



Home Office

**To: Home Secretary
Security Minister
Permanent Secretary**

**From: James Dix, Investigatory
Powers Unit, OSCT
SCS: Tom Hurd, DG OSCT
Date: 9 April 2019**

[TE]

[REDACTED]: Investigatory Powers Compliance – handling update

Issue

You are aware of the current issue with MI5's safeguards under the IPA. This note sets out the current position and key next steps being undertaken.

Recommendation

We recommend that you:

- **Note** Sir Adrian's strong concern with how this issue has been handled by MI5 and how this has caused a breakdown in trust
- **Note** that Sir Adrian has agreed for now that sufficient safeguards are in place to enable him to sign warrants
- **Agree** to write to, and **call in**, DG MI5 regarding the issue
- **Agree** to meet Sir Adrian Fulford once you have spoken to DG MI5
- **Note** that this issue will become public through litigation
- **Note** the next steps on this work

Annexes

Annex A – Sir Adrian's legal note in support of his decision on warrantry [\[MI5 Core Document 77\]](#)

Annex B – Letter from DG MI5 to Home Secretary [\[MI5 Core Document 76\]](#)

Annex C – Details on next steps and wider handling

Background

1. You are aware that MI5 have a serious compliance issue in their systems that manage data obtained under their investigatory powers [REDACTED]. These compliance issues were notified to IPCO in February 2019. [TE]
2. As you are also aware, IPCO have conducted an inspection and provided a report to MI5. In response MI5 have put in place a number of mitigations. [REDACTED]

[REDACTED] As notified to private office on Friday, Sir Adrian considers that there are sufficient safeguards in place to enable him to continue considering warrants. His view contains knowledge of additional MI5 mitigations that were not in place when First Treasury Counsel advised.

LPP

MI5 handling of the issue

3. Sir Adrian met with DG OSCT on 5 April to discuss the issue. Although Sir Adrian was not notified until February 2019 he is clear that the MI5 Management Board were aware of the compliance risks in January 2018. In his note documenting his decision to continue considering warrants (at Annex A) he considered that the risks *"were understood to a level that MI5 should have considered the legality of continuing to [REDACTED] operational data in [REDACTED]."* [TE]
[use]
4. Sir Adrian's firmly held view is that the failure to notify him and his Commissioners of the issue sooner has seriously undermined their trust and confidence in MI5. Indeed he considered that the substance of the issue was dwarfed by MI5's failure to disclose the matter in a timely or sufficiently contrite fashion. He described it as both *"inexcusable"* and *"outrageous"*.
5. He considered MI5 to be in *"special measures"* and was clear that it would take significant time and effort on behalf of MI5 to repair that damage. He is clear that IPCO's inspection regime will require fundamental changes. This will involve more regular inspections with greater access to MI5 [REDACTED]. His view is that *"It will be unacceptable for the inspectors to be asked to rely on hearsay accounts of internal conversations between members of MI5. I am confident that a method of undertaking this form of inspection can be secured without causing undue anxiety for members of MI5."* [staff]
6. Since that meeting DG OSCT has spoken to MI5 seniors to underline the gravity of their situation given the breakdown of trust with IPCO. DG OSCT has made clear that DG MI5 needs to take personal leadership on this and should personally meet Sir Adrian to discuss this issue. He has also advised MI5 to take every step possible to facilitate IPCO's enhanced inspection regime. While this may be inherently uncomfortable for MI5 and will no doubt have some impact on effectiveness, this was the central part of rebuilding the trust that has now been lost.
7. MI5 Seniors have so far responded positively to this advice and have met internally to agree next steps.

8. DG MI5 has formally written to you, Home Secretary, copying in SOSFCA, SOSNI, Cabinet Secretary and No 10 to provide their latest position. That letter is attached at Annex B. In light of the strength of Sir Adrian's concerns we **recommend** that you **respond formally** to that letter and also **call in** DG MI5 to discuss this issue in person and express your dissatisfaction with how it has been handled. We will provide a draft response and further advice around the meeting later this week.
9. While it is for MI5 to take the lead on rebuilding trust with IPCO, the Home Office should look to support and shape that work. DG MI5 has set out their proposal for one of their non-executive directors to conduct a full review of the issue. Their getting this review right will be absolutely key to them winning back the trust of IPCO. DG OSCT is clear that we should, at all levels, work to ensure that this review is answering the right questions. MI5 have sought Home Office input in shaping that review and we consider you should utilise your draft response and meeting referred to above to set out the Home Office's expectations for that review and that you will want sight and sign off of the recommendations.

IPCO decision on future warrantry

10. Sir Adrian met MI5 on 4 April to discuss their mitigations. He was keen to ensure that he properly understood what mitigations were being put in place and how they were put in practice. He was also keen to discuss and agree processes by which IPCO could reassure themselves of the efficacy of those mitigations as part of their oversight role.
11. As set out above, having considered MI5's mitigations Sir Adrian considers that sufficient safeguards are in place to enable him to continue to consider warrantry and has since signed a number of warrants. While there is ongoing work to put in place technical safeguards [REDACTED], the key safeguards on which Sir Adrian is basing his decision at the present time are the clear additional guidance put out to staff about their responsibilities in relation to the copying and use of warranted material. Sir Adrian concludes that:

"On the basis of the mitigations set out in [MI5's updated guidance], combined with the answers to the questions that I have received, subject to certain critical caveats, I am satisfied that MI5 have the capability henceforth to handle warranted data in a way which is compliant with the IPA. The protection in the immediate future is that, following the Guidance recently issued and repeated to staff, there can now be no doubt that all [REDACTED] users are [TE] aware of the ways in which they need to handle warranted material, and particularly as regards "minimisation" and destruction."

12. He also stresses the ongoing risk to the regime if MI5 are unable to reassure him that appropriate controls have been put in place and the need for the long term mitigation to be progressed at pace:

*"The future will entirely depend on compliance by MI5 with the legislation and the adequacy of the internal **and** external inspection regimes. IPCO will need to be reassured on a continuing basis that new warranted material is being handled lawfully. In the absence of this reassurance, it is likely that future*

[TE]

warrant applications for data held in [REDACTED] will not be approved by the Judicial Commissioners, and I will expect that the proposed mitigations are progressed at pace.”

13. He re-iterated this position in his meeting with DG OSCT. **While Sir Adrian accepts that individual error is always a possibility and has a pragmatic attitude to solving these issues, any indication from now that non-compliance was a consistent and systematic issue could result in IPCO refusing to approve warrant applications.**

14. Sir Adrian has briefed his Judicial Commissioners on the issue and his decision note setting out his reasoning for continuing to consider warrants is being shared with other Judicial Commissioners. While each Judicial Commissioner is independent and may come to differing conclusions we expect Sir Adrian’s view to carry significant weight.

15. As set out in that note IPCO will be conducting a further inspection in week commencing 15 April. The key purpose of that inspection will be to probe the effectiveness of the mitigations put in place and to assess whether there are any further concerns and what, if any, additional mitigations might be needed.

16. We are therefore at the first key milestone in what will be an ongoing process rather than a one-off event and we stand ready to support MI5 as needed to address any emerging concerns arising from Sir Adrian and his Commissioners. Despite Sir Adrian’s clear frustrations with MI5 he was clear when meeting DG OSCT that the OSCT team had been very helpful.

17. [REDACTED]
[REDACTED] LPP

18. Given our duty of candour in the litigation, and the fact that the IPCO will want to cover the issue in his next annual report, **it is inevitable that the issue will be made public.** It is important that we are prepared for this eventuality. More detail on our ongoing work on broader handling can be found in Annex C.

Immediate next steps

19. As you are aware, we have engaged extensively with IPCO and MI5 on these issues in recent weeks. You (Home Secretary, Security Minister and Permanent Secretary) met Andrew Parker on 28 March and discussed the issues with [REDACTED] [TE] and its possible implications. Following this, the Security Minister visited Thames House on 1 April to be briefed on the detail of the issue and afterwards he spoke to Sir Adrian to reassure him that the Home Office and MI5 were treating the potential compliance issues seriously and implementing the mitigations that were possible.

20. In terms of the engagement with Sir Adrian as we move forward, there are high level messages which it is useful to reinforce across various relationships

(including the seriousness with which we view the issue, the importance of MI5 working very hard to put in place their mitigations, the importance of taking a considered view on our responses and our desire for their continuing involvement in verifying the work MI5 are undertaking).

21. We will want to assess Sir Adrian's, and his Judicial Commissioners', immediate reaction over the coming days but **we consider there will be benefit in you, Home Secretary, meeting Sir Adrian to discuss IPCO's review of the issues and MI5's response to date.** This meeting, which should take place following your meeting with DG MI5. This meeting will build on the previous engagement by the Security Minister and will enable you to demonstrate how seriously this issue is being taken within MI5 and across HMG more widely. We will provide further advice later this week.
22. Given the legal sensitivities and ongoing litigation we will, however, need to continue to be disciplined in our engagement with Sir Adrian over the substance of this issue. The next key step will be once we have received formal written advice from James Eadie QC on this issue.
23. One of the areas that the review will clearly need to focus on is why IPCO were not notified sooner. We are currently conducting a review of our own knowledge of this issue and have checked the minutes of our quarterly review meetings with MI5. These risks were not proactively raised by MI5. In June 2018 OSCT asked [risk register] MI5 about their [REDACTED], where the risk of MI5 not complying with their statutory obligations was rated 'red'. This led to a general discussion around MI5's programme of work to ensure it complied with the IP Act. The scale of the [TE] issue with [REDACTED] and associated risks were not made apparent during this discussion. It was recorded as an action in the minutes of the meeting that MI5 would brief the IPC on the risks around IP Act compliance. When OSCT asked what progress had been made in briefing the IPC in the next meetings we were informed that the rating of the risk had been downgraded to 'amber' and that MI5 no longer felt it was necessary to brief the IPC.
24. Prior to the commencement of various provisions in the IPA there was a process by which relevant parties formally wrote to the Home Office to confirm their readiness for commencement. Letters were received from MI5 on 17 May 2018 in relation to interception and equipment interference, including bulk and 9 July 2018 in relation to commencement of the bulk communications data and bulk personal data set provisions. Both letters were clear that MI5 would be ready to "*operate in full compliance with*" the relevant provisions of the IPA. While these letters set out a number of assumptions or caveats surrounding that confirmation no mention was made of a risk of non-compliance with the safeguards.

Further contingencies

25. Should IPCO or in slower time the courts conclude the MI5 safeguards are inadequate there are a number of options which can be progressed depending on the exact nature of the concern.

- a. Support MI5 to add further safeguards as necessary in order to address the concerns.
- b. If having put in place all possible safeguards then further, [REDACTED], mitigations could include MI5 stopping certain warrantry or [REDACTED] data differently, potentially through the imposition of conditions on warrants.
- c. If the operational changes would not address the concerns or the consequences of those changes are [REDACTED] then changes to guidance or legislation are potential other options though the latter would need significant further consideration. [REDACTED]

[using]

LPP

[REDACTED] While Ministers will be well placed to judge the Parliamentary handling of any legislative proposals we assess that the public, legal and political handling challenges of legislation to lower safeguards in line with operational practice would be significant. There would be serious questions as to whether any changes to the legislation which assisted MI5 were compatible with Article 8 ECHR (right to private/family life) and EU law, raising issues as to whether the legislation could be laid before Parliament compatibly with the Ministerial Code. Even if enacted, such legislation would then have to be defended against further litigation. [REDACTED]

Copy list

Special Advisers, Sam Ede, [REDACTED]

[REDACTED], Jonathan Emmett, [REDACTED]

Annex C – Wider handling

1. The work on the issue is broadly divided into 3 phases:

- ensuring current warrant applications can continue to be lawfully signed and approved by the judicial commissioners,
- managing the impact on current litigation, and
- wider discovery and assurance and broader engagement.

2. Further detail of current and future actions against each phase can be found in the table at the end of this annex. While there is clearly a need to progress all three phases of work at pace there is a relative need to prioritise across these strands and the work done to continue to sign off current and the impact on litigation will help guide the wider discovery and assurance work. [REDACTED]

Wider discovery and assurance and broader engagement

3. It's important that this issue continues to be handled carefully across the operational community, Government stakeholders and Ministerial colleagues, including former Home Secretaries and others who have, in the past, been responsible for signing off warrants on behalf of MI5.

4. On 29 April DG OSCT will host a meeting with senior counterparts from across Whitehall (all warrant granting departments and the Cabinet Office) and operational partners. The key aims will be to brief partners on how the issue with MI5 is being managed, to begin to look forward and plan the broader discovery work and to discuss wider handling, including briefing of former Home Secretaries and others who have authorised warrants as well as our [REDACTED].

5. DG MI5 has written to the Intelligence and Security Committee of Parliament to set out the findings from IPCO's report and to offer to talk through the issue in more detail if the committee would find it helpful. MI5 will keep the ISC updated on developments in their response to the issue through their usual Quarterly Reports to the committee.

Litigation

7. There are a number of cases ongoing before the High Court and Investigatory Powers Tribunal challenging the lawfulness of various aspects of the investigatory powers regime. As noted above there is a duty of candour under which we are obliged to disclose information which is relevant in the ongoing litigation. This includes the recent IPCO report on the matter. Given the sensitive nature of the material to be disclosed (concerning MI5 capabilities) we will need to apply for closed material proceedings to enable this disclosure in at least one case. However the court is likely to press for some details to be released to the claimant (and in the public domain) where this can be done without risking national security in order to ensure fair trial. As part of the work with Counsel we will want to carefully consider whether there is merit in disclosure of the issues proactively outside of the legal process, either ourselves or working with the IPC. We will provide further advice on this point.

Issue	Actions to date	Immediate next steps	Medium-long term actions
MI5 continued warranty	<p>[REDACTED]</p> <ul style="list-style-type: none"> • IPCO have briefed their judicial commissioner on the issue. They have been sent details of the MI5 mitigations. 	<ul style="list-style-type: none"> • Continue to work to support MI5 in addressing residual concerns with the sufficiency of the mitigations. • Work with IPCO to verify mitigations are being put in place and consider how best to reassess MI5 compliance. 	<ul style="list-style-type: none"> • As necessary – continue to support MI5 in addressing residual concerns with mitigations and involve IPCO in that process. • Assure longer term proposals
Litigation LPP	<p>[REDACTED]</p> <ul style="list-style-type: none"> • We have briefed Counsel working on other ongoing Investigatory powers cases and they are urgently considering our disclosure obligations. 	<ul style="list-style-type: none"> • Counsel to prepare detailed legal arguments for forthcoming hearings (in June) and support MI5 work to prepare associated evidence. • Application to be made to enable these issues to be heard in closed proceedings with associated process of opening up to claimants. • Consider whether, and if so how, to disclose the issue in other ongoing litigation. 	<ul style="list-style-type: none"> • Support MI5 and counsel in various litigation, ensuring our strongest case is made consistently across relevant litigation. • Contingency planning in the event of an adverse judgement on these, or other, issues
Cross system discovery and assurance	<ul style="list-style-type: none"> • [REDACTED] 	<ul style="list-style-type: none"> • [REDACTED] 	<ul style="list-style-type: none"> • Review why this decision took so long to be flagged to Home Office and IPCO, and consider whether changes to oversight processes are required to avoid repeat in future. MI5 have already begun work on this task.