Attorney General's Guidance

Regulation of Investigatory Powers (Jersey) Law 2005
Article 22
Guidelines for Crown Advocates and prosecutors

1) These guidelines concern the approach to be taken by prosecutors in applying Article 22 of the Regulation of Investigatory Powers (Jersey) Law 2005 ("RIPL").

Background

2) It has been long-standing policy that the fact that interception of communications has taken place in any particular case should remain secret and not be disclosed to the subject. This is because of the need to protect the continuing value of interception as a vital means of gathering intelligence about serious crime and activities which threaten national security. The argument is that if the use of the technique in particular cases were to be confirmed, the value of the technique would be diminished because targets would either know, or could deduce, when their communications might be intercepted and so could take avoiding action by using other, more secure means of communication.

3) In the context of legal proceedings, the policy that the fact of interception should remain secret is implemented by Article 21 of RIPL. Article 21 provides that no evidence shall be adduced, question asked, assertion or disclosure made or other thing done in, for the purposes of, or in connection with, any legal proceedings which discloses the contents of a communication which has been obtained following the issue of an interception warrant or a warrant under the Interception of Communications (Jersey) Law 1993, or any related communications data ("protected information"), or tends to suggest that certain events have occurred.

4) The effect of Article 21 is that the fact of interception of the subject's communications and the product of that interception cannot be relied upon or referred to by either party to the proceedings. This includes the disclosure process, of course. This protects the continuing value of interception whilst also creating a "level playing-field", in that neither side can gain any advantage from the interception. In the context of criminal proceedings, this means that the defendant cannot be prejudiced by the existence in the hands of the prosecution of intercept material which is adverse to his interests.

Detailed analysis

First Stage: action to be taken by the prosecutor

Article 22(7)(a) of RIPL provides:

"*Nothing in Article 22(1) shall prohibit any such disclosure of any information that continues to be available for disclosure as is confined to . . . a disclosure to a person conducting a criminal*

prosecution for the purpose only of enabling that person to determine what is required of him or her by his or her duty to secure the fairness of the prosecution;"

5) If protected information is disclosed to a Crown Advocate or prosecutor, as permitted by Article 22(7)(a), the first step that should be taken by the Crown Advocate or prosecutor is to review any information regarding an interception that remains extant at the time that he or she has conduct of the case[1]. In reviewing it, the Crown Advocate or prosecutor should seek to identify any information whose existence, if no action was taken by the prosecution, might result in unfairness. Experience suggests that the most likely example of such potential unfairness is where the evidence in the case is such that the Court or jury may draw an inference which intercept shows to be wrong, and to leave this uncorrected will result in the defence being disadvantaged.

6) If, in the view of the Crown Advocate or prosecutor, to take no action would render the proceedings unfair, he or she should, first consulting with the Attorney General, take such steps as are available to him or her to secure the fairness of the proceedings provided these steps do not contravene Article 22(10). In the example given above, such steps could include:

    a) putting the prosecution case in such a way that the misleading inference is not drawn by the Court or jury; or

    b) not relying upon the evidence which makes the information relevant; or

    c) discontinuing that part of the prosecution case in relation to which the protected information is relevant, by amending a charge or count on the indictment or offering no evidence on such a charge or count; or

    d) making an admission of fact[2].

7) There is no requirement for the Crown Advocate or prosecutor to notify the Bailiff or judge of the action that he or she has taken or proposes to take. Such a course should only be taken if he or she considers it essential in the interests of justice to do so (see below).

Second Stage: disclosure to the Bailiff (or, if in the Royal Court, the trial judge)

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1 Article 19(1) of RIPL provides that it is the duty of the Attorney General to ensure that arrangements are in place to ensure that (amongst other matters) intercept material is retained by the intercepting agencies only for as long as is necessary for any of the authorised purposes. The authorised purposes include retention which -

> *"is necessary to ensure that a person conducting a criminal prosecution has the information he needs to determine what is required of that person by his or her duty to secure the fairness of the prosecution."* (Article 19(4)(d))

2 This is acceptable as long as to do so would not contravene Article 21 i.e. reveal the existence of an interception warrant. Crown Advocates and prosecutors must bear in mind that such a breach might conceivably occur not only from the factual content of the admission, but also from the circumstances in which it is made.

8) There may be some cases (although these are likely to be rare) where the Crown Advocate or prosecutor considers that he or she cannot secure the fairness of the proceedings without assistance from the Bailiff. In recognition of this, Article 22(7)(b) of RIPL provides that in certain limited circumstances, the Crown Advocate or prosecutor may invite the Bailiff to order a disclosure of the protected information to the Bailiff.

9) If the Crown Advocate or prosecutor considers that he or she requires the assistance of the Bailiff to ensure the fairness of the proceedings, or he or she is in doubt as to whether the result of taking the steps outlined at paragraph 6 above would ensure fairness, he or she must apply to see the Bailiff *ex parte*. Although it is unlikely that notice of any such application will in practice be given to the defence, the ordinary rules on the extent to which the defence should have notice of any ex parte application to the Court in a criminal case, apply. It is the duty of the Crown Advocate to consider these on a case by case basis. Under Article 22(8), the Bailiff shall not order a disclosure to him or her except where he or she is satisfied that the exceptional circumstances of the case make that disclosure essential in the interests of justice. Before the Bailiff is in a position to order such disclosure the Crown Advocate or prosecutor will need to impart to the Bailiff such information, but only such information, as is necessary to demonstrate that exceptional circumstances mean that the Crown Advocate or prosecutor acting alone cannot secure the fairness of the proceedings. Experience in England and Wales suggests that exceptional circumstances in the course of a trial justifying disclosure to the Bailiff arise only in the following two situations:

   a) where the Bailiff's assistance is necessary to ensure the fairness of the trial

      This situation may arise in the example given at paragraph 5 above, where there is a risk that the Court or jury might draw an inference from certain facts, which protected information shows would be the wrong inference, and the Crown Advocate or prosecutor is unable to ensure that the Court or jury will not draw this inference by his or her actions alone. The purpose in informing the Bailiff is so that the Bailiff will then be in a position to ensure fairness by:

      i) summing up in a way which will ensure that the wrong inference is not drawn; or
      ii) giving appropriate directions to the Jurats or jury; or
      iii) requiring the prosecution to make an admission of fact which the Bailiff thinks essential in the interests of justice if he or she is of the opinion that exceptional circumstances require him or her to make such a direction (Article 22(9)). However, such a direction must not authorise or require anything to be done which discloses any of the contents of an intercepted communication or related data or tends to suggest that anything falling within Article 21(2) has or may have occurred or be going to occur (Article 22(10)). Situations where an admission of fact is required are likely to be rare. The Bailiff must be of the view that proceedings could not be continued unless an admission of fact is made (and the conditions in Article 22(9) are satisfied). There may be other ways in which it is possible for the Bailiff to ensure fairness, such as those outlined at (i) and (ii) above.

      In practice, no question of taking the action at (i)-(iii) arises if the protected information is already contained in a separate document in another form that has

been or can be disclosed without contravening Article 21(1), and this disclosure will secure the fairness of the proceedings.

b) where the Bailiff requires knowledge of the protected material for some other purpose

This situation may arise where, usually in the context of a PIT application, the true significance of, or duty of disclosure in relation to, other material being considered for disclosure by the Bailiff, cannot be appraised by the Bailiff without reference to protected information. Disclosure to the Bailiff of the protected information without more may be sufficient to enable him or her to appraise the material, but once he or she has seen the protected information the Bailiff may also conclude that the conditions in Article 22(9) are satisfied so that an admission of fact by the prosecution is required in addition to or instead of disclosure of the non-protected material.

Another example is a case where protected information underlies operational decisions which are likely to be the subject of cross- examination and it is necessary to inform the Bailiff of the existence of the protected information to enable him or her to deal with the issue when the questions are first posed in a way which ensures Article 21(1) is not contravened.

What if the actions of the Crown Advocate or prosecutor and/or the Bailiff cannot ensure the fairness of the proceedings?

10) There may be very rare cases in which no action taken by the Crown Advocate or prosecutor and/or the Bailiff can prevent the continuation of the proceedings being unfair, e.g. where the requirements of fairness could only be met if the prosecution were to make an admission, but it cannot do so without contravening Article 22(10). In that situation the Crown Advocate or prosecutor will have no option but to offer no evidence on the charge in question, or to discontinue the proceedings in their entirety.

Responding to questions about interception

11) Crown Advocates or prosecutors are sometimes placed in a situation in which they are asked by the court or by the defence whether interception has taken place or whether protected information exists. Whether or not interception has taken place or protected information exists, an answer in the following terms, or similar should be given –

"*I am not in a position to answer that, but I am aware of Articles 21 and 22 of the Regulation of Investigatory Powers Law 2005 and the Attorney General's Guidelines on the Disclosure of Information in Exceptional Circumstances under Article 22*."

12) In a case where interception has taken place or protected information exists, an answer in these terms will avoid a breach of the prohibition in Article 21 while providing assurance that the Crown Advocate or prosecutor is aware of his or her obligations.

13) For the avoidance of doubt, any notification or disclosure of information to the Bailiff in accordance with paragraphs 8-11 must be *ex parte*. It will never be appropriate for Crown Advocates or prosecutors to volunteer, either inter parties or to the Bailiff

ex parte, that interception has taken place or that protected information exists, save in accordance with Article 22 as elaborated in these Guidelines. Crown Advocates are reminded of the strictness in the opening lines of paragraph 8 above.

Further assistance

14) Should a Crown Advocate or prosecutor be unsure as to the application of these guidelines in any particular case, further guidance should be sought from the Attorney General.

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