

Report of the Intelligence Services Commissioner for 2005-2006

Commissioner:
LORD BROWN
OF EATON-UNDER-HEYWOOD

Presented to Parliament by the Prime Minister
pursuant to Section 60(4) of the
Regulation of Investigatory Powers Act 2000

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From: The Right Honourable The Lord Brown of Eaton-under-Heywood



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The Rt. Hon. Tony Blair MP
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12th December 2006

I enclose my sixth, and final, Annual Report on the discharge of my functions under the Regulation of Investigatory Powers Act 2000. The Report covers my last fifteen months in office from 1 January 2005 to 31 March 2006. It is, of course, for you to decide, after consultation with me, how much of the report should be excluded from publication on the grounds that it is prejudicial to national security, to the prevention or detection of serious crime, to the economic well-being of the United Kingdom, or to the continued discharge of the functions of any public authority whose activities include activities that are subject to my review (section 60(5) of the Act). Following the practice consistently followed in previous years, I have taken the course of writing the report in two parts, the confidential annex containing those matters which in my view should not be published. I hope that this is a convenient course.

Lord Brown

Annual Report of the Intelligence Services Commissioner for 2004

Introduction

1. On 1 April 2000 I was appointed both Commissioner for the Security Service under section 4 of the Security Service Act 1989 (SSA) and Commissioner for the Secret Intelligence Service and Government Communications Headquarters under section 8 of the Intelligence Services Act 1994 (ISA). My appointment was initially for a period of three years.
2. On 2 October 2000, when Parts I, II, IV and V of the Regulation of Investigatory Powers Act 2000 (RIPA) came into force, section 4 of SSA and section 8 of ISA ceased to have effect and I thereupon took, and have since held, the office of Intelligence Services Commissioner under section 59(1) of RIPA. My current three-year appointment expired on 31 March 2006.
3. I am required by section 60(2) of RIPA as soon as practicable after the end of each calendar year to report with respect to the carrying out of my functions as the Intelligence Services Commissioner. This is my sixth, and final, annual report as Commissioner and it covers my final period in office: 1 January 2005 until 31 March 2006. In producing my report, I propose to follow, as I have done previously, the practice adopted by my predecessor of writing the report in two parts, this main part for publication, the other part being a confidential annex to include those matters which cannot be fully explained without disclosing sensitive information.

Regulation of Investigatory Powers Act 2000 (RIPA)

4. In my previous reports I outlined the scope of each Part of RIPA. It is, I think, useful to do so again.
5. **Part I of RIPA** is concerned with interception of communications and the acquisition and disclosure of communications data. The Interception of Communications Act 1985 has been repealed. RIPA incorporates a number of changes, in part to extend the protection for human rights required by the simultaneous coming into force of the Human Rights Act 1998 (and the substantive incorporation of the European Convention on Human Rights into domestic law), and in part to reflect the changed nature of the communications industry over recent years. Section 57 of RIPA provides for the appointment of an Interception of Communications Commissioner to review the Secretary of State's role in interception warrantry and the operation of the revised regime for acquiring communications data. That Commissioner during the currency of my own appointment was Sir Swinton Thomas and Part I of RIPA has been essentially his concern rather than mine.
6. **Part II of RIPA** for the first time provides a statutory basis for the authorisation and use by the intelligence agencies and certain other public authorities of covert surveillance (defined variously as intrusive surveillance and directed surveillance) and also of covert human intelligence sources (undercover officers, agents, informants and the like). Part II regulates the use of these intelligence techniques and safeguards the public from unnecessary invasions of their privacy.
7. **Part III of RIPA** (whilst not yet in force) contains provisions designed to maintain the effectiveness of existing law enforcement powers in the face of increasing criminal and hostile intelligence use of encryption. Specifically, it will

introduce a power to require disclosure of protected (encrypted) data. However, the use of information security and encryption products by terrorist and criminal suspects is not, I understand, as widespread as had been expected when RIPA was enacted in the year 2000. Equally the Government's investment in the National Technical Assistance Centre – a previously Home Office managed facility to undertake complex data processing – is enabling law enforcement agencies to understand, as far as necessary, protected electronic data. I understand that the Government is keeping under review the need to implement Part III of RIPA and that a public consultation has recently been undertaken.

8. **Part IV of RIPA** provides for independent judicial oversight of the various investigatory powers. My appointment under section 59 came within this part of the Act. Part IV also establishes a Tribunal as a means of redress for those who complain about the use of investigatory powers against them. This Part also provides for the issue and revision of codes of practice relating to the exercise and performance of certain of the powers and duties provided for in Parts I to III of RIPA and in section 5 of ISA. These codes are available to the general public and are a mine of information as to the workings of RIPA in practice.

9. **Part V of RIPA** deals with miscellaneous and supplemental matters. Perhaps most relevant for present purposes is section 74 which amends section 5 of ISA as to the circumstances in which the Secretary of State may issue property warrants, in particular by introducing for the first time an express criterion of proportionality.

Functions of the Intelligence Services Commissioner

10. My statutory functions have been as follows:

- a. To keep under review the exercise by the Secretary of State of his powers to issue, renew and cancel warrants under sections 5 and 6 of ISA, i.e., warrants for entry on or interference with property or with wireless telegraphy, warrants in practice issued by the Home Secretary or the Secretary of State for Northern Ireland.
- b. To keep under review the exercise by the Secretary of State of his powers to give, renew and cancel authorisations under section 7 of ISA, i.e., authorisations for acts done outside the United Kingdom, authorisations in practice issued by the Foreign Secretary.
- c. To keep under review the exercise and performance by the Secretary of State of his powers and duties under Part II of RIPA in relation to the activities of the intelligence services and (except in Northern Ireland) of Ministry of Defence officials and members of the armed forces, in practice the Secretary of State's powers and duties with regard to the grant of authorisations for intrusive surveillance.
- d. To keep under review the exercise and performance by members of the intelligence services of their powers and duties under Part II of RIPA, in particular with regard to the grant of authorisations for directed surveillance and for the conduct and use of covert human intelligence sources.
- e. To keep under review the exercise and performance in places other than Northern Ireland by Ministry of Defence officials and members of the armed forces of their powers and duties under Part II of RIPA, in particular with regard to the grant of authorisations for directed surveillance and the conduct and use of covert human intelligence sources.
- f. To give the Tribunal all such assistance (including my opinion on any issue falling to be determined by it) as it may require in connection with its investigation, consideration or determination of any matter.
- g. To make an annual report to the Prime Minister on the carrying out of my functions, such report to be laid before Parliament.

Functions of the Intelligence Services

11. In my previous reports I outlined the functions of the three intelligence services. I think it appropriate to re-state the specific statutory functions imposed upon each of the intelligence agencies and certain constraints to which all are subject.

The Security Service

12. The Security Service's functions are:

- a. The protection of national security, in particular against threats from espionage, terrorism and sabotage, from the activities of agents of foreign powers, and from actions intended to overthrow or undermine parliamentary democracy by political, industrial or violent means.
- b. Safeguarding the economic well-being of the United Kingdom against threats posed by the actions or intentions of persons outside the British Islands.
- c. To act in support of the activities of police forces and other law enforcement agencies in the prevention and detection of serious crime.

Secret Intelligence Service (SIS)

13. The functions of SIS are to obtain and provide information and to perform other tasks relating to the actions or intentions of persons outside the British Islands either

- a. in the interests of national security, with particular reference to the United Kingdom Government's defence and foreign policies, or
- b. in the interests of the economic well-being of the United Kingdom, or
- c. in support of the prevention or detection of serious crime.

Government Communications Headquarters (GCHQ)

14. GCHQ's functions are:

- a. To monitor or interfere with electromagnetic, acoustic and other emissions and any equipment producing such emissions and to obtain and provide information derived from or related to such emissions or equipment and from encrypted material, but only in the interests of national security, with particular reference to the United Kingdom Government's defence and foreign policies, or in the interests of the United Kingdom's economic well-being in relation to the actions or intentions of persons outside the British Islands, or in support of the prevention or detection of serious crime.
- b. To provide advice and assistance about languages (including technical terminology) and cryptography (and other such matters) to the armed services, the Government and other organisations as required.

15. The Security Service operates under the control of its Director General, SIS under the control of its Chief and GCHQ under the control of its Director. In broad terms each head of service is responsible for the efficiency of their agency and for ensuring that it only obtains and discloses information so far as is necessary for the proper discharge of its functions, and that it takes no action to further the interests of any UK political party. The Director General of the Security Service must ensure also that when it acts in support of others in the prevention and detection of serious crime its activities are co-ordinated with those of the police forces and other law enforcement agencies concerned.

16. In producing intelligence, both SIS and GCHQ respond to requirements laid on them by Ministers and the Joint Intelligence Committee.

17. In the area of preventing and detecting serious crime all three intelligence services work in support of the police and other law enforcement agencies to

combat the ever increasing threat of serious and organised crime from abroad. Each service has considerable expertise, experience and skills, which can prove invaluable in what are often complex operations.

The issue of property warrants

18. Section 5 of ISA as amended provides for the Secretary of State to issue warrants authorising entry on or interference with property or with wireless telegraphy (which for convenience I shall refer to as property warrants). Applications may be made by the Security Service, SIS or GCHQ in respect of their respective statutory functions. Additionally, where assisting the other intelligence services, the Security Service may apply on behalf of SIS and GCHQ, even if the proposed operation is outside the Security Service's own functions. This latter facility reflects the position that the Home Secretary or, in Northern Ireland, the Secretary of State for Northern Ireland, and the Security Service, should normally have responsibility for operations which may affect people in the United Kingdom. In the case of SIS's and GCHQ's anti-crime function, property warrants may not be issued for operations relating to property in the United Kingdom. Property warrants relating to property in the British Islands may, however, be issued to the Security Service in furtherance of their function under section 1(4) of the Security Service Act 1989 as amended (SSA) to act in support of the police or other enforcement agencies in the prevention and detection (as to the meaning of which see now section 1(5) of SSA and section 81(5) of RIPA) of serious crime (as to the meaning of which see section 81(2) and (3) of RIPA). Property warrants are usually signed by the Secretary of State under whose authority the agency acts, that is the Home Secretary for the Security Service and the Foreign Secretary for SIS and GCHQ. In their absence, however, or where otherwise appropriate such as in Northern Ireland, another Secretary of State can sign a warrant.

19. Section 5 of ISA, as amended first by section 2 of the Security Service Act 1996 and later by section 74 of RIPA, requires that before such a warrant is issued (to legitimise action by way of entry on or interference with property or with wireless telegraphy) the Secretary of State (a) must think the proposed action necessary for the purpose of assisting the particular intelligence agency to carry out one of its statutory functions as described above (section 5(2)(a)); (b) must be satisfied that the action is proportionate to what it seeks to achieve (section 5(2)(b)); and (c) must be satisfied that the agency has in place satisfactory arrangements for securing that it shall not obtain or disclose information except insofar as necessary for the proper discharge of one of its functions (section 5(2)(c)); and in deciding whether requirements (a) and (b) are satisfied, the Secretary of State must take into account whether what it is thought necessary to achieve by the action could reasonably be achieved by other means (section 5(2A)).

The giving of Section 7 authorisations

20. Under section 7 of ISA the Secretary of State (in practice the Foreign Secretary) may authorise SIS to carry out acts outside the United Kingdom which are necessary for the proper discharge of one of its functions. As with section 5 warrants, before the Secretary of State gives any such authority, he must first be satisfied of a number of matters: (a) that the acts being authorised (or acts in the course of an authorised operation) will be necessary for the proper discharge of an SIS function (section 7(3)(a)); (b) that satisfactory arrangements are in force to secure that nothing will be done in reliance on the authorisation beyond what is necessary for the proper discharge of an SIS function (section 7(3)(b)(i)); (c) that satisfactory arrangements are in force to secure that the nature and likely consequences of any acts which may be done in reliance on the authorisation will be reasonable having regard to the purposes for which they are carried out (section 7(3)(b)(ii)); and (d) that satisfactory arrangements are in force to secure that SIS shall not obtain or disclose information except insofar as is necessary for the proper discharge of one of its functions (section 7(3)(c)).

21. By virtue of section 7(4)(a) of ISA, authorisations may be given for acts of a specified description. These are known as class authorisations. Examples of the type of act which they could cover are the obtaining of documents which might involve theft, or payment to an agent which might involve bribery.

22. As I mentioned in my 2002 Report, section 7 was amended at the end of 2001 so as to apply also to GCHQ. The amendment was effected by section 116 of the Anti-Terrorism, Crime and Security Act 2001 and arose from a further consideration of the powers available to the intelligence services in the light of the events of 11 September 2001. Section 7 as amended allows GCHQ to be authorised to carry out acts outside the United Kingdom for the proper exercise of its functions in the same manner as SIS and (by a newly inserted subsection 9) puts beyond doubt any question as to whether activities taking place in the UK but intended only to relate to apparatus situated outside the UK are covered by section 7 authorisations.

23. The purpose of section 7 is to ensure that certain of SIS's (and now GCHQ's) activities overseas, which might otherwise expose its officers or agents to liability in the United Kingdom, are (where appropriate) expressly authorised by the Secretary of State.

Authorisation of intrusive surveillance

24. Intrusive surveillance is covert surveillance undertaken in residential premises or a private vehicle for the purposes of a specific investigation or operation in a manner likely to reveal private information about someone (including particularly information relating to their private or family life). Typically it would involve a surveillance device in someone's house or car. There is now provision for such action on the part of any of the intelligence services to be authorised by the Secretary of State by way of warrant (section 42 of RIPA). The Secretary of State can only authorise such action if he believes (a) that it is necessary in the interests of national security, or for the purpose of preventing or detecting serious crime, or in the interests of the United Kingdom's economic well-being (sections 32(2)(a) and 32(3)); and (b) that the authorised surveillance is proportionate to what it seeks to achieve (section 32(2)(b)); and, in deciding whether those two requirements are satisfied, the Secretary of State must take into account whether the information it is thought necessary to obtain by the surveillance could reasonably be obtained by other means. Section 42(2) of RIPA allows a single warrant issued by the Secretary of State to combine both the authorisation of intrusive surveillance and a property warrant under section 5 of ISA.

Authorisation of directed surveillance

25. Directed surveillance is covert surveillance but not intrusive surveillance undertaken for the purposes of a specific investigation or operation in a manner likely to reveal private information about someone. Section 28 of RIPA now provides for designated persons within each of the intelligence services (and within other public authorities including for present purposes the Ministry of Defence) to authorise such action but only if they believe that it is necessary in the interests of national security, for the purpose of preventing or detecting crime, or in the interests of the economic well-being of the UK, and that it is proportionate to what it seeks to achieve.

Authorisation of covert human intelligence sources

26. Covert human intelligence sources are essentially people who are members of or act on behalf of one of the intelligence services to obtain information from people who do not know that this information will reach the intelligence service. Section 29 of RIPA now provides for the conduct or use of a covert human intelligence source to be authorised by designated persons within the relevant intelligence service (or Ministry of Defence) provided that he believes that the authorisation is necessary in the interests of national security, for the purpose of preventing or detecting crime, or in the interests of the economic well-being of the UK, and that the conduct or use of the source is proportionate to what it seeks to achieve.

Discharge of my functions

Review of the Secretary of State's powers to issue warrants and grant authorisations

27. As I have already explained, property (and/or intrusive surveillance) warrants for the Security Service are generally issued by the Home Secretary and the Secretary of State for Northern Ireland and those for the SIS and GCHQ by the Foreign Secretary. Section 7 authorisations are invariably granted by the Foreign Secretary. In carrying out my functions during 2005-2006 I have, as usual, made visits to each of the security and intelligence agencies – the Security Service, SIS and GCHQ – as well as the Ministry of Defence, the Home Office and the Foreign and Commonwealth Office. I have also visited Belfast to examine authorisations relating to Northern Ireland. In the course of these visits I have been concerned to satisfy myself that the respective agencies' object in obtaining the information being sought has been in the discharge of one of its statutory functions; that the action in question has appeared to be both necessary for obtaining information which could not reasonably be obtained by other less intrusive means and also proportionate to what is sought to be achieved; and that such information is likely to be of substantial value.

28. I have read the files relating to a number of warrants and authorisations issued during the course of the year and some of those where the warrants or authorisations previously issued have been renewed. In so doing, I have also had the opportunity to review the material obtained from the operation. In several cases I have questioned those involved in the preparation of the warrant or authorisation application, those who administer the system for issuing warrants and authorisations and those who have implemented the warrant or authorisation once it has been issued and acted on the information obtained under it.

29. In issuing warrants and authorisations the respective Secretaries of State must largely rely on the accuracy of the information contained in the application and the candour of those applying for it. This depends essentially upon the integrity and quality of the personnel involved in the warrantry process both in the agencies and the government departments concerned. I regard it as one of my functions to check these matters so far as I can and as a result I am as satisfied as I believe I possibly can be that the applications made during the year in question properly reflected the position at the time of submission, and that the Secretaries of State have properly exercised their powers under the Acts. So too I am satisfied that the various members of the intelligence services (and Ministry of Defence and armed forces insofar as they too come within the ambit of my review) have properly exercised their powers and performed their duties under Part II of RIPA.

30. It is the duty of every member of each intelligence service, every official of the department of each relevant Secretary of State and every member of Her Majesty's Forces to disclose or provide to me all such documents and information as I may require to enable me to carry out my oversight functions – see section 60(1) of RIPA. I have enjoyed, therefore, very wide powers to ensure that I obtained maximum assistance from those I saw during my reviews. In exercising these powers throughout the course of my appointment I experienced the fullest possible co-operation on the part of all those concerned. Indeed, members of the various agencies at all levels have always appeared keen to confide in me all possibly relevant information and, where appropriate, to share with me their concerns. I remain firmly of the opinion that I expressed in my previous reports that all staff in this difficult and challenging area of work have been trustworthy, conscientious and dependable.

31. During the period covered by this report I met the Home Secretary and the Secretary of State for Defence. I was unable to see either the Secretary of State for Northern Ireland or the Foreign Secretary. It is quite clear to me from my discussions with the two Secretaries of State that I did see that they both take considerable care to satisfy themselves that the warrants applied for are necessary for the authorised purposes, and that what is proposed is proportionate. If either Secretary of State has felt he needs further information in order to satisfy himself

that the warrant should be granted then it is requested and given. Outright and final refusal of an application is comparatively rare, because the requesting agencies and the senior officials in the Secretary of State's Department scrutinise the applications with care before they are submitted for approval. However, the Secretary of State may refuse to grant the warrant if he or she considers, for example, that the strict requirements of necessity or proportionality are not met. The agencies are fully cognisant of the fact that the Secretary of State does not act as a "rubber stamp".

32. Consistently with the practice followed since annual reporting by the respective statutory Commissioners began, I do not propose to disclose publicly the numbers of warrants or authorisations issued to the agencies. It would, I believe, assist the operation of those hostile to the state if they were able to estimate even approximately the extent of the work of the Security Service, SIS and GCHQ in fulfilling their functions. The figures are, however, of interest and I have included them in the confidential annex to this report.

33. In April 2005 I met Ms Eva Plunkett (the Canadian Inspector General) and her accompanying officials. My discussions with Ms Plunkett, which covered various matters of mutual interest, were most useful.

34. Along with the Interception of Communications Commissioner, Sir Swinton Thomas, I attended the Intelligence and Security Committee in February 2006 for an informal discussion about our respective roles. With a new Chairman and mostly new members, the Committee had changed significantly since my last informal discussion with them in December 2001. There was a helpful exchange of views on a number of current issues.

The Investigatory Powers Tribunal

35. The Investigatory Powers Tribunal (the Tribunal) was established by section 65 of RIPA. The Tribunal came into being on 2 October 2000 and from that date assumed responsibility for the jurisdiction previously held by the Interception of Communications Tribunal, the Security Service Tribunal and the Intelligence Services Tribunal (the last two of which I presided over from their respective commencement dates until 1 April 2000 when I became the Commissioner and was succeeded by Lord Justice Mummery) and the complaints function of the Commissioner appointed under the Police Act 1997 as well as for claims under the Human Rights Act. The President of the Tribunal is Lord Justice Mummery with Mr. Justice Burton acting as Vice-President. In addition, six senior members of the legal profession serve on the Tribunal. A Registrar has also been appointed to help in the process of hearing claims alleging infringements of the Human Rights Act.

36. As I explained in paragraph 41 of my Annual Report for 2000, complaints to the Tribunal cannot easily be "categorised" under the three Tribunal systems that existed prior to RIPA. Consequently, I am unable to detail those complaints that relate to the interception of communications that would previously have been considered by the Interception of Communications Tribunal. I can only provide the information on the *total* number of complaints made to the Investigatory Powers Tribunal. The Tribunal received 80 new applications during the calendar year 1 January – 31 December 2005 and completed its investigation of 44 of these during the year as well as concluding its investigation of 49 of the 51 cases carried over from 2004. 38 cases have been carried forward to 2006.

Assistance to the Investigatory Powers Tribunal

37. Section 57(3) of RIPA requires me to give all such assistance to the Tribunal as the Tribunal may require in relation to investigations and other specified matters. I was not asked to assist the Tribunal during the period 2005-2006.

Determination made in favour of complainants by the Investigatory Powers Tribunal

38. During 2005 the Investigatory Powers Tribunal made a determination in favour of two complainants who lodged a joint complaint. This is the first time that the Tribunal has upheld a complaint. On the grounds of confidentiality, the Investigatory Powers Tribunal Rules 2000 prohibits me from disclosing specific details about the complaint, but it is sufficient to say that the conduct complained of was not authorized in accordance with the relevant provisions of RIPA nor was it a complaint against any of the agencies or persons whose conduct I have been responsible for reviewing. The Tribunal ordered payment of an award of compensation to the complainants and the respondents to destroy the relevant records as provided for by section 67(7) of RIPA.

Errors

39. Twelve errors in respect of RIPA authorisations and ISA warrants and three breaches in one of the agencies' handling arrangements were reported to me by the three agencies during the period of this report. As it is not possible for me to say much about these errors without revealing information of a sensitive nature, I have referred to them in more detail in the confidential annex. However, I can report that the majority of these errors occurred as a result of there being no valid authorisation or warrant in force in respect of surveillance and interference with property. There were also two instances of disclosures being made beyond the agreed handling arrangements. None of the cases involved bad faith or any deliberate departure from established practices. In all cases the agencies' internal procedures have been reviewed and strengthened.

Postscript

40. In signing off this, my sixth and final report, I would like to put on record my appreciation of the very considerable assistance and co-operation I have received throughout my time in office as Commissioner from all those both in the various intelligence agencies and in the issuing departments of state with whom I have had dealings. I would like to record too my strong belief that each of the intelligence agencies nowadays is properly to be regarded as a highly professional and disciplined service employing a large number of committed officers and staff of real quality. It is right that Commissioners (and other bodies such as the Parliamentary Intelligence and Security Committee) should be ever vigilant to ensure the Services' strict compliance with the legal constraints placed upon them. But it is right too to record my own judgment that the Services themselves are also intent upon acting scrupulously within the confines of the law. In recent years, as is well known, they have had their troubles in the gathering and evaluation of intelligence-critical tasks as must be obvious to all. Happily, however, legal compliance has not proved a significant problem.

41. Finally, I would like to welcome my successor, Sir Peter Gibson, upon his appointment as Intelligence Services Commissioner and to wish him as rewarding and interesting a period in office as I myself have enjoyed.

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