

		RIG Internal Guidance		RIG-2015-01	
The application of the 2014 Code of Practice on the use of Covert Human Intelligence Sources to the activities of Railway Safety Directorate					
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Keywords		Informant, complainant, information, covert, RIPA, CHIS, RIP(S)A			
Summary		This RIG sets out advice from legal services on the relevant law and code of practice governing the practice of investigatory authorities, such as ORR. It applies when asking informants, for example, an employee, to covertly use a relationship they have with a suspect, such as the employer, to supply information to them. This is otherwise known as using a covert human intelligence source (CHIS). This guidance applies in England, Scotland and Wales.			
Original consultation		Tom Cole, Senior Legal Advisor, Legal Services			
Subsequent consultation (reviews only)					

Detail

1. Obtaining evidence and information from human sources is, in most circumstances both an acceptable and legally acceptable investigatory practice. However where the use of human sources qualifies as the use of a *covert human intelligence source* (a CHIS), such practice is regulated by the Regulation of Investigatory Practices Act 2000 (RIPA) and the associated Code of Practice. The requirements are similar in Scotland, as aspects of the Code apply north of the border and there is also a specific legislation - the Regulation of Investigatory Powers (Scotland) Act 2000 - Codes of Practice for Covert Surveillance and Covert Human Intelligence Sources. The principles contained in this RGD should be followed by all operational teams.

2. The Codes of Practice might be triggered when a complainant contacts us about a health, safety or welfare matter, and we would like/request **further information from them** to help us decide on a course of action. It is the action of asking the complainant for more information that may make them a covert human intelligence source (CHIS), and not the initial, unsolicited contact.

3. It is important to note that there is no specific prohibition on using a CHIS; however doing so without complying with the regime set out by RIPA may constitute a breach of the suspect's human rights to establish and maintain relationships without them being exploited by public authorities.¹ This in turn may create significant legal and reputational risk including exclusion of the relevant evidence and possible actions of abuse of process.

4. Activity which constitutes using a CHIS is carefully defined. Using a CHIS is about exploiting the **relationship** a person (the **source**) has with another person or business (the latter usually being the **suspect**). Investigators who think they may be using a CHIS should consider the following questions:

- a. Does the source have or seek to establish **a relationship** (business or personal) with the suspect duty holder?
- b. Is the source **using or exploiting** that relationship to obtain or gain access to information from the suspect; or, is the source disclosing information obtained from or **as a consequence of the existence** of the relationship?
- c. Is the activity being undertaken **covertly** i.e. is the source acting in a

¹ This right derives from the Human Rights Act 1998, Schedule 1, Article 8 (Right to respect for private and family life)

- matter so as to ensure that the suspect is unaware of their true purpose (to obtain or disclose information from them)?
- d. Have you, the investigator, positively **asked or induced** the source to carry out the aforementioned activity?

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5. In summary: are we asking a person to use their relationship with the duty holder e.g. as an employee, to gain information for us without the duty holder's knowledge? If the answer to the questions in paragraph 4 is yes, then the activity may constitute making use of a CHIS.

6. In certain, reasonably foreseeable circumstances, legal risk could be created through ORR using or asking complainants to obtain further information or evidence about a work activity, (post receipt of the initial complaint) as such activity may constitute using a CHIS. This risk will vary from case to case and be **highly fact sensitive**.

7. For example an employee could come forward as a whistleblower with information about an alleged offence. If ORR were to go back and ask them to obtain more information about their company or a colleague this could amount to using a CHIS *if* the person were being asked to use their relationship (either employment or personal) to obtain information without the other party knowing. This could amount to as little as asking a person to use their access rights as an employee (e.g. to gain access to a site) to take photographs etc.

8. The use of information from complainants who *volunteer* information is, in most cases, unlikely to fall within the definition of using a CHIS as the ORR has not induced, asked or assisted the obtaining of that information. However such situations should be **carefully monitored**.

9. Another exception is where disclosures are made (whether induced or not), pursuant to regulatory or professional duties. This is because the business or professional relationships from which the information is derived would not have been established or maintained for the covert purpose of disclosing such information (the presumption being that the other party to the relationship would be aware of the potential for the person holding the duty to disclose such information).

<p><u>Action</u></p>	<p>Inspectors, Inspector’s Assistants and other ORR staff, should not ask persons to use their position to obtain information on our behalf unless careful consideration of the circumstances has been carried out. This might include a complainant who we might otherwise ask to take a photograph, or gather further information without the employer’s knowledge.</p> <p>If staff believe there is a good case for asking someone to gather information on ORR’s behalf, they should contact the Regulatory Management Team or Legal Services to discuss their intentions before doing so. A legal risk analysis should be carried out.</p>
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