



Home Office

Consultation on the ‘Code of Practice for officers exercising functions under Schedule 1 of the Counter-Terrorism and Security Act 2015 in connection with seizing and retaining travel documents’

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¹ As amended in the light of this consultation. This is the Code of Practice as published following Royal Assent. Any future amendments will be published at <https://www.gov.uk/government/publications/code-of-practice-for-police-and-border-officials-on-seizing-travel-documents>

Introduction

This document is the summary of responses to the consultation on the draft 'Code of Practice for officers exercising functions under Schedule 1 of the Counter-Terrorism and Security Act 2015 in connection with seizing and retaining travel documents'.

It covers:

- the background to the legislative provisions
- a summary of responses to the consultation exercise
- responses to specific questions posed in the consultation
- amendments made to the Code of Practice as a result of this consultation

Background

The Government introduced the Counter Terrorism and Security Bill to Parliament on Wednesday 26 November 2014. The Bill received Royal Assent on Thursday 12 February 2015.

This Act is a direct response to the increased terrorist threat faced in the UK, and includes a power to seize and retain, temporarily, travel documents at a port (or in the Northern Ireland border area) where there are reasonable grounds to suspect that a person is travelling for the purposes of involvement in terrorism-related activity outside the United Kingdom.

Travel documents may be retained for an initial period of 14 days while further investigation takes place (including consideration of alternative disruptions). The Code of Practice gives specific guidance to police officers and Border Force officers on exercising the power to seize and retain travel documents.

The police may apply to the courts to extend the retention period up to a maximum period of 30 days.

Summary of responses

A total of four responses were received.

Respondents to the on-line survey were not required to identify themselves so the survey could be answered anonymously if individuals wished. However all respondents chose to identify themselves as representing the police.

In addition to the responses made to the formal consultation exercise, the Home Office has also considered contributions made by Parliamentarians during the passage of the Act through Parliament and in particular to the recommendations of the Joint Committee on Human Rights.

As a result, provision has been made to:

- allow access to legal aid for civil proceedings under this power throughout the UK (should the individual concerned meet statutory means and merit tests); and
- provide temporary support arrangements for qualifying individuals (to be considered on a case by case basis) which can be extended to those travelling with the individual should this prove necessary and appropriate.

The responses were, in the main, positive, indicating the Code of Practice gave clear guidance on the exercise of these powers and the process to be followed in both seeking extensions of the period of retention from the courts and in recording the manner in which the powers have been exercised.

The responses to this consultation have assisted in informing the development of the guidance in the Code of Practice to ensure these powers are exercised appropriately and effectively.

The consultation commenced on 17 December 2014. A number of potentially interested organisations² were directly notified of the launch of the consultation. The consultation period concluded on 30 January 2015.

² Including police areas across the UK and community and regulatory organisations.

Responses to specific questions³

1. Please tell us the extent to which you agree the code appropriately describes who is subject to the new power:

The responses indicated the definition of individuals to whom the powers would apply was clearly considered and explained for operational staff.

2. Please tell us the extent to which you agree the code appropriately describes who can exercise the new power:

In the responses to this question, two respondents indicated the Code of Practice was clear and concise with regard to who can exercise this power.

One other respondent raised queries with regard to the methodology of accreditation for Border Force officers, how accredited Border Force officers would be identified by the police when required, and indicated a concern about how the relevant procedures would be implemented between the different parties to take action under the Code.

In response: The Code of Practice advises that accredited Border Force officers are entitled both to determine whether the test is met and to exercise the powers under Schedule 1. The Code also advises that at present the Secretary of State has not designated any Border Force officers as accredited officers.

The Secretary of State will not designate Border Force officers to be accredited without first having revised the Code of Practice. The Code therefore makes no provision about the exercise of powers under Schedule 1 by accredited Border Force officers.

3. Please tell us the extent to which you agree the code appropriately describes the designation and training processes:

Comments indicated paragraphs 10, 39 and 40 adequately described the designation and training process. In another response, concern was raised about a lack of clarity for Border Force officers, specifically referring to a lack of guidance for accredited Border Force officers or explaining the training they would undertake.

In response, and as above (question 2), the Secretary of State will not designate Border Force officers to be accredited without having first revised the Code of Practice.

A designated Border Force officer is one who has been designated by the Secretary of State to exercise powers under Schedule 1 where directed to do so by a police officer. Designated Border Force officers are not entitled to determine whether the test has been met. Designated Border Force officers will have completed the required training in the exercise of the power and received confirmation of their designated status, and will at all times require police direction to exercise powers under the Act.

4. Please tell us the extent to which you agree the code appropriately describes the test for exercising the new power:

The responses indicated the Code of Practice was clear and straightforward and clearly articulated the 'reasonable suspicion' test.

³ Any comments refer to paragraphing in the Code of Practice as originally laid. Government responses refer to the corresponding paragraphs in the amended Code of Practice.

5. Please tell us the extent to which you agree the code appropriately describes how the exercise of the power is authorised:

In their answers two respondents indicated the guidance was 'clear and straightforward' and that 'clear direction' was provided for operational staff.

Another response suggested consideration should be given to summarising the role of the authorising and reviewing (police) officers, and giving their respective ranks in the introduction to the Code of Practice. The respondent felt the references to the roles of authorising and reviewing police officers might be confusing and that the reference set out in paragraph 8 of the Code could be overlooked.

In response: We consider that the Code of Practice contains detailed reference to required levels of authority and the oversight by Chief Officers in subsequent sections of the Code of Practice (in particular paragraph 16 which sets out the review process in some detail). The police have additionally been briefed on the use of this power and the Government does not consider further amendment or clarification to be necessary.

6. Please tell us the extent to which you agree the code appropriately describes the power to hold travel documents for up to 14 days or up to 30 days, if approved by a court:

Two respondents commented that the guidance was 'clear and straightforward' and 'self explanatory, and that the information was clearly set out.

One respondent commented their only concern was over the level of awareness that would be held by the courts.

In response, Courts in England and Wales which may list applications for hearings under Schedule 1 of the Act have received a briefing from HM Courts and Tribunals Service in England and Wales. The Home Office has shared this briefing and supplementary guidance with the devolved administrations to support preparations for applications heard in their jurisdictions.

This briefing and process guidance sets out key elements of the Code of Practice, particularly the provisions relating to the court considering the appropriateness of extending the retention period on application up to a maximum of 30 days.

7. Please tell us the extent to which you agree the code appropriately describes how information is provided to people subject to the power:

Respondents indicated the guidance was clear on this point, noting that the issue of disclosure was complex. Respondents recognised the need to prevent the disclosure of information which could prejudice national security while balancing the need to provide written notification of the reasons for seizure where requested.

One respondent described the references in the Code as 'a comprehensive list of what must be issued and information that must be provided'.

In response: We have clarified in the Code of Practice the need for consultation, on a case by case basis, with information holders or owners, in advance of any disclosure of information relating to the exercise of this power.

8. Please tell us the extent to which you agree the code appropriately describes the new criminal offence related to this power:

Respondents agreed the Code of Practice was, on this point, clear and straightforward.

9. Please tell us the extent to which you agree the code appropriately describes the judicial oversight provisions:

Respondents indicated a key issue would be the level of briefing provided to judicial authorities in advance of the implementation of this power (in line with comments made in respect of question 6).

In addition there was a suggestion that some of the language used in paragraph 58 might be somewhat confusing (particularly around whether the Code was referring to criminal or civil proceedings). One respondent said he was unable to clearly identify the judicial oversight provisions from the Code of Practice.

In response: The guidance contained in the relevant paragraphs (61 to 68 under the amended Code of Practice) relates to the judicial oversight of the civil power to retain documents on application beyond the fourteen day period, and does not relate to criminal law.

The criminal offence is clearly set out in paragraph 34 of the revised Code of Practice, specifying that, at the point of the exercise of the power, it is an offence for an individual to:

(i) refuse to hand over all travel documents in their possession without reasonable excuse to do so; or

(ii) intentionally obstruct or seek to frustrate a search.

10. Please tell us the extent to which you agree the code appropriately describes the safeguards against repeated use of the power:

The safeguards were described as appropriately described in paragraphs 64 and 65. One respondent referred to the 'notable restriction' on the time limit for the exercise of the power and the timeliness with which applications must be made to the courts.

Another respondent observed that each and every intended repeated use would be judged in terms of the European Convention on Human Rights.

In response: The Code of Practice clearly sets out the restrictions on the repeated use of this power in paragraphs 67 and 68. The revised Code of Practice specifies that the power is not meant to be used as a long term disruption tool but as a means to enable the police to take immediate action to disrupt travel while investigations are undertaken into whether an alternative longer term disruptive action would be appropriate.

The Code of Practice is explicit in saying there must be exceptional circumstances justifying the further use of this power in relation to the same person, and that it would be highly unusual for the power to be exercised in quick succession against the same person in a six month period.

We have considered the implications of the Human Rights Act 1998 and are satisfied that the provisions of the Counter-Terrorism and Security Act are compatible with the Convention rights.

In addition, paragraph 26 of the Code of Practice explicitly covers the duties and responsibilities of police and Border Force officers in exercising functions under the Code of Practice (specifically section 149 of the Equality Act 2010).

11. Please tell us any additional comments you may have about this Code of Practice:

There were additional comments concerning:

- (i) specific guidance for Chief Officers;
- (ii) documents already in the possession of Border Force officers and whether those documents could lawfully be passed to the police;
- (iii) timescales for authorisation;
- (iv) aligning the Code of Practice with the Police and Criminal Evidence Act (PACE) Codes of Practice in the context of recording the authority given by senior police officers.

In response:

- (i) there are a wide range of possible scenarios and it would not be appropriate for this guidance to proscribe how an officer of this seniority should respond in detail to all of the potential variations. Chief Officers have received a briefing on the exercise of the power;
- (ii) paragraph 15 is clear that while only designated Border Force officers may act under the direction of the police to exercise powers under the Act, where documents are already in the lawful possession of a Border Force officer (designated or not) s/he may be directed to either retain those documents while seeking police advice, or to pass those documents to the police;
- (iii) any authorisation to seize and retain a travel document should be conducted as soon as is practicably possible after the seizure of the documents. The Code is also clear that there should be a review by a senior police officer (started within 72 hours of seizure) of the authorisation decision;
- (iv) the Code of Practice has been amended in the light of this comment to reflect that if authorisation is given verbally it should be recorded in writing as soon as is practicably possible.

Further amendments to the Code of Practice

In addition to the revisions to the Code described above, during the Parliamentary passage of the Counter-Terrorism and Security Bill the Government amended the Bill to provide that the exercise of these powers will be subject to review by the Independent Reviewer of Terrorism Legislation.

Amendments were also made to the Code to provide that:

- a. the offer to arrange temporary support (to which reference was made in the original draft of the Code of Practice at paragraph 54) in respect of an individual not resident in the United Kingdom without sufficient means to provide for basic living costs may, if necessary, be extended to travel companions of a person whose travel documents have

been retained. Individual circumstances should be assessed by the officer exercising the power; and

- b. an individual may qualify for civil legal aid for proceedings relating to an application to the courts to extend the retention period, subject to the individual satisfying statutory means and merits tests.

The amended Code of Practice was laid before Parliament on Thursday 12 February 2015 and came into effect on the following day.

Consultation principles

The principles that Government departments and other public bodies should adopt for engaging stakeholders when developing policy and legislation are set out in the consultation principles.

<https://www.gov.uk/government/publications/consultation-principles-guidance>