

**LORD ADVOCATE'S GUIDELINES ON:  
THE EXTENSION OF DETENTION OF PERSONS ARRESTED  
UNDER SECTION 41 AND SCHEDULE 8 OF THE TERRORISM  
ACT 2000**

**AND**

**POST-CHARGE QUESTIONING UNDER SECTION 23 OF THE  
COUNTER-TERRORISM ACT 2008**

These guidelines have been developed in light of the Terrorism Act 2000 (TACT 2000) as amended by the Terrorism Act 2006, the Counter-Terrorism Act 2008 and Section 57 of the Protection of Freedoms Act 2012.

Terrorist investigations can be large and complex. These guidelines provide guidance to the police where: -

- consideration is being given to extend the period of detention under TACT 2000;
- consideration is being given to delay access to a solicitor to a person arrested under section 41 of TACT 2000; or
- post-charge questioning is considered necessary under section 23 of the Counter-Terrorism Act 2008.

**Extension of Detention**

Persons arrested under section 41 of TACT are subsequently held under provisions contained in Schedule 8 to TACT 2000, which sets out the person's rights and covers practical aspects of their detention. All aspects of Schedule 8 must be complied with in any investigation under TACT 2000. This includes any period of extension of detention, granted in accordance with the following guidelines.

Section 41 of TACT 2000 enables a police officer to arrest a person whom they reasonably suspect to be a terrorist. The person may be detained for a period of not longer than 48 hours, although this period may be extended. A police officer of at least the rank of superintendent, the Lord Advocate or a Procurator Fiscal may apply to a sheriff for a warrant of further detention under section 29 of TACT 2000. This shall initially be for a maximum period of seven days, but may be extended on further application to fourteen days.

Applications for further detention must be made within the initial 48 hour period of detention, starting with the person's arrest, or within 6 hours of the end of that period. However the Sheriff can dismiss an application made in this latter period where he or she considers that it would have been reasonably practicable to make it before that.

If it is considered necessary and appropriate to apply for a warrant of further detention the police must liaise with the Procurator Fiscal in whose jurisdiction the suspected offence occurred as soon as that view is formed. The Procurator Fiscal will prepare and present the application unless the person has been transferred to another police station for security reasons (in which case the Procurator Fiscal in whose jurisdiction the person is detained will make the application).

In considering any application for a warrant for further detention, the sheriff must be satisfied that there are reasonable grounds for believing that further detention is necessary **and** the investigation is being conducted diligently and expeditiously. Further detention is necessary if it is required: -

- to obtain relevant evidence whether by questioning or otherwise;
- to preserve relevant evidence; or
- pending the result of an examination or analysis of any relevant evidence or of anything the examination or analysis of which is to be or is being carried out with a view to obtaining relevant evidence.

The police must address all of the issues referred above and provide information to the Procurator Fiscal on the current progress of the investigation.

A notice must be given to the person when a warrant for further detention is sought (and each time an application is made to extend an existing warrant). This must be done before the judicial hearing of the application and must include notification of the fact an application for warrant has been made, the time at which the application was made, the time at which the application is to be heard and the grounds upon which further detention is sought.

In certain circumstances it is possible for the Procurator Fiscal to apply to the Sheriff for an order to withhold specific information upon which it is intended to rely when applying for a warrant of further detention. This can only be done where there are reasonable grounds for believing that if the information was disclosed: -

- evidence of an offence under section 40(1)(a) of TACT 2000 would be interfered with or harmed;
- the recovery of property obtained as a result of an offence under any of those provisions would be hindered;
- the recovery of property in respect of which a forfeiture order could be made under section 23 or 23A of TACT would be hindered;
- the apprehension, prosecution or conviction of a person who is suspected of falling within section 40(1)(a) or (b) would be made more difficult as a result of his being alerted;
- the prevention of an act of terrorism would be made more difficult as a result of a person being alerted;
- the gathering of information about the commission, preparation or instigation of an act of terrorism would be interfered with; or
- a person would be interfered with or physically injured.

The person to whom an application for a warrant of further detention relates shall be given an opportunity to make oral or written representations to the Sheriff about the application and is entitled to be legally represented at the hearing unless they (or their legal representative) are otherwise excluded from any part of the hearing by the Sheriff.

Where it is believed necessary to withhold information upon which it is intended to rely when applying for a warrant of further detention or to exclude the person and/or their legal representative from the hearing (or part thereof), the police must bring these matters to the attention of the Procurator Fiscal immediately. The police must provide the Procurator Fiscal with reasons to justify this proposed course of action.

Throughout the period of further detention the police must keep the Procurator Fiscal updated on the progress of the investigation. Where the grounds on which a sheriff authorised a further detention no longer apply, the detainee must be released immediately from that period of detention.

### **Right To Legal Advice and Delayed Access to a Solicitor**

All persons detained under section 41 of TACT 2000 must be informed that they may consult a solicitor at any time, without delay.

Where a person has been allowed to consult a solicitor in accordance with their right to do so, the solicitor, subject to the

condition that their behaviour will not interfere with or obstruct the conduct of the interview, should be allowed to be present at any subsequent interview with the person carried out in connection with a terrorist investigation.

Where a person chooses to waive their rights to solicitor access, they should be reminded that the right includes the right to speak with a solicitor on the telephone. If the person continues to waive this right, this must be recorded and should be referred to at the start of any interview. Any waiver of the rights must be an 'informed' waiver and must be fully recorded. The person should sign a waiver of their rights.

The right is to consult a solicitor at any time during the period of detention. This means that the person may ask at any time for advice from a solicitor even if they have previously indicated that they did not wish the advice of a solicitor. Where a person changes their mind about the exercising of rights this must be accurately recorded.

A police officer, not below the rank of Assistant Chief Constable, may direct that a consultation with a solicitor shall be in the presence of a police officer (not below the rank of inspector) not connected with the ongoing investigation, if it appears necessary to them on one of the following grounds: -

- (a) that it is in the interests of the investigation or prevention of crime;
- (b) that it is in the interests of the apprehension, prosecution or conviction of offenders;
- (c) that it will further the recover of property obtained as a result of the commission of an offence or in respect of which a forfeiture order could be made under section 23 or 23A of TACT; or
- (d) that it will further the operation of Part 2 or 3 of the Proceeds of Crime Act 2002 or the Proceeds of Crime (Northern Ireland) Order 1996 (confiscation of the proceeds of an offence)

A police officer, not below the rank of superintendent, may authorise a delay in making intimation to, or in holding a consultation with, a solicitor where, in their view, the delay is necessary on one of the grounds referred to above. The person's rights may also be delayed where an officer, not below the rank of superintendent, has reasonable grounds for believing that the person has benefited from their criminal conduct (in accordance with Part 3 of the Proceeds of Crime Act 2002) and the recovery of

the value of the property constituting the benefit will be hindered by the person exercising either their right to intimate the fact and place of detention or by holding a consultation with a solicitor.

Where a delay is authorised:-

- (a) this must be given in writing, or where it is given orally, confirmed in writing;
- (b) the detainee must be told of the reason for the delay, and
- (c) the reason for the delay must be recorded in the custody record

all as soon as is reasonably practicable.

If the grounds referred to above cease to apply, the person must, as soon as practicable, be asked if they wish to exercise their right, the custody record being annotated accordingly.

### **Post-Charge Questioning**

Section 23 of the Counter-Terrorism Act 2008 came into force on 10 July 2012. It allows a Sheriff to authorise the questioning of a person about an offence:-

- for which they have been charged by the police, or
- after the person has appeared on petition in respect of the offence.

This applies where the offence is a terrorism offence (as set out in section 27 of the Counter-Terrorism Act 2008) or if it appears to the sheriff to have a terrorism connection (as further described in section 93 of the Counter-Terrorism Act 2008). There is no power to detain a person solely for the purposes of post-charge questioning. A person can only be detained whilst being so questioned (whether at a police station or in prison) if they are already in lawful custody under some existing power.

Any application under section 23 must be made by the Procurator Fiscal.

The Sheriff may authorise the questioning if he or she is satisfied that:-

- further questioning is in the interests of justice **and**
- the investigation is being conducted diligently and expeditiously **and**

- the further questioning would not interfere unduly with the preparation of the person's defence to the charge, or any other criminal charge that they may be facing.

As all three conditions must be met before authorisation is granted, it is important that the police provide the Procurator Fiscal with as much information as possible on the status of the investigation and on the reasons why further questioning is necessary. This should include full consideration of: -

- what further evidence the questioning is expected to provide;
- why it was not possible to obtain this evidence before charge;
- how and why the need to question after charge was first recognised;
- how the questioning is expected to contribute further to the case;
- to what extent the time and place for further questioning may interfere with the preparation of the person's defence – for example, if authorisation is being sought close to the time of a trial; and
- what steps could be taken to minimise any risk that questioning might interfere with the preparation of the person's defence.

The sheriff may only authorise a period up to a maximum of 48 hours before further authorisation must be sought. The 48 hour period runs continuously from the commencement of questioning and includes any breaks in questioning. If a further application under section 23 is believed to be necessary, the police must provide the Procurator Fiscal with a full update on the status of the investigation, the results of the questioning under the previous authorisation and further consideration of the factors referred to above.

The person being questioned must be offered access to legal advice without delay. Where a person chooses to waive their rights to solicitor access, they should be reminded that the right includes the right to speak with a solicitor on the telephone. If the person continues to waive this right, this must be recorded and should be referred to at the start of any interview. Any waiver of the rights of a person must be an 'informed' waiver and must be fully recorded. The person should sign a waiver of their rights.

The person's right is to consult a solicitor at any time during their period of detention. This means they may ask at any time for advice from a solicitor even if they have previously indicated that

they did not wish the advice of a solicitor. Where persons change their mind about exercising the right to consult a solicitor, this must be accurately recorded.

The solicitor, subject to the condition that their behaviour will not interfere with or obstruct the conduct of the interview, should be allowed to be present at any subsequent interview with the person.

Any interview must be conducted in accordance with the Code of Practice for the Video Recording with Sound of Interviews of Persons Detained under section 41 of or schedule 7 to the Terrorism Act 2000 and Post Charge Questioning of Persons Authorised under sections 22 or 23 of the Counter Terrorism Act 2008.

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