

*Status: Point in time view as at 13/08/2020.*

*Changes to legislation: There are currently no known outstanding effects for the Counter-Terrorism and Border Security Act 2019, Cross Heading: Retention of property. (See end of Document for details)*

## SCHEDULES

### SCHEDULE 3

#### BORDER SECURITY

##### Modifications etc. (not altering text)

- C1** Sch. 3 modified by S.I. 1993/1813, Sch. 4 para. 7 (as inserted (12.2.2019 for specified purposes; 13.8.2020 in so far as not already in force) by Counter Terrorism and Border Security Act 2019 (c. 3), s. 27(1)(g), Sch. 3 para. 63(1) (with s. 25(9), Sch. 3 para. 63(2)); S.I. 2020/792, reg. 2(g))

#### PART 1

##### POWERS

###### *Retention of property*

- 11 (1) This paragraph applies to any article which—
- (a) is given to an examining officer in accordance with paragraph 3(d),
  - (b) is searched or found on a search under paragraph 8, or
  - (c) is examined under paragraph 9.
- (2) An examining officer may retain the article—
- (a) for the purpose of examination, for a period not exceeding 7 days beginning with the day on which the retention commences,
  - (b) while the officer believes that it may be needed for use as evidence in criminal proceedings,
  - (c) while the officer believes that it may be needed in connection with a decision of the Secretary of State whether to make a deportation order under the Immigration Act 1971,
  - (d) while the officer believes that it could be used in connection with the carrying out of a hostile act, or
  - (e) while the officer believes it necessary to do so for the purpose of preventing death or significant injury.

##### Commencement Information

- I1** Sch. 3 para. 11 in force at Royal Assent for specified purposes, see. s. 27(1)(g)(2)(c)  
**I2** Sch. 3 para. 11 in force at 13.8.2020 in so far as not already in force by S.I. 2020/792, reg. 2(g)

- 12 (1) This paragraph applies in relation to an article retained by virtue of paragraph 11(2) (d) or (e), other than an article in respect of which an authorisation is granted under paragraph 14.

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- (2) The Investigatory Powers Commissioner (“the Commissioner”) must be informed of the article's retention as soon as is reasonably practicable.
- (3) Sub-paragraph (4) applies where it appears to the Commissioner that there are reasonable grounds to believe—
  - (a) that the article has been or could be used in connection with the carrying out of a hostile act, or
  - (b) that returning the article to the person from whom it was taken could result in a risk of death or significant injury to any person.
- (4) The Commissioner may—
  - (a) direct that the article is destroyed, or
  - (b) authorise the retention and use of the article (subject to sub-paragraph (5)).
- (5) The Commissioner may authorise the retention and use of an article under sub-paragraph (4)(b) that consists of or includes confidential material only if satisfied that—
  - (a) arrangements are in place that are sufficient for ensuring that the material is retained securely, and
  - (b) the material will be used only so far as necessary and proportionate for a relevant purpose.
- (6) If the Commissioner does not proceed under sub-paragraph (4) in relation to an article, the Commissioner must (subject to sub-paragraph (7)) direct that the article is returned to the person from whom it was taken.
- (7) Sub-paragraph (6) does not apply if the article is further retained under a power conferred by paragraph 11(2)(b) or (c).
- (8) In authorising the retention and use of an article under this paragraph the Commissioner may impose whatever conditions the Commissioner thinks appropriate in relation to its retention and use.
- (9) For the purposes of sub-paragraph (5)(b), the use of material is necessary for a relevant purpose if it is necessary—
  - (a) in the interests of national security,
  - (b) in the interests of the economic well-being of the United Kingdom so far as those interests are also relevant to the interests of national security,
  - (c) for the purpose of preventing or detecting serious crime, or
  - (d) for the purpose of preventing death or significant injury.
- (10) In this paragraph “confidential material” means—
  - (a) confidential journalistic material, within the meaning of the Investigatory Powers Act 2016 (see section 264(6) and (7) of that Act), and
  - (b) protected material as defined by sub-paragraph (11).
- (11) “Protected material”—
  - (a) in relation to England and Wales, means—
    - (i) items subject to legal privilege, within the meaning of the Police and Criminal Evidence Act 1984 (see section 10 of that Act),
    - (ii) material falling within section 11(1)(a) or (b) of that Act (certain personal records, human tissue or tissue fluid held in confidence), or

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- (iii) material to which section 14(2) of that Act applies (other material acquired in course of a trade etc that is held in confidence);
- (b) in relation to Scotland, means—
  - (i) items in respect of which a claim to confidentiality of communications could be maintained in legal proceedings, or
  - (ii) other material of a kind mentioned in paragraph (a)(ii) or (iii) of this sub-paragraph;
- (c) in relation to Northern Ireland, means—
  - (i) items subject to legal privilege, within the meaning of the Police and Criminal Evidence (Northern Ireland) Order 1989 (S.I. 1989/1341 (N.I. 12)) (see Article 12 of that Order),
  - (ii) material falling with Article 13(1)(a) or (b) of that Order (certain personal records, human tissue or tissue fluid held in confidence), or
  - (iii) material to which Article 16(2) of that Order applies (other material acquired in the course of a trade etc that is held in confidence).

#### Commencement Information

**I3** Sch. 3 para. 12 in force at Royal Assent for specified purposes, see. s. 27(1)(g)(2)(c)

**I4** Sch. 3 para. 12 in force at 13.8.2020 in so far as not already in force by [S.I. 2020/792](#), [reg. 2\(g\)](#)

- 13 (1) Before proceeding under paragraph 12 in relation to an article, the Commissioner—
- (a) must invite each affected party to make representations, before the end of whatever period the Commissioner may specify, about how the Commissioner should proceed under that paragraph, and
  - (b) must have regard to any representations made by an affected party before the end of that period.
- (2) Where a Judicial Commissioner, other than the Investigatory Powers Commissioner, exercises a function under paragraph 12 in relation to an article, an affected party may ask the Investigatory Powers Commissioner to decide whether to approve the way in which the function was exercised.
- (3) Each of the following is an “affected party” for the purposes of this paragraph—
- (a) where the examining officer is a constable, the responsible chief officer,
  - (b) the Secretary of State, and
  - (c) the person from whom the article was taken.
- (4) In sub-paragraph (3) “responsible chief officer” means—
- (a) in a case where the article was taken in connection with an investigation being conducted by a police force in England and Wales, the chief officer of police of that police force;
  - (b) in a case where the article was taken in connection with an investigation being conducted by the Police Service of Scotland, the chief constable of the Police Service of Scotland;
  - (c) in a case where the article was taken in connection with an investigation being conducted by the Police Service of Northern Ireland, the Chief Constable of the Police Service of Northern Ireland;
  - (d) in any other case—

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- (i) where the examining officer is a constable of a police force in England and Wales, the chief officer of police of that police force,
  - (ii) where the examining officer is a constable of the Police Service of Scotland, the chief constable of the Police Service of Scotland, or
  - (iii) where the examining officer is a constable of the Police Service of Northern Ireland, the Chief Constable of the Police Service of Northern Ireland.
- (5) Sub-paragraph (6) applies where —
- (a) a direction for the destruction of an article is given under paragraph 12, or
  - (b) authorisation for the retention and use of an article is granted under that paragraph.
- (6) The Commissioner must inform the person from whom the article was taken that—
- (a) a direction to destroy the article has been given, or
  - (b) (as the case may be) authorisation to retain and use the article has been granted (and in this case the Commissioner must provide details of any conditions subject to which that authorisation was granted).
- (7) A requirement under this paragraph to invite representations from, or to provide information to, the person from whom an article was taken applies only so far as it is reasonably practicable to do so.
- (8) Representations under sub-paragraph (1) must be made in writing.

#### Commencement Information

- I5** Sch. 3 para. 13 in force at Royal Assent for specified purposes, see. s. 27(1)(g)(2)(c)
- I6** Sch. 3 para. 13 in force at 13.8.2020 in so far as not already in force by [S.I. 2020/792, reg. 2\(g\)](#)

- 14 (1) This paragraph applies where—
- (a) an article is retained by virtue of paragraph 11(2)(d) or (e), and
  - (b) the examining officer who retained the article considers that the urgency condition is met in relation to the article.
- (2) The urgency condition is met in relation to an article if—
- (a) there is an urgent need for the article to be examined or otherwise used for the purpose of preventing—
    - (i) the carrying out of a hostile act, or
    - (ii) death or significant injury,
 or for the purpose of mitigating the risk of any such act, death or injury occurring, and
  - (b) the time it would take for the requirements of paragraphs 12 and 13 to be complied with in relation to the article would not enable such use to take place with sufficient urgency.
- (3) The examining officer may apply to a senior officer for authorisation to continue to retain and use the article.
- (4) An application under sub-paragraph (3) in relation to an article may be made only to a senior officer who has not been directly involved in the exercise of any power

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under this Part of this Schedule to take the article or to question a person from whom the article was taken.

- (5) A senior officer may grant an authorisation under this paragraph for the retention and use of the article if satisfied—
- (a) that there are reasonable grounds for considering that the urgency condition is met in relation to the article, and
  - (b) in the case of an article that consists of or includes confidential material, that—
    - (i) arrangements are in place that are sufficient for ensuring that the material is retained securely, and
    - (ii) the material will be used only so far as necessary and proportionate for a purpose mentioned in sub-paragraph (2)(a).
- (6) An authorisation under this paragraph—
- (a) must be recorded in writing;
  - (b) may be granted subject to whatever conditions the senior officer thinks appropriate.
- (7) Paragraphs 15 and 16 contain further provision about authorisations granted under this paragraph.
- (8) In this paragraph—
- “confidential material” has the meaning given by paragraph 12(10) and (11);
  - “senior officer” means—
    - (a) where the examining officer is a constable, another constable of at least the rank of superintendent,
    - (b) where the examining officer is an immigration officer, an immigration officer of a higher grade than the examining officer, and
    - (c) where the examining officer is a customs officer, a customs officer of a higher grade than the examining officer.

#### **Commencement Information**

- I7** Sch. 3 para. 14 in force at Royal Assent for specified purposes, see. s. 27(1)(g)(2)(c)  
**I8** Sch. 3 para. 14 in force at 13.8.2020 in so far as not already in force by [S.I. 2020/792](#), [reg. 2\(g\)](#)

- 15 (1) If a senior officer grants an authorisation under paragraph 14, the examining officer who applied for the authorisation must inform the Investigatory Powers Commissioner and each affected party of its grant.
- (2) The information required under sub-paragraph (1) must be given as soon as reasonably practicable and in any event within 24 hours after the grant of the authorisation.
- (3) An affected party may make representations to the Commissioner about how the Commissioner should proceed under paragraph 16 in respect of an authorisation granted under paragraph 14.
- (4) Representations under sub-paragraph (3) must be made in writing no later than the end of two working days beginning with the first working day after the day on which the authorisation is granted.

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- (5) The information provided under sub-paragraph (1) must include an explanation of the right to make representations in writing and the time by which they must be made.
- (6) The Commissioner must have regard to any representations received before the end of the time mentioned in sub-paragraph (4) in determining how to proceed under paragraph 16.
- (7) The requirement under this paragraph to provide information to the person from whom an article was taken applies only so far as it is reasonably practicable to do so.
- (8) In this paragraph and paragraph 16—
  - “affected party” has the meaning given by paragraph 13(3);
  - “working day” means a day other than a Saturday, a Sunday, Christmas Day, Good Friday or a day which is a bank holiday under the Banking and Financial Dealings Act 1971 in the part of the United Kingdom in which the authorisation is granted.

#### Commencement Information

**I9** Sch. 3 para. 15 in force at Royal Assent for specified purposes, see. s. 27(1)(g)(2)(c)

**I10** Sch. 3 para. 15 in force at 13.8.2020 in so far as not already in force by [S.I. 2020/792](#), [reg. 2\(g\)](#)

- 16 (1) This paragraph applies after the Investigatory Powers Commissioner has considered any representations made about an authorisation in accordance with paragraph 15.
- (2) The Commissioner must—
  - (a) approve the grant of the authorisation, or
  - (b) cancel the authorisation.
- (3) A decision under sub-paragraph (2) must be made—
  - (a) after the end of the time for making representations referred to in paragraph 15(4), and
  - (b) before the end of three working days beginning with the first working day after the day on which the authorisation is granted.
- (4) If the decision under sub-paragraph (2) is to approve the grant of the authorisation, the retention and use of the article may continue in accordance with the conditions on which the authorisation was granted (subject to any further conditions or variation of the existing conditions that the Commissioner specifies).
- (5) If the decision under sub-paragraph (2) is to cancel the authorisation, any further use of the article must stop as soon as possible.
- (6) If the Commissioner cancels the authorisation the Commissioner may direct that the article—
  - (a) is destroyed, or
  - (b) is returned to the person from whom it was taken,
 and the Commissioner may further direct that all reasonable steps are taken to secure that any information derived from the article is destroyed.
- (7) Sub-paragraphs (5) and (6) do not apply if the article is further retained under a power conferred by paragraph 11(2)(b) or (c).

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- (8) The Commissioner must inform each affected party of the Commissioner's decision under sub-paragraph (2).
- (9) The requirement under this paragraph to provide information to the person from whom the article was taken applies only so far as it is reasonably practicable to do so.
- (10) Where a Judicial Commissioner, other than the Investigatory Powers Commissioner, exercises a function under this paragraph in relation to an article, an affected party may ask the Investigatory Powers Commissioner to decide whether to approve the way in which the function was exercised.
- (11) Nothing in this paragraph affects the lawfulness of—
  - (a) anything done under an authorisation before it is cancelled;
  - (b) if anything is in the process of being done under an authorisation when it is cancelled—
    - (i) anything done before that thing could be stopped, or
    - (ii) anything done which it is not reasonably practicable to stop.

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**Commencement Information**

**I11** Sch. 3 para. 16 in force at Royal Assent for specified purposes, see. s. 27(1)(g)(2)(c)

**I12** Sch. 3 para. 16 in force at 13.8.2020 in so far as not already in force by [S.I. 2020/792](#), [reg. 2\(g\)](#)

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