any public authority whose activities include activities that are subject to review by the Intelligence Services Commissioner."

I would like to discuss further what directions should be given and how much should be made public. I would prefer my oversight in relation to bulk data and its use to be made public and it is for consideration whether my oversight should be extended to the use by the agencies of operational data obtained under Part II of RIPA or ISA sections 5 and 7. It may be possible to make public that an oversight of the Secretary of State's powers to give directions under section 94 exists but it is difficult to see how any report could be made in an open Annual Report. I am content for my oversight of agent participation in criminality not to be published.

10. AGENT PARTICIPIATION IN CRIMINALITY

By letter from the Prime Minister dated 27 November 2012 I was asked (and agreed) to provide extra-statutory oversight of the participation in criminal activity by Security Service agents.

10.1 Security Service

The Security Service has an internal process for the authorisation of agency participation in criminality. These guidelines have been in place since the early 1990s and arose out of the need for agents recruited and run by MI5 to sometimes engage in criminality.

These activities (for instance membership of a proscribed organization) are sometimes necessary to protect national security.

[for the use of agents who participate in criminality]

The Guidelines set out the circumstances in which internal authorisation may be given

[Regard must be had to the factors set out in paragraphs 7 and 8 of the Guidelines.]

They provide as follows:

Introduction

1. These Guidelines are intended to provide guidance to agent-running sections on the use of agents who participate in criminality.
2. Part II of the Regulation of Investigatory Powers Act 2000 ("RIPA") creates a regime for authorising the conduct and use of Covert Human Intelligence Sources ("CHISs"). This regime applies to the Service's use of agents, and the Service conducts its agent operations in accordance with RIPA, its subordinate legislation and the CHIS Code of Practice issued under it.
3. RIPA does not provide any immunity from prosecution for agents or others who participate in crime. Section 27 of RIPA provides that conduct specifically authorised under a CHIS authorisation is "lawful for all purposes".
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
4. Subject to this, neither RIPA nor the Code of Practice provides for CHISs to be authorised to participate in criminality. However, the Service has established its own procedure for authorising the use of agents participating in crime.
[REDACTED]
5. [REDACTED]
[REDACTED] the nature of the work of the Service is such that its agents are frequently tasked to report on sophisticated terrorist and other individuals and organisations whose activities may pose a threat to national security and/or involve the commission of serious offences. In those circumstances it may sometimes be

LPP

[REDACTED]

necessary and proportionate for agents to participate in criminality in order to secure or maintain access to intelligence that can be used to save life or disrupt more serious criminality, or to ensure the agent's continued safety, security and ability to pass such intelligence.

Authorisation of use of participating agent

6. An officer empowered to issue a CHIS authorisation under RIPA (an "authorising officer") may in appropriate cases authorise the use of an agent participating in crime

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

7. [REDACTED]
[REDACTED]
[REDACTED] may
authorise the use of the agent [REDACTED] if [REDACTED]
[REDACTED]:

- a) there is a real prospect [REDACTED] that the agent will be able to provide information concerning serious crime [REDACTED]
[REDACTED]
[REDACTED]
- b) the required information cannot readily be obtained by any other means; and
- c) the need for the information that may be obtained by the use of the agent justifies his use notwithstanding the criminal activity in which the agent is or will be participating.
8. The criterion at paragraph 7(c) is not satisfied unless [REDACTED]
[REDACTED] the potential harm to the public interest from the criminal activity of the agent is outweighed by the benefit to the public interest from the information it is anticipated that the agent may provide and that the benefit is proportionate to the criminal activity in question.

Effect of an authorisation

9. An authorisation of the use of a participating agent has no legal effect and does not confer on either the agent or those involved in the authorisation process any immunity from prosecution. Rather, the authorisation will be the Service's explanation and justification of its decisions should the criminal activity of the agent come under scrutiny by an external body e.g. the police or prosecuting authorities. In particular, the authorisation process and associated records may form the basis of representations by the Service to the prosecuting authorities that prosecution is not in the public interest. Accordingly, any such authorisation should, on its face, clearly establish that the criteria for authorisation are met, in terms which will be readily understood by a prosecutor.

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]

Procedure

[REDACTED]

11. It is vital that full and accurate records are made of everything said to an agent on the subject of participation and of his response. [REDACTED]

[MI5 officers involved in the authorisation process should understand that they may be called upon to account for their decisions and actions.]

[REDACTED] it should be clearly explained to the agent that the authorisation process does not bestow on the any immunity from prosecution. [REDACTED]

[REDACTED]

[REDACTED]

As the Guidelines set out, an authorisation is provided on the express understanding that it carries no immunity from prosecution. In the event that an agent was ever considered for prosecution for an authorised crime, MI5 would need to make representations to the Crown Prosecution Service arguing that a prosecution would not be in the public interest. The authorisation setting out the justification for the participation in criminality would form the basis of this argument.

[REDACTED]

[REDACTED]

So far as my review is concerned I am concerned to assess whether in my opinion what can be called "the public interest test" is being properly applied. Nothing I can say can make conduct non-criminal but I am prepared to express a view as to whether I think the test is being properly applied.

In 2013, the Security Service [REDACTED] authorised to participate in criminality. Of these I scrutinised [REDACTED] had been authorised to participate in criminality.

[about a fifth of cases where the CHIS]

On 31 December 2013, the extant number of Security Service CHIS authorised to participate in criminality was [REDACTED]

The following are examples of the types of criminality in which Security Service CHIS have been authorised to participate during 2013:

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

No authority or anything I can say can make conduct non-criminal. [REDACTED]
[REDACTED]
[REDACTED]

[The redacted text refers to the issues set out in paragraph 9 of the Guidelines]

In my oversight I am prepared to make an assessment of whether participation would be likely to satisfy a public interest test. If the guidelines were adhered to, this would in my view be satisfied.

[about a fifth of cases where the CHIS had been]

Having looked at [REDACTED] authorised to participate in criminality I can say that, in my view, in each case the guidelines have been adhered to and the public interest test would have been satisfied.

[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]

Pages 32 to 74 withheld on relevancy grounds