



The Scottish Parliament
Pàrlamaid na h-Alba

JUSTICE COMMITTEE

AGENDA

2nd Meeting, 2016 (Session 4)

Tuesday 12 January 2016

The Committee will meet at 10.00 am in the David Livingstone Room (CR6).

1. **Decisions on taking business in private:** The Committee will decide whether to take items 3, 4 and 5 in private.
2. **Interception of communications by Police Scotland:** The Committee will take evidence from—

Ruaraidh Nicolson, Assistant Chief Constable, Organised Crime and Counter Terrorism, Police Scotland.
3. **Draft Budget Scrutiny 2016-17:** The Committee will consider a draft report to the Finance Committee on the Scottish Government's Draft Budget 2016-17.
4. **Abusive Behaviour and Sexual Harm (Scotland) Bill:** The Committee will consider a draft Stage 1 report.
5. **Work programme:** The Committee will consider its work programme.

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The papers for this meeting are as follows—

Agenda item 2

Paper by the clerk

J/S4/16/2/1

Private paper

J/S4/16/2/2 (P)

Agenda item 3

Private paper

J/S4/16/2/3 (P)

[Scotland's Spending Plans and Draft Budget 2016-17](#)

Agenda item 4

Private paper

J/S4/16/2/4 (P)

[Abusive Behaviour and Sexual Harm \(Scotland\) Bill, accompanying documents and SPICe briefing](#)

[Written submissions received on the Bill](#)

Agenda item 5

Private paper

J/S4/16/2/5 (P)

Justice Committee

2nd Meeting, 2016 (Session 4), Tuesday 12 January 2016

Interception of Communications by Police Scotland

Note by the Clerk

Purpose

1. This paper provides background information in advance of the Committee's evidence session with Assistant Chief Constable Ruaraidh Nicolson of Police Scotland on 12 January 2016. The main purpose of the meeting is to discuss Police Scotland's governance arrangements specifically in relation to implementation of revised rules on the interception and acquisition of communications data, which came into force in March 2015, and which Police Scotland was subsequently found to have contravened.

Background

2. The Acquisition and Disclosure of Communications Data Code of Practice 2015¹ requires law enforcement agencies² in the UK to seek judicial authorisation when applying for communications data to identify or determine journalistic sources.³ The independent Interception of Communications Commissioner is responsible for keeping under review the interception of communications and the acquisition and disclosure of communications data by intelligence agencies, police forces, and other public authorities. In his half-yearly report of 16 July 2015, the Commissioner found that "since 25 March, when the revised code came into force, two police forces have acquired communications data to identify the interactions between journalists and their sources in two investigations without obtaining judicial approval". He explained that his office was in the early stages of investigating these breaches. Media reports at the time suggested that Police Scotland was one of the two forces under investigation.
3. The newly appointed Commissioner, the Rt Hon Sir Stanley Burnton, published his findings on the investigation on 25 November 2015, naming Police Scotland:

"I concluded that there had been contraventions of the Acquisition and Disclosure of Communications Data Code of Practice 2015 in respect of five applications for communications data submitted by Police Scotland relating to one investigation. It is evident from these applications that Police Scotland sought communications data in order to determine either a journalist's source or the communications of those suspected to have been acting as intermediaries between a journalist and a suspected source. In contravention of Paragraph 3.78 of the Code, judicial approval was not obtained to acquire this communications data."

4. The Commissioner went on to say that "I am satisfied that four individuals were adversely affected by these contraventions and that the failures identified can properly be viewed as reckless". He added that Police Scotland had also breached the code, in two of the five cases, by failing to ensure that the "designated person" within the force who approved the interception had been insufficiently independent of the relevant investigation. Finally, he stated that Police Scotland's actions had shown insufficient

¹ [The Acquisition and Disclosure of Communications Data Code of Practice.](#)

² Which include police forces.

³ This change to the Code of Practice came into effect in March 2015, following an inquiry by the IOCCO concluding that some police forces were misusing their interception powers.

consideration of Articles 8 and 10 of the European Convention on Human Rights. The Commissioner advised that he had provided those affected with information to enable them to engage with the Investigatory Powers Tribunal⁴ if they wished to do so. He added that “I recognise the comprehensive review that Police Scotland conducted and wish to emphasise that Police Scotland has put in place significant measures in order to prevent any recurrence of such contraventions”.

5. Police Scotland’s released a statement on 25 November in which it said it “did not adhere to the new guidelines covering access to communications data during a recent investigation into alleged serious breaches of information security”, adding “for the purposes of clarification, none of the applications concerned a journalist”. It went on to say that “the IOCCO has noted that there was no evidence of an intentional act by Police Scotland to avoid the requirements of the Code” and that “a detailed action plan was put in place as soon as the issue was highlighted by IOCCO and no further recommendations have been made to Police Scotland”.
6. Statements were also released by the Scottish Police Authority and the Cabinet Secretary for Justice on 25 November. In its statement, the SPA said that it—

“considers there are wider considerations raised by this case that would warrant further independent assurance work. That is why we have requested that HM Inspector of Constabulary in Scotland carry out an in depth assurance review of the effectiveness and efficiency of Police Scotland’s counter corruption practices”.
7. The SPA also said it hoped that the review could be progressed in order for a final report to be made available in the spring of 2016. It is understood that HMICS will publish his formal remit very shortly.
8. In his statement, the Cabinet Secretary said “it is clear Police Scotland’s actions in accessing communications data have fallen short of the standards expected and I welcome today’s announcement by the SPA that they have asked HMICS to review the robustness of procedures around Police Scotland counter corruption practices”.

Committee’s work on this issue

9. Following, the IOCCO’s 25 November statement, the Committee agreed to invite DCC Neil Richardson, Designated Deputy for the Chief Constable, Police Scotland; John Foley, Chief Executive, Scottish Police Authority and Michael Matheson, Cabinet Secretary for Justice, Scottish Government on 15 December. At that meeting, the Committee asked a number of questions relating to the Information Commissioner’s findings and Police Scotland’s handling of the change in regulations on the interception of communications⁵. The Committee agreed to take further evidence from Police Scotland and also wrote to them requesting additional information, some of it provided in a letter of 7 January (see annexes).

Next Steps

10. The Committee will take evidence from ACC Ruaraidh Nicolson from Police Scotland. The Committee will decide what further steps to take in the light of that evidence.

⁴ The Investigatory Powers Tribunal was established in October 2000 under the Regulation of Investigatory Powers Act 2000 and provides a right of redress for anyone who believes they have been a victim of unlawful action under RIPA or wider human rights infringements in breach of the Human Rights Act 1998.

⁵ Official Report 15 December 2015:

<http://www.scottish.parliament.uk/parliamentarybusiness/report.aspx?r=10280&i=94579>

ANNEXE A: EXTRACT FROM CONVENER LETTER, 16 DECEMBER 2015, TO DCC RICHARDSON

ANNEXE

The Committee requests the following:

1. a timeline of relevant events, from the coming into force of the 2015 Code of Practice onwards. For the avoidance of doubt, this should include: when consultation on the change to the Code took place; when the change was communicated to officers, the notice Police Scotland was given of the change coming into effect, when relevant training was rolled out to officers, and when key decisions in relation to the five interceptions subsequently ruled to have been in contravention of the 2015 code of practice occurred,
2. the findings of the Interception of Communications Commissioner, following his inspections of Scottish police forces in 2012-13,
3. further information as to whether Police Scotland holds an 'accredited list' in relation to IOCCO inspections for authorisation and, if so, how many individuals have had their accreditation removed,
4. information as to what actions Police Scotland took in response to the findings of the Commissioner's first inspection of Police Scotland which took place in June 2014,
5. information as to who in Police Scotland was charged with acting upon the Commissioner's report of his inquiry into the use of Chapter 2 of Part 1 of the Regulation of Investigatory Powers Act 2000 to identify journalistic sources (published in February 2015), and what actions they took,
6. a copy of Police Scotland's action plan which Assistant Chief Constable Ruaraidh Nicolson put in place following notification from the IOCCO on 8 July 2015 that there were potential breaches of the code of practice, and information as to when each of the 12 measures in the plan were implemented, or are expected to be implemented,
7. information as to how much notice Police Scotland was given by the IOCCO that an inspection would take place on 15 June 2015,
8. a copy of the document provided to Police Scotland by the IOCCO which, according to DCC Richardson's evidence, put in context the IOCCO's finding that Police Scotland's interception of communications had been determined to be 'reckless',
9. information as to whether Detective Superintendent David Donaldson sought advice from his senior officers and/or Detective Superintendent Brenda Smith (the SRO responsible, as the Committee understands it following evidence on 15 December, for ensuring that Home Office guidance is appropriately disseminated to officers) before taking the decision to authorise the applications without judicial approval,
10. information as to when DCC Richardson first became aware that information published in the media relating to the handling of the Emma Caldwell murder investigation may have been provided from a source within Police Scotland and what action, if any, DCC Richardson took to address this issue,

11. information as to whether Police Scotland was investigating the possible leak of information relating to the murder investigation on 25 May (the date when, as the Committee understands it, following evidence led at the 15 December meeting, the Lord Advocate instructed Police Scotland to escalate the case),
12. a copy of the 25 May communication from the Lord Advocate to Police Scotland (if in written form),
13. information as to what official guidance was provided in relation to the new Acquisition and Disclosure of Communications Code of Practice 2015, and as to when any such guidance was received by Police Scotland,
14. details of any other information or guidance as to interpretation of/compliance with the new Code disseminated to officers (including a copy of the Powerpoint presentation referred to during evidence and information as to whether this included material from the College of Policing), and confirmation of the ranks of officer/levels of staff to whom such information or guidance was circulated,
15. information as to how many officers in Police Scotland are authorised to carry out interceptions of communications under the Regulation of Investigatory Powers Act 2000, and
16. information as to whether Police Scotland's Standing Operating Procedures have been updated to reflect the change to the code of practice and subsequent breaches.

ANNEXE B: EXTRACT FROM 7 JANUARY LETTER FROM DUNCAN CAMPBELL
(POLICE SCOTLAND), REPLYING TO CONVENER'S 16 DECEMBER LETTER

1. A timeline is now provided which endeavours to address most of the matters set out in the first numbered paragraph. The timeline has been drawn up with the assistance of Detective Superintendent Brenda Smith. The timeline does not include any matters bearing on (what the annexe itself characterised as) "...key decisions in relation to the five interceptions subsequently ruled to have been in contravention of the 2015 code of practice...". That is for the reasons set out in my said letter (of 23 December).

The timeline starts in 2014 and because of the introduction of the Data Retention Investigatory Powers Act 2014 ('DRIPA'). DRIPA provides a basis on which domestic companies can be required to retain certain types of communications data. DRIPA, and the Data Retention Regulations 2014 made under it, replaced the UK's previous data retention regime and followed on from a judgment of the European Court of Justice in April 2014. That judgment ruled that the EU Data Retention Directive was invalid. DRIPA was enacted, in part, to put the basis in law for retention of data in the UK beyond doubt.

The Counter-Terrorism & Security Act 2015 (CTSA) amended DRIPA, in addition, to provide for the retention of data to enable a Communications Service Provider ('CSP') to determine which device had been used to send a communication on the internet (known as IP resolution).

On 9 December 2014 the Home Office launched a consultation on proposals to update the Acquisition and Disclosure of Communications Data Code of Practice (which had been last updated in 2007) and published a new Retention of Communications Data Code of Practice – following the passage of DRIPA and the Data Retention Regulations – in July 2014. The key changes at that time included:

- Enhancing the operational independence of the authorising officer from the specific investigation for which communications data was required;
- Ensuring that where there may be concerns relating to professions that handle confidential or privileged information (e.g. lawyers or journalists), law enforcement should give protection and consideration to the level of intrusion and must record such applications.

Police Scotland was fully aware of the intended changes and was consulted at that time. The intended changes to independence were circulated to relevant individuals within Police Scotland during December 2014.

In the interim (October 2014 to 4 February 2015) Sir Paul Kennedy conducted his enquiry into the use of RIPA powers by the police to acquire communications data relating to journalistic sources. Detective Superintendent Smith had responsibility for compiling and providing the response to this enquiry. Sir Paul Kennedy's report was published on 4 February and recommended further changes to the Code of Practice to include the requirement for judicial authorisation in cases where communications data was sought to determine the source of journalistic information. That Report was shared with relevant individuals within Police Scotland.

Between 20 February and 6 March 2015 the Scottish Government and Police Scotland were in consultation with the Home Office regarding the intended changes to the Code. However, at this time there was insufficient time to consult with the Office of the Lord Advocate and a form of words was agreed in the interim.

On 24 February 2015 Detective Superintendent Smith updated the (Police Scotland) Communications Investigation Unit ('CIU') managers of the intended changes and to cease progression of any applications involving journalists. Detective Superintendent Smith further directed them to Annex D of Sir Paul Kennedy's report (of 4 February) for the definition of a journalist. As all applications for communications data were channelled through Detective Superintendent Smith's department (via Accredited Officers, otherwise known as Single Points of Contact - SPoCs) this would allow for a wider communications strategy to be completed following the change to the Code.

In addition, meetings were arranged with Detective Chief Superintendent Clark Cuzen, Head of Counter Corruption Unit, and Duncan Campbell, Interim Head of Legal Services, Police Scotland, and separately with Ms Lindsey Miller of Crown Office and Procurator Fiscal's Service, on 2 and 4 March 2015 to update on the intended changes to the Code and to discuss ways forward in securing judicial authorisation. Both Deputy Chief Constable Iain Livingstone (Crime & Special Operations) and Detective Chief Superintendent Mason (Head of Intelligence) were copied in on the correspondence.

The revised Code of Practice came into effect on 25 March 2015. CIU managers emailed instructions to the SPoCs regarding the new Code on 26 March 2015. A Home Office Power Point training documentation covering 'journalistic sources' was uploaded on 30 March 2015. This was uploaded onto the Home Office Communications Data Assistant ('CDA') website – the website is a knowledge and training website for all SPoCs.

Detective Superintendent Smith's CIU manager in West Command Area emailed all Force Authorising Officers on 7 April 2015 with the relevant changes to the Code and a hyperlink to the draft Code.

On the same day (i.e. 7 April 2015) intimation was received of a College of Policing Distance Learning Tradecraft (DLT) teleconference to take place on 8 May 2015. This was uploaded onto CDA. An invitation was sent to all SPoCs in Police Scotland. Designated Persons (DP) guidance documents were updated on 8 April to include the new changes; these were posted on the Police Scotland intranet.

The final iteration of the new Code was uploaded onto the CDA on 1 May 2015. The teleconference (DLT) took place on 6 May 2015.

2. I wrote to the Office of the Interception of Communications Commissioner seeking his view on your request for sight of copies of his reports further to inspections of the Scottish Forces carried out in 2012 to 2013. Your attention is drawn to paragraph 8.5 of the associated Code of Practice as the reason for doing so. It would be helpful to have your explicit confirmation that you do indeed request copies of the said IOCCO inspection reports.

I received a response on behalf of the Commissioner yesterday evening. In principle, the IOCCO position is to approve Police Scotland providing the Committee with copies of its said inspection reports; however, IOCCO has also suggested various redactions to be made to certain documents (before they are provided) and has also acknowledged that Police Scotland may have further redactions of its own to make.

For the sake of completeness, IOCCO takes the same position as regards the 2014 Police Scotland inspection report (and the actions we took in response).

What that means practically, however, is the close examination and redaction of fifteen documents (fourteen IOCCO reports and a Police Scotland response). I hope you will

appreciate that that will take time and will not be concluded before today's deadline. We will address this aspect of your request as soon as we are able and will be in touch again, under separate cover, in due course.

Otherwise, we reserve our position.

3. It is, and with all due respect to the person or persons proposing this question, not entirely clear to us what is intended to be encompassed in the phrase "accredited list" (and which appears in the third numbered paragraph). It might be more helpful if those drafting the question have regard to the relevant provisions in RIPA, the associated statutory instruments made thereunder and Code of Practice as appropriate to clarify or re-phrase the question.

If it is of assistance to the Committee, the Single Point of Contact (SPoC) is an accredited individual or group of individuals trained to facilitate the lawful acquisition of communications data ('CD') and effective cooperation between Police Scotland and Communications Service Providers ('CSPs'). To become accredited an individual must complete a course of training appropriate for the role of a SPoC and have been issued the relevant SPoC identifier (SPoC PIN). Details of all such accredited individuals are available to CSPs for authentication purposes and this List is maintained nationally.

All officers and staff who are deployed within the Police Scotland Communications Investigation Unit (CIU) have received accredited training and issued with a PIN. The CCU had a separate SPoC.

Accreditation is reviewed when an officer or member of staff leaves the department, retires or changes roles.

Meantime, we reserve our position.

4. (I refer you to my response at the second numbered paragraph above).

5. Detective Superintendent Brenda Smith and reference is made to the timeline - referred to above - provided in response to the first numbered paragraph .

6. A copy narration of the relevant parts of the Action plan is as undernoted. With the exception of the final Action all have been implemented. Work is currently ongoing – in association with the Lord President's Office – to determine a procedure to fulfil the 12th.

Action 1:

Processes are in place to ensure all submissions of Communications Data requests can only be made to independent Designated Persons/Authorising Officers who must be independent from operations and investigations when granting authorisations or giving notices related to those operations.

Action 2:

Any requests for Communications Data that fall within the scope of Section 3.78 to 3.79 of the Code of Practice (Communication Data involving certain professions) must be referred to the Force SRO for clarification of process/procedure, and referral for judicial review.

Action 3:

All new CCU Communications Data requests to be submitted to one of the Communications Intelligence Unit SPoCs.

Action 4:

A Chief Officer briefing/notification process to be implemented to ensure full consideration is given to Article 10 of the European Convention of Human Rights prior to embarking on any investigation relative to unauthorised disclosure of information to the media.

Action 5:

A Chief Officer briefing/notification process to be implemented to highlight to Chief Officers the intention to seek a judicial review in relation to an application to obtain communications data involving certain professions.

Action 6:

All data obtained from the 5 applications found to be in breach of the revised Code of Practice to be quarantined to ensure it is not inadvertently used or referred to in other investigations.

Action 7:

Provide a full report of any action taken in relation to all the data obtained from the 5 applications.

Action 8:

Seek Commissioner's view in relation to the retention of said data.

Action 9:

CCU senior management team portfolios to be realigned to facilitate the provision of enhanced support and oversight of the CCU Intelligence Section by a Detective Superintendent.

Action 10:

CCU to prepare a letter for DCC Richardson to notify Crown Office of these occurrences.

Action 11:

The SRO will ensure that all personnel involved in these processes have undertaken the relevant CPD training, specifically that the SRO and SPoCs have read the Commissioner's journalist enquiry report, as referenced in Section 3.16 of the Half Yearly Report.

Action 12:

Undertake further discussion with COPFS to formalise the process for judicial review.

[The Committee's attention is drawn to the observations made by the Commissioner and featuring in the IOCCO press statement of 25 November acknowledging the steps taken by Police Scotland since the said investigation.]

7. This was the annual inspection by IOCCO. Informal confirmation of the inspection was given to Police Scotland on 6 March 2015 and the official intimation was made to us on 23 March.
8. We are not in a position to provide you with a copy of this document and for the reasons already set out in my letter of 23 December 2015. For the Committee's further information, in the IOCCO letter to me of yesterday evening the position of the Commissioner was restated that there is to be no further dissemination or disclosure of the document. That restatement noted Mr Richardson's evidence to the Committee on 15 December.
9. We are not in a position to respond to this request for information and for the reasons set out in my letter of 23 December 2015.
10. We are not in a position to respond to this request and for the reasons set out in my letter of 23 December 2015.
11. We are not in a position to provide information in response to this request and for the reasons set out in my letter of 23 December 2015.
12. We are not in a position to provide information in response to this request and for the reasons set out in my letter of 23 December 2015.
13. The guidance was provided from the College of Policing ('CoP'). We await confirmation from the CoP as to whether we have permission to provide a copy of the training material. A copy of a circulation from Assistant Chief Constable Jo Byrne, dated 30 December 2014, on behalf of ACPO is attached meantime for your assistance. If we identify other relevant material which we are in a position to provide we will do so. Reference is also made to the timeline referred to at numbered paragraph 1 above.
14. We are still considering the extent to which we can properly release details of Police Scotland's relevant guidance (and training) materials. We presume the Committee's intention is to make any such material we provide publicly available.

More particularly, we are treating this as a request which encompasses our Communications Data Standard Operating Procedure ('SOP'). Certain aspects of that SOP are adjudged operationally sensitive and there may be potentially harmful consequences in it being published. When we have an agreed and redacted version of the SOP available we will forward that under separate cover. We may forward further materials (which may be redacted) under separate cover.

For details of the ranks of officer to whom the guidance was circulated you should have regard to the appropriate provisions in RIPA and the associated statutory instruments made thereunder.

15. As with the request set out at the third numbered paragraph it is, and with respect, not immediately clear to those instructing me what is intended in this question. It may be of more assistance if regard were to be had to the relevant provisions of the statutory scheme and then the question reformulated as appropriate.

16. The relevant Police Scotland SOP was updated further to issue of the Code of Practice and in consequence of relevant developments.