



The Port Examination Codes of Practice and National Security Determinations Guidance Regulations 2020

Fact Sheet

What does this statutory instrument (SI) do?

Subject to Parliament's approval, this SI will bring into operation:

- A revised Code of Practice for the counter-terrorism port examination powers under Schedule 7 to the Terrorism Act 2000;
- A similar Code of Practice for the new hostile state activity port examination powers under Schedule 3 to the Counter-Terrorism and Border Security 2019 Act; and
- Revised guidance under the Protection of Freedoms Act 2012 relating to biometric retention provisions amended by the 2019 Act.

Why do we need it?

- The Counter-Terrorism and Border Security Act 2019 introduced measures to close gaps in existing counter-terrorism legislation and to ensure that terrorist offending can be disrupted more rapidly. In response to the attempted assassination of Sergei and Yulia Skripal in March 2018, it also created new powers to strengthen the UK's defences against hostile state activity.
- Many of these measures came into effect shortly after Royal Assent of the 2019 Act. However, the port examination powers and changes to the biometric retention provisions cannot come into effect until associated codes of practice and guidance have been drafted, subject to consultation and approved by Parliament.
- The codes and guidance instruct and guide officers in the procedural exercise of these important powers, including rights and duties, as well as additional safeguards.

Background

- The powers under Schedule 7 to the Terrorism Act 2000 allow a counter-terrorism port and border officer to stop, question, search and detain a person at a UK port or the Northern Ireland border area to determine whether they are or have been involved in terrorism. These powers have been integral to counter-terrorism work for two decades.
- Schedule 3 to the 2019 Act created similar powers to support law enforcement partners in efforts to detect and disrupt hostile state actors.
- The guidance issued under section 22 of the Protection of Freedoms Act 2012 provides direction to the police and to other relevant law enforcement authorities about the making or renewing of a National Security Determination (NSD), allowing the retention and use of biometric material for national security purposes.

What changes have been made to the draft Schedule 7 and 3 codes of practice?

In response to public consultation and feedback received from the Independent Reviewer of Terrorism Legislation, we have made changes to the draft Schedule 7 and 3 codes of practice to strengthen the provisions and provide further clarity on how they will work in practice. We have:

- provided further clarity on the process and timeframes relating to new seizure and retention powers under Schedule 3;
- strengthened protections for confidential material and provided additional safeguards for journalistic sources and information subject to legal privilege;
- mandated the timely provision of, or access to, relevant information and material relating to Schedule 7 or 3 powers to assist an examinee or their representatives;
- ensured appropriate complaints procedures are in place and accessible to any person who has been the subject of a Schedule 7 or 3 examination; and
- provided further clarity on the training and accreditation standards for officers.

Does the Schedule 3 code provide further information about what would constitute 'hostile activity'?

- Yes. Annex C to the draft Schedule 3 code provides further information about the types of harmful activity the Government is concerned about, including espionage, sabotage, assassination and subversion.

What safeguards are in place to protect those examined under these powers?

- Only accredited officers that have completed their training can exercise these powers and they must do so in accordance with the relevant code of practice. Accreditation is reviewed biennially and anyone who fails to complete their training will not be able to exercise the powers.
- The powers will also be subject to independent oversight. For Schedule 7, this will continue to be through the role of the Independent Reviewer of Terrorism Legislation who is responsible for reviewing how terrorism powers are used and applied. A similar role will be fulfilled by the Investigatory Powers Commissioner with respect to Schedule 3 powers.
- Every individual subject to an examination will be provided with information about their rights and duties under the legislation and how to make a complaint if they are unhappy about their treatment.

What further clarity has been provided on the new Schedule 3 retention powers?

- Schedule 3 includes additional powers to allow an examining officer to retain and copy a person's property (including confidential material) subject to the authorisation of the Investigatory Powers Commissioner.
- The code now provides a clearer articulation of the procedural expectations and timeframes; a focus on the timely and accurate provision of information to the property owner to ensure that they fully understand their right to make representations; as well as further clarity on how decisions will be made and communicated by the Investigatory Powers Commissioner.
- It also mandates that officers, in using these powers, notify the Commissioner where a person's property has been identified as comprising confidential material

How have you strengthened protections for journalists?

- Changes to the draft codes make clear that all confidential material is to be handled with care to minimise the risk of it being seen by a frontline officer.
- Officers will be prohibited from reviewing confidential material in order to verify whether a person's claim to be in possession of such material is true. Instead, they must seek the assistance of independent counsel to verify a person's claim. This is an important new safeguard and is modelled on processes employed by other public bodies and upheld by the High Court.
- Protections for confidential material have been extended so that they also apply with respect to confidential journalistic sources.
- Additional protections for confidential journalistic sources have been included to protect individuals where there is potential for disclosure during the questioning of an individual. The codes now prohibit officers from asking a person to identify a confidential source.
- The codes now place greater emphasis on respecting confidential material and protecting journalistic sources, as well as the need to exercise the powers in accordance with human rights legislation.

Can officers switch between the Schedule 7 and 3 powers?

- There is nothing to preclude an officer who has begun an examination under one power, from switching to use the other power, if the officer decides that this would be a necessary and proportionate course of action.
- Both draft codes of practice are clear that where this is the case, examination under either power, or a combination of both, must not exceed a period of 6 hours.
- Where such a situation occurs with respect to a person who has been detained, any rights that have been exercised with respect to the first detention may continue to be exercised during the second detention.

What changes have been made to biometric retention guidance?

The biometric retention guidance, which has been subject to consultation with a range of stakeholders, including the Biometrics Commissioner and the Lord Advocate, primarily reflects amendments made by Schedule 2 to the 2019 Act to National Security Determinations (NSDs). NSDs allow the biometrics (fingerprints and DNA profiles) of un-convicted individuals of national security interest to be retained after initial specified statutory periods have expired, if doing so is necessary and proportionate for the purpose of national security. The changes include:

- increasing the maximum length of an NSD from two to five years;
- allowing any Chief Officer of a police force in England and Wales to make an NSD in respect of biometric data taken by any police force in England and Wales;
- allowing multiple sets of fingerprints relating to the same individual to be retained under a single NSD;
- bringing the rules applying to the automatic retention of biometric data of persons arrested for qualifying terrorism offences under the Police and Criminal Evidence Act 1984 into line with those applying to persons arrested for the same offences under the Terrorism Act 2000; and
- making clear that in circumstances where an individual has been arrested but not convicted of a non-terrorist related offence, the biometric data can be further retained for a reasonable period to allow for an NSD to be considered if appropriate, and that if an NSD application is being considered a reasonable period may be up to six months.

Why are you extending the length of time that you can retain biometric information under an NSD?

- Operational experience had shown that the previous two-year length was too short in many cases, and that those involved in terrorism will often pose a more enduring threat than this. This change will help avoid police forces and the Biometrics Commissioner reviewing NSDs more frequently than is necessary. This extended period will strike a better balance between allowing the police to prioritise their resource and retaining the safeguard of regular reviews.
- At the Biometrics Commissioner's suggestion, the revised guidance also makes clear that Chief Officers should consider making an NSD for a shorter period than the statutory maximum, if they are not satisfied that retention for the full period would be necessary and proportionate in all the circumstances of the case.