MINORS AS COVERT HUMAN INTELLIGENCE SOURCES OF THE POLISH POLICE
PART 2

Introduction

Despite the last 30 years of subsequent modifications, the right to use the assistance of Covert Human Intelligence Sources (CHIS) by the police is invariably granted by only one article of the Police Act, which states that: “The police may use the assistance of persons who are not police officers in the performance of their tasks.” The secret internal regulations are equally laconic in this regard. The problem resulting from the general nature of the regulations in force is particularly important from the perspective of investigating juvenile perpetrators of crimes, because in many cases, infiltration of this environment by adults is simply impossible. In the opinion of some police officers, there are no subjective limitations in this matter, while according to others, due to the rule of law and the lack of unambiguously formulated provisions, using the help of juvenile CHIS is not allowed. The first part of the article discusses the imprecise concept of juvenile delinquency and the tasks performed by the police to combat it. The position of minors in the light of generally applicable regulations has also been presented.

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Regulations regarding the use of Covert Human Intelligence Sources contained in the Act on the Police and internal regulations

The only article in the Police Act authorising police officers to use the assistance of CHIS informs that “the police may use the assistance of non-police officers in carrying out their tasks.” It is forbidden to disclose personal information of an individual assisting the police in the scope of intelligence gathering activities².

The laconic nature of such a provision arouses many doubts regarding, in particular, the assistance of minors as CHIS³. This is confirmed by studies carried out in 2013, which show that over half of the respondents (54.91%) believed that the then binding ordinance on the covert policing of the police did not regulate the principles of obtaining and cooperating with CHIS, including using the help of minors, in a clear and comprehensive manner⁴. In fact, both former and current regulations, not only do not regulate the rules of recruitment and working with CHIS in a sufficiently precise and exhaustive manner, but also ignore the issues of minors. The results of the research indicated that the high level of generality of the regulation regarding intelligence gathering is not in line with the principle of specificity of regulations, being one of the postulates of adequate legislation⁵. Ordinance No. 0052/74 of the Ministry of Internal Affairs of 5 July 1974 on the covert work of the Civic Militia⁶ (hereinafter: Ordinance), effective before the political transformation in 1990, defined three categories of human intelligence sources: reporting persons (RP), informers (I) and secret collaborators (SC). A reporting person was an individual who, with a sense of social responsibility, agreed to disclose the news of interest to the Civic Militia (CM) officer, while an informer was any person other than RP who provided information in an ad hoc manner. From the provisions of the Ordinance appears that in the case of RP, the commissioned tasks could not cause a person to be associated with suspects or damage their good reputation. On the other hand, the characteristic feature of informers was their occasional (random) contact with the police, which could be initiated by both the person in question and the Civic Militia officer. With regard to – deliberately acquired – secret collaborators, recruitment motives could include material interest, compromising or aggravating material concerning the minor obtained by the police, and other motivations

that make the candidate cooperate\textsuperscript{7}. The Ordinance contained a provision, stating that minors who were under 17 years of age could not be recruited as SC\textsuperscript{8}. After agreeing to assist the police, the recruited individual personally prepared the so-called declaration of commitment to cooperate with the militia. In the case of incriminating or compromising materials, the preparation of the obliging declaration intended to illustrate the recruited person that in the event of non-compliance with the terms of cooperation, these materials would be used. The Ordinance shows that before 1990, there were no formal obstacles for minors under the age of 17 to be personal sources of intelligence of other categories, namely RP and I. In the case of reporting minors, it was also possible to conduct relatively permanent cooperation or even – if they agreed to it – commission them to perform tasks. An important condition was that such tasks could not endanger their good reputation or cause them to be associated with suspects. Since minors could assume the role of CHIS, it should be assumed that they could also be rewarded and receive reimbursement of costs incurred in connection with gathering intelligence. What was the reason for placing a ban on obtaining the assistance of minors who were under 17? It did not result from the Act on Juvenile Delinquency Proceedings, as 9 years have passed after the adoption of Ordinance No. 0052/74. The condition of reaching the age of 17 was also not due to the Civil Code, which invariably states that an adult is a person over 18 years of age\textsuperscript{9}. The only normative act, in which the term “minor under 17” was used, was the Act of 19 April 1969 – Penal Code, under which, criminal liability was imposed on a person who committed an offence after reaching the age of 17\textsuperscript{10}.

The condition of the completion of 17 years of age was directly related to the basis for recruiting a secret collaborator. In particular, it consisted of compromising materials that could form the basis for initiating proceedings in the event of refusal to cooperate\textsuperscript{11}. The condition for recruiting based on incriminatory materials was trust in keeping them secret from third parties and a situation when the expected or obtained information resulting from the candidate’s operational capabilities, from the point of view of the social interest, far outweighed the harmfulness of their actions\textsuperscript{12}. If the recruitment was unsuccessful or the recruited SC did not comply with the terms of the commitment, the incriminating materials were transferred to authorities initiating the pre-trial investigation\textsuperscript{13}. Such a way of dealing with a minor under the age of 17 who was not subject to criminal liability would not make sense. In the light of the above, it should be noted that with regard to secret collaborators, the condition of completing 17 years of age resulted from the admissible bases of recruit-

\textsuperscript{7} Ordinance No. 0052/74, 1974: Article 59(2).
\textsuperscript{8} Ordinance No. 0052/74, 1974: Article 57(1)(3).
\textsuperscript{9} Civil Code, 1964: Article 10(1).
\textsuperscript{10} Penal Code, 1969: Article 9.
\textsuperscript{11} Ordinance No. 0052/74, Article 59(4).
\textsuperscript{12} Ordinance No. 0052/74, Article 60(1).
\textsuperscript{13} Ordinance No. 0052/74, Article 69(2).
ment, such as incriminating materials and age, which entailed criminal liability in the event of refusal to cooperate or non-compliance with terms and conditions of such a collaboration.

After the political transformation in 1990, activities related to intelligence gathering were regulated in detail in secret, unpublished Ordinance No. 0018/91 of the National Police Headquarters of 18 December 1991. An important difference that distinguishes Ordinance No. 0018/91 from Ordinance No. 0052/74 of the Ministry of Internal Affairs, which was in force before the transformation, was that due to the constitutional principle of legalism, recruitment based on incriminating or compromising material became illegal. Among the Covert Human Intelligence Sources, whistleblowers, informants (instead of reporting persons) and collaborators have been identified. In addition to the change of naming, individual CHIS categories have been defined slightly differently. For example, the informant, similarly to the former RP, could only perform tasks related to previously provided information. There was no condition which stated that these tasks could not endanger their good reputation or cause them to be associated with suspects. This meant that the informant could be connected with people from the criminal environment or even function in this environment. After 1991, several subsequent, classified ordinances regulating police intelligence gathering were issued. In all of them, similarly to those established before 1990, the condition for recruiting a secret collaborator (SC) was their consent to cooperate, confirmed by a handwritten declaration (since 2006, the requirement to sign the declaration has been obligatory). A particularly important change was the prohibition to recruit persons under 18 as CHIS from the secret collaborator category. The change consisted in using the term “persons” (not: minors) and determining their age, i.e. the completion of 18 years (before 1990, it was 17). It should be noted that the term “recruitment” means the intentional action of police officers driven by the need to obtain intelligence necessary to carry out tasks resulting from the scope of activity, threats and character of the unit or organisational unit of the police. In the case of other types of CHIS, similarly to the period before 1990, the cooperation could be initiated by both the CHIS and the police. It is also important to emphasise that in the case of whistleblowers, their identity (and age) may remain unknown, which in practice may indicate that police officers may use the assistance of juvenile CHIS.

Many police officers are inclined to see the reasons for increasing the age limit from 17 to 18 years in generally applicable, dispersed legal provisions adopted after 1990. However, the conducted analysis did not lead to the determination of the regulations these restrictions could result from. The requirement of reaching the age of 18 does not stem from Article 22(4) of the Police Act regulating the issue of compensation benefits, which states that, if at the time of use and in connection with the use of the persons referred to in Article 22(1) of the Police Act (including CHIS), these people have lost their lives or suffered damage to health or property, compensation is granted on the terms and in the manner set out in the
Ordinance of the Minister of Internal Affairs and Administration of 15 October 1991 on the rules and procedure for awarding compensation benefits in the event of loss of life or damage to health or damage to property when providing or in connection with providing assistance to the Police, the State Protection Service or the Border Guard\(^\text{14}\) because it applies to all persons providing assistance to the police, regardless of their age. On the other hand, providing assistance to the police by persons who are not police officers, in the terminology of intelligence gathering referred to as cooperation, is not regarded as a labour relationship, therefore, the provisions of the Labour Code do not apply. The condition of reaching the age of 18 is also not due to the Act on proceedings in juvenile cases, within the meaning of which, a person up to 17 years of age and 18 years of age, as well as up to 21 years of age, is a minor. It also is not derived from the Civil Code, since becoming a collaborator, conditioned by the consent to cooperate, confirmed by a hand-made declaration, is not the same as the concept of civil law obligations. Therefore, such obligations should not be treated as an element resulting from the Civil Code, which regulates the social forms of the exchange of goods and services.

Prior to 1990, the failure of a secret collaborator to comply with the obligation might have led to the use of incriminating material, and only a person who was 17 years of age could suffer any criminal consequences. Because, after the system transformation, according to the principle of legalism, the mentioned grounds for recruitment have become prohibited, the requirement to prepare a written declaration has acquired only psychological significance and should be treated as one of the elements of influencing a CHIS. The awareness of the signing (existence) of such a document in a sense “forces” the recruited person to undertake the actual cooperation and its continuation. As a result, it is an additional motivation to abide by the commitments made, and thus implement specific objectives of cooperation\(^\text{15}\).

**Regulations regarding the use of CHIS in the United Kingdom and Northern Ireland**

The basic legal act regulating the issues of intelligence gathering in the legislation of Great Britain and Northern Ireland is over one-hundred-pages-long law on the regulation of investigative measures of 2000\(^\text{16}\) (the Regulation of Investigatory Powers Act 2000 – hereinafter: RIPA). It applies to all services authorised to use intelligence gathering. The Act specifies particularly the application of classical methods of obtaining intelligence,
such as surveillance, secret audio-visual recording in public and private places, and cooperation with Covert Human Intelligence Sources (CHIS). RIPA is the statutory basis for covert policing, Security Service (MI5), Secret Intelligence Service (MI6), covert policing, Government Communications Headquarters (GCHQ) and other forces. On its basis, ordinances, that is, acts corresponding to the Polish regulations, and codes of practice, that is, the rules of conduct, supplementing the provisions of RIPA and having legal force, intended for use by competent persons for the authorisation of specific activities, are issued. Authorisation constitutes the basis for the legalisation of specific operational activities in the legislation of Great Britain and Northern Ireland. It also applies to the use of CHIS, because the British legislature assumed that influencing the interpersonal relations by the state body is a far-reaching interference in the sphere of privacy. Therefore, it is allowed only in exceptional circumstances. Authorisation to use CHIS as a method of covert policing may be performed by the administrative body, i.e. a senior member of that authority. The conditions that must be met to obtain the authorisation are described in the individual codes of practice issued on the basis of RIPA and other laws. Rules of conduct are included in separate publications discussing in detail the terms and conditions, as well as methods of use of, among others: means to register the image of places and events, violation of ownership of real property and movable property (for example, installing wiretaps and cameras), violation of the secret of correspondence and telecommunications (intrusive surveillance), and CHIS\(^{17}\) (Covert Human Intelligence Sources Code of Practice). The rules of conduct have a practical dimension and define the individual terms and situations in which the authorisation should be requested.

In contrast to Polish normative acts, the content of the rules of conduct is illustrated by examples which, according to the information obtained at the outset of their collection, have no legal power. Despite this, they explain, for example in the Covert Human Intelligence Sources Code of Practice, who is and who is not a human intelligence source in an understandable way. Irrespective of the fact that the rules of conduct are addressed to the officers of the departments that carry out intelligence gathering, they are widely available, also on the websites maintained by the Home Office.

The terms of use of minors as CHIS, including those under the age of 16, are set forth in section 4.24 of the Covert Human Intelligence Sources Code of Practice. Authorisation to use the help of a minor as a human intelligence source may be issued only after becoming convinced that the cooperation will not cause any adverse effects in the minor’s psyche. The Covert Human Intelligence Sources Code of Practice sets out specific conditions for the use of minors under the age of 16. A person under this

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age may provide information to the police, on condition that it does not concern the person themselves or the person primarily responsible for them. In addition, a juvenile informant under the age of 16 is required to be attended by an appropriate adult during the meeting. This requirement means the parent and any other person over 18 who is responsible for the wellbeing of the minor (legal guardian). The uniqueness of cooperation with minors is also demonstrated by short periods, during which activities are authorised, *i.e.* up to one month\(^\text{18}\). In any case, establishing cooperation should be intentional and not opportunistic.

Rules concerning minors generally relate to the provision of information on other minors, excluding information about their families. In the event, the information relates to the family of a given minor, cooperation is not allowed (no authorisation is granted). In practice, this means that it is not possible to further obtain and document information from a minor. For the same reason, such a person will not be registered in the police database as a CHIS. An example of consequences of granting an unlawful authorisation may be a situation where, based on information obtained from a child, their father would be arrested and charged with burglary. If the defence asked on what basis the information providing grounds for the arrest was obtained, the police would have to disclose that their source was the child of the accused because they were registered as an informant (CHIS). Then, the defenders could raise a correct argument that the investigation was unlawful.

In practice, legislation can be ineffective because it does not stop the police from receiving information from minors regarding their family members. Police officers, knowing that in such a case, they will not obtain authorisation (consent) to use the help of an underage individual, they simply do not apply for it. This approach is unlawful, and as a result, a minor who is an unregistered CHIS does not receive care and formal protection\(^\text{19}\). Therefore, there were postulates that stated it is necessary to search for ideas to change the existing regulations. Paradoxically, however, modifying the regulations intended to ensure the protection of minors can have the opposite effect, as sometimes, a minor provides intelligence to protect his or her other family members.

Regulations on minors under 16 years of age require the presence of a senior police officer (superintendent) and a parent or the so-called appropriate adult. The definition of such a person is derived from the Police and Criminal Evidence Act\(^\text{20}\) (PACE) and generally characterises such an individual as “any responsible person over the age of 18”. How to understand this concept? Is it a person who is appropriate in the sense of what to do


or what should be respected, guaranteeing confidentiality with regard to all concerned parties, including the police, who is able to understand the situation of a minor. Such an understanding of this concept would require a fairly outstanding person trained in this field. It could be, for example, a judge. Having the right preparation, they would know how to react in a delicate situation, while not allowing for any important information to be missed. Therefore, it is appropriate to consider the view of P. Bean, according to which, minors require protection, but the use of their help as informants should be accepted, as the information obtained can lead to the detection of perpetrators of serious crimes. Adequately, properly trained adults are required to assist in the process of gathering intelligence from underage informants.

Regulations regarding the use of CHIS in the United States

In the United States, there is no absolute prohibition on using minors as Confidential Informants (CI). The help of juvenile informants under the age of 12 is prohibited. For persons under 18 years of age, written consent of their parents, as well as the consent of the court in some cases, are also required. Motives behind undertaking cooperation by minors are different. Some informants are simply paid for the information provided. Others engage with the police in exchange for lighter sentences in the event of their arrest, usually agreeing to help to arrest other criminals. According to M. Dodge, the use of juvenile informants has increased over the past few decades, constituting a significant part of proactive law enforcement. Adult law enforcement officials find it difficult to effectively and covertly investigate teenage suspects and are usually unable to infiltrate young drug subcultures. In practice, such access is only possible through minors. Juvenile informants are used in particular to infiltrate young gangs and parts of the drug market dominated by underage persons. Minors also take part in controlled purchase operations aimed at identifying companies selling alcohol and tobacco products to children.

Prosecutor General’s guidelines for the use of confidential information define a Confidential Informant (CI) as any person who provides useful and reliable information to JLEA (Department of Justice Law Enforcement Agency) concerning criminal activities and from which JLEA expects

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or intends to obtain such information in the future. Before establishing cooperation, federal agents must consider in particular: the age of the potential informant, the importance of the investigation, motivation, as well as the threats to the potential informant, their family and friends, resulting from possible cooperation. As part of the cooperation undertaken, the informant may in some cases be entitled to commit certain predetermined crimes. On the FBI website, there is a link to the guidelines page — *the Attorney General’s guidelines regarding the use of confidential informants*. They stipulate that informants (CI) may only provide information obtained in accordance with applicable law. Every time it wishes to cooperate with minors, each federal agency must obtain the written consent of a parent or legal guardian of such an individual. However, if the minor is a charge of the court or the accused, the court’s consent is also required. If a minor remains under judicial supervision, the guardian’s consent is required. Juvenile informants may only be used if there is no other alternative way to obtain information or proof, and if it is within the public interest.

The law applicable in individual states and counties of the United States includes age limits, but the rules in force, which change under the influence of public opinion, are not uniform. For example, in 1998, the press widely described the murder of 17-year-old Chad MacDonald Jr., who was detained by the Los Angeles Police Department for drug possession. In exchange for a mild sentence, he agreed to become an informant. He gave the police information that led to two or three arrests. Sometime later, he was beaten to death while his girlfriend was raped and shot. The described case resulted in the imposition of restrictions on the use of juvenile informants in California. Under the pressure of public opinion, the conditions, the fulfilment of which allows for the use of juvenile informants, have become more rigorous. The California Criminal Code, similarly to the Code applicable throughout the United States of America, prohibits the use of children aged 13 and less as informants. However, all persons between the age of 13 and 18 may be informants after obtaining the consent of the court. Before issuing a judgment, the court is obliged to

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consider: the age and maturity of the minor and social interest, as well as make sure that the consent to cooperate with the police is informed and voluntary. In the case of establishing cooperation in exchange for a milder sentence for a minor who committed an offence, the court takes into account the seriousness of the alleged offence. Before the assessment, certain conditions must be met, in particular:
— if the minor has committed a crime, the court must state that the fact that the minor has committed the alleged crime is likely and inform the minor about the obligatory minimum and maximum length of the sentence facing,
— the court must explain what the juvenile can benefit from when cooperating,
— the minor’s parent or guardian has consented to the cooperation (unless the parent or guardian is a suspect in a criminal investigation)\(^{30}\).

It is important that in California, one cannot use the help of minors in controlled drug purchase operations, who commonly assist in such cases in the rest of the USA, except for the controlled purchase of tobacco products intended to stop the seller offering cigarettes to children. On the other hand, in Cincinnati (Ohio), CI who are minors can be used for the controlled purchase of drugs, alcohol, and in other criminal investigations if circumstances are extraordinary and conventional investigative techniques provide no results\(^{31}\).

It might seem that a person under the age of 18 would regard assisting the police as an informant as inappropriate or even offensive. However, many minors agree to such cooperation, and some even decide to provide intelligence about their friends and family, including their parents. Police officers do not underestimate this intelligence, especially if it comes from a source that they believe is reliable. Moreover, they agree that this information can contribute to reducing the number of crimes committed by minors, including drug trafficking, since the police themselves cannot infiltrate drug subculture of young people and, therefore, must seek informants of the same age as the investigated individuals.

### Conclusions

The fact that minors commit crimes and minor offences is confirmed by the relevant literature, statistical data and provisions of Ordinance No. 1619 of the National Police HQ. Counteracting demoralisation and juvenile delinquency requires intelligence gathering in young-offender communities using CHIS. In many cases, CHIS can only be juveniles, since adults would have trouble infiltrating this kind of environment. According


to available statistical data, the police detect thousands of juvenile perpetrators of crimes and minor offences. This allows cautiously concluding that in practice, in some cases, they use the help of juvenile informants. However, in the light of applicable regulations, such practice is not in line with legislation in force. In accordance with applicable law in Poland:

1. Minors who are at least 16 years old have actual legal capacity to make decisions;
2. Minors may enter into an employment relationship without requiring the consent of a legal representative (e.g. parents), but cooperation with the police as a minor informant is not an employment relationship and thus is not covered by the provisions of the Labour Code;
3. The written obligation to cooperate with the police imposed on a minor informant is not the same as the notion of an obligation included in the Civil Code and should not be treated as an element arising from the Civil Code;
4. Minors may earn income, and the remuneration of juvenile informants granted by the police must not threaten to expose them.

Therefore, it should be stated that the lack of legal regulations regarding the use of the assistance of juvenile informants by the Polish police does not result from the prohibitions contained in generally applicable legal provisions. Doubts on this issue should not apply to whether minors should be used as informants, but to how the use of their assistance should be regulated to make it more ethically acceptable. Undoubtedly, minors who are under 18 years of age should be protected. In line with the ruling of the Constitutional Tribunal in case No. K16 / 10, the protection of minors against their reckless and risky decisions is conditioned by the age of 16. An identical age limit is laid down in the legislation of Great Britain and Northern Ireland. Permission to use the assistance of juveniles as CHIS may only be issued after making sure that the cooperation undertaken will not negatively affect minor’s psyche in any way. As with the laws in the United States of America, Great Britain and Northern Ireland, it would be necessary to specify:

1. The age limit of minors, after reaching of which, it would be possible to use their assistance as juvenile informants;
2. A situation or list of offences in which cooperation with the police would be allowed;
3. The entity competent to consent to cooperation with the police (authorisation of activities).

Police officers and the police alone are not able to face evolving crime. The legislators, government, prosecutors and judicial authorities must play their role. The legislators should amend the Act on the Police by indicating that police officers are entitled to use the assistance of juvenile informants. Such minors should be at least 16 years old and assist only in case of certain offences, e.g. murder, terrorism, drug-related crime. Under specific conditions, they could be less than 16 years old. The entity

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competent to authorise their specific actions should be the court, which would consider the age and maturity of the minor and social interest, and make sure that consent to cooperate with the police is informed and voluntary before issuing the decision. The period of validity of the authorisation and the conditions to be met to obtain authorisation should be described in the ordinance of the competent minister.

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DOI: 10.5604/01.3001.0015.2500
http://dx.doi.org/10.5604/01.3001.0015.2500

Keywords: intelligence gathering, informant handler, juvenile delinquency, Covert Human Intelligence Sources (UK), Confidential Informants (USA), juvenile informants

Summary: In 1990, due to political changes in Poland, the use of Covert Human Intelligence Sources (CHIS) in combating crime raised controversy. Therefore, the hastily and secretly prepared legislation limited the provisions to merely signalling the possibility of the police using this method of intelligence gathering. Despite further modifications of the existing law, the use of CHIS is still only referred to in Act on the Police [1990 Article 22(1)], which states that: “Police can use the help of non-police officers to perform their tasks.” The laxity of this provision is particularly evident in the context of precise and understandable regulations in countries such as Great Britain, Northern Ireland and the United States of America. The use of minors’ help is not regulated at the level of internal confidential police regulations, which makes it difficult for police officers to fight juvenile delinquency. The aim of the research was to determine whether legal conditions in Poland prevent the use of juvenile CHIS. The analysis led to the conclusion that there are no legal obstacles present, but the use of juvenile informants should depend on the fulfilment of certain conditions.