

## **For publication**

### **Review of Surveillance Policy (FG000)**

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Meeting:	Cabinet
Date:	4 April, 2017
Cabinet portfolio:	Finance and Governance
Report by:	Local Government and Regulatory Law Manager

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## **For publication**

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### **1.0 Purpose of report**

- 1.1 To inform members about the effects of the Regulation of Investigatory Powers Act 2000, actions following an inspection in 2016 and current best practice.
- 1.2 To make recommendations for updates to the current policy and procedures.

### **2.0 Recommendations**

- 2.1 To note the report and actions.
- 2.2 To formally adopt the suggested changes to the Council's RIPA policy and procedures.
- 2.3 To delegate to the Cabinet Member for Finance and Governance decisions on all matters relating to investigatory powers.
- 2.4 That Standards and Audit Committee receive annual reports on RIPA policy and practices.

2.5 To delegate to the Local Government and Regulatory Law Manager any necessary and consequential amendments relating to RIPA procedures.

### **3.0 Background**

3.1 The Regulation of Investigatory Powers Act 2000 (RIPA) regulates different types of surveillance. Regulation is to ensure that surveillance is carried out in a way that conforms with the Human Rights Act (the right to privacy and the right to a fair trial).

3.2 This council very rarely uses the types of surveillance regulated by the Act. This is because any surveillance carried out by the council tends to be overt (ie open and known about) surveillance, with nothing secretive or hidden about it.

3.3 Under RIPA any secret (covert) surveillance must be properly authorized by the Council and, since 2012, also by the Magistrates Court.

3.4 This note updates members on use of the powers, though the Council has not needed to obtain any authorisations since February 2010.

### **4.0 Surveillance**

4.1 RIPA controls the use of various methods of investigation, in particular the use of:

- covert surveillance
- covert human intelligence sources (known as "CHIS") - informants and
- accessing communication data

4.2 There are two types of surveillance covered by the Act:

*Intrusive surveillance* is covert surveillance in residential premises or a vehicle by a person or a device. *Local authorities are not allowed to use intrusive surveillance.*

*Directed surveillance* is covert (but not intrusive) planned surveillance for the purposes of a specific investigation. *Local authorities are allowed to use directed surveillance in certain circumstances, but only if properly authorised and regulated.*

4.3 Any surveillance must be both necessary and proportionate:

- *Necessary*: It must be for the purpose of preventing or detecting crime or disorder and the authorising officer must be satisfied that it is necessary to use covert surveillance in the investigation.
- *Proportionate*: It must not be used where open methods of investigation will be adequate, it must be proportionate to the activity being investigated and the intrusion on the persons caught by the surveillance.

4.4 Participation by a person in an interview, or core public functions (such as staff disciplinary investigations) do not fall within the RIPA regime and authorisation is not needed.

4.5 Overt surveillance is not regulated. Public CCTV, such as the CCTV in the town centre generally observing the public, is not covert as people are made aware that it is there.

4.6 Even where surveillance is overt (eg CCTV) data protection considerations relating to personal information will still be relevant.

4.7 The Office of Surveillance Commissioners produces detailed procedures and guidance relating to their oversight of arrangements relating to public authorities. It also inspects local authorities every few years.

## **5.0 Authorisation**

5.1 Before surveillance is carried out it must be authorised by specified officers.

5.2 Since 2012 surveillance can only be authorised:

- for preventing or detecting a crime punishable by a maximum term of at least 6 months imprisonment or
- if related to the underage sale of alcohol or tobacco.

This significantly limits the types of local authority matters where authorisation is permitted.

- 5.3 A detailed record must be kept of all authorisations, which must be reviewed and a specific end date set. Authorisations for directed surveillance must not last longer than 3 months. Any authorised surveillance must be reviewed and cancelled at the end of the authorised period.
- 5.4 The Council has a surveillance policy which is reviewed periodically to keep it up to date and a secure database of authorisations (all cancelled).
- 5.5 Members are never involved in making decisions on specific authorisations but have a role in overseeing the process.

## **6.0 Authorised Surveillance**

- 6.1 Since February 2010 there has been no surveillance carried out requiring authorisation at the council.
- 6.2 Since the Protection of Freedoms Act 2012 RIPA authorisations can only be used for detecting serious crimes (see above).
- 6.3 As an additional test, authorisations approved by the Council also must be approved by the Magistrates Court following an application.

## **7.0 OSC Visit**

- 7.1 The council has visits from the Office of Surveillance Commissioners every few years. The most recent inspection was in 2016 and before that in 2012. Inspections result in a report containing any recommendations for review of policies and practices. It is usual to receive recommendations to ensure best practice.
- 7.2 The 2016 inspection report, carried out by a Surveillance Inspector, was received in July. While recognizing that the Council rarely, if at all, carries out covert surveillance, the report confirmed

that the council should do more to keep itself ready for doing so, in case the need arose.

7.3 In brief, the key recommendations of the report were that the council:

- (a) maintains a state of preparedness
- (b) ensures regular corporate training for appropriate officers and access to procedures and guidance
- (c) understands more about Arvato and Kier's knowledge about and involvement with the process
- (d) reviews who should be the Senior Responsible Officer overseeing the process
- (e) carries out biannual audit of processes
- (f) regularly reviews policy and guidance
- (g) reports at least annually to members, regardless of any activity
- (h) ensure up to date CCTV procedures are in place
- (i) ensure liaison with local magistrates court

The full recommendations are contained in **Appendix A**

7.4 The report recognises that

*Given such a prolonged absence of use of RIPA powers and the unlikelihood of an application being made in the future it is understandable at least, that the subject of RIPA does not occupy a high profile within the Council.*

## **8.0 Surveillance Policy**

8.1 The Council's surveillance policy (see **Appendix B**) incorporates proposed changes to take account of the 2016 Inspection report, changes relating to RIPA best practice and also recent senior officer restructures.

8.2 There is also opportunity for further rationalization of authorizing officers given how little the system is needed to be used. The inspection report recommends the council should have one or more authorizing officers. Formerly there were authorizing officers in relevant services, meaning the need for greater dissemination of knowledge about the law and practices of RIPA. The opportunity

exists to concentrate authorizing officers within the legal service, where knowledge of RIPA is greatest.

- 8.3 Inspections tend to focus on themes and liaison with other authorities has shown that the focus in 2017 inspections is on social media and surveillance. Accordingly further amendments to the policy have been made.

## **9.0 Training and Information**

- 9.1 It is important that relevant officers regularly receive appropriate training and updates.
- 9.2 The council's regulatory solicitors periodically attend RIPA seminars (either face to face or online) and will continue to do so regularly to keep up to date with the law and guidance. In addition to routine updates the Senior Responsible Officer will undertake online training about Investigations using Social Media Sites (in March).
- 9.3 For more than a year the regulatory team of solicitors was short staffed for a variety of reasons. Now staffing levels are restoring there are opportunities to ensure knowledge of RIPA powers and duties right across, and to share authorization responsibilities within, the new team. Greater capacity has also now enabled progress on review of systems following the 2016 inspection report.
- 9.4 Relevant investigation and authorizing officers have previously received training, and a comprehensive and well received training course was provided to many of them in early 2016 by Weightmans solicitors through EM Lawshare.
- 9.5 However, the need for regular training was an outstanding recommendation from the 2012 inspection. Senior leadership team changes and corporate restructures meant, in any case, that some previously with responsibility under the council's policy (and trained) are no longer with the council.
- 9.6 A new and effective training system, focused on the needs of those who might need to apply RIPA is overdue. The 2016 inspection report commented that

*it is important that its officers are able to recognise when the activity which they undertake as part of their role, may be intrusive and fall within the legislation.*

- 9.7 Various means of delivering regular training have been considered, including external online training, face to face delivery by external providers (as the 2016 training) or in house staff. None satisfactorily fulfilled the need to ensure that mandatory training was undertaken regularly by the relevant officers and records kept centrally and monitored.
- 9.8 During the course of 2016 due to the needs of the authority generally, a decision was made to acquire a corporate online training system.
- 9.9 The Council is now rolling out an online development resource from Learning Pool, accessible to all staff via the intranet, branded Aspire Learning.
- 9.10 While there is currently no RIPA training module on the system one is being developed at Chesterfield. This will enable identification of relevant officers, ensure relevant mandatory training is undertaken and renewed and also enable training activities to be monitored by management.
- 9.11 Liaison with other authorities shows that inspection reports are now also recommending training on controlling/handling 'covert human intelligence sources' to ensure preparedness should the need ever arise.
- 9.12 There are already pages of information on Aspire, the Council's intranet, about RIPA with links to the current Surveillance Policy and guidance. These pages will be refreshed and expanded as appropriate.
- 9.13 If the number of authorizing officers is reduced it will be easier to ensure that all the relevant officers receive regular training.

## **10.0 Senior Responsible Officer**

- 10.1 The 2016 Inspection Report recommended that the current Senior Responsible Officer should not be an authorizing officer, as the SRO oversees the process, including activities of an authorizing officer. The Local Government and Regulatory Law Manager is currently the SRO and also an authorizing officer. This overlap in responsibilities came about as the result of the deletion of the Head of Government post when many of the head of service's responsibilities passed on to him.
- 10.2 While the SRO role could be passed to an Executive Director or CMT Manager, the opportunity now exists to make regulatory solicitors authorizing officers instead, leaving the Local Government and Regulatory Law Manager as SRO. This is commensurate with his role also as statutory Monitoring Officer and Senior Information Risk Owner. This would be consistent with retaining the management of RIPA within a legal team with a thorough knowledge of the relevant law behind RIPA.
- 10.3 Liaison with other authorities shows that 2017 inspection reports recommend that the SRO should also be an authorizing officer, but should only authorize in exceptional circumstances. There is an inference in Home Office Guidance on directed surveillance that the SRO should also be an authorizing officer. It is proposed that the dual role is retained, but only exercised in exceptional circumstances.

## **11.0 Reporting to Members**

- 11.1 Members have an important role in overseeing the use of surveillance, but as there has been no surveillance in recent years there has been nothing to update them about. The OSC wishes members to be kept informed, even when there are no authorisations. This will help ensure proper procedures are in place and applied with member oversight.
- 11.2 It is proposed that Standards and Audit Committee is updated at least annually (as required) as to use (or non-use) of the surveillance policy. Members will also have the opportunity to consider any substantive amendments to the Surveillance Policy prior to approval. A copy of a report, to go to the next Standards and Audit committee, is attached at **Appendix C**.



## **12.0 Arvato and Kier**

12.1 Both Arvato and Kier are being liaised with to ensure that any investigative and enforcement staff are appropriately aware of RIPA, have relevant training and follow Council procedures.

## **13.0 Magistrates Court**

13.1 Local authorities in the area liaised with the North East Derbyshire and Dales Magistrates Court in Chesterfield at the time of the 2012 changes.

13.2 It was not considered by the court at that time that any special procedures should be introduced.

13.3 Recent contact with the court confirms that they do not deal with authorizations on a regular basis (this confirms feedback from other nearby local authorities), but that applications have been made to the court in the past.

13.4 No local protocol exists, but the court confirms that it would follow relevant procedures in the Home Office Guidance to Magistrates Courts on RIPA Authorisations (issued in 2012).

## **14.0 Relevant Portfolio**

14.1 Matters relating to RIPA were previously referred to the portfolio holder with responsibility for ensuring the Council exercises its functions with due regard to the effect on prevention of crime and disorder (delegation reference HW1140L), currently the Cabinet Member for Health and Wellbeing.

14.2 In recognition of the significance of RIPA in terms of proper governance, responsibility for this function has now been moved by the Leader to the Cabinet Member for Finance and Governance. The Constitution will be updated to reflect this.

## **15.0 Conclusion**

15.1 The Council has not needed to use RIPA authorisations since 2010. Since 2012 there is a much higher threshold before covert surveillance can be used and a double authorization procedure

involving first the council and then an application to the Magistrates Court. Evidence suggests that the procedures are also rarely used by local authorities in the wider area.

15.2 However it is important for procedures to be kept up to date and for relevant Council and partner staff to have knowledge of the law and procedures to ensure RIPA is complied with. Members must be kept informed regularly.

15.3 Accordingly it is recommended that the changes in procedures outlined in this report, and any consequential changes, are put into effect.

## **16.0 Human resources/people management implications**

16.1 There are no HR or people management implications other than an identifiable training need for staff and proposed training through face to face / Aspire Learning delivery.

16.2 RIPA controls do not apply to core employment functions of the council.

## **17.0 Financial implications**

17.1 There are no significant cost implications.

17.2 There is no financial penalty for non-compliance with RIPA. However, admissibility of evidence obtained in breach of RIPA could be questioned in a criminal prosecution, with potential to affect the outcome of the case and any penalties and costs order imposed.

## **18.0 Legal and data protection implications**

18.1 Legal duties are set out in detail throughout this report. While the council rarely has had need to use the RIPA in recent years, and since 2012 the controls on use have restricted how it is used, it must periodically review the procedures in place to ensure it complies with the law, relevant guidance and best practice.

## **19.0 Risk management**

19.1 The risks relating to the changes to procedures set out in this report are considered below.

Description of the Risk	Impact	Likelihood	Mitigating Action	Impact	Likelihood
Regulated surveillance is carried out without any necessary authorisation	High	Low	Continue to ensure that where possible overt surveillance is carried out. Ensure knowledge of RIPA and restrictions through training.	Low	Low
Relevant officers lacking relevant knowledge as do not receive adequate and regular RIPA training	Medium	High	Regular training that is monitored. Limit number of authorizing officers	Medium	Low
Court enforcement action is prejudiced by failure to follow RIPA procedures	High	Medium	Ensure the council and its officers are prepared, ensuring appropriate action is taken in compliance with law and guidance	Medium	Low

## 20.0 Equalities Impact Assessment (EIA)

20.1 As there are some recommendations for changes to the Surveillance Policy arising from the 2016 Inspection Report a preliminary EIA has been carried out. An EIA was previously carried out in respect of the policy in connection with a report to Cabinet dated 19<sup>th</sup> May 2010.

20.2 No negative impacts from the revised policy are anticipated. The policy is implementing legislative requirements and guidance in place to protect human rights.

## 21.0 Alternative options and reasons for rejection

21.1 The changes recommended come about as the result of the 2016 OSC inspection.

21.2 The proposals are the minimum reasonable, given that the council has not sought any authorisations since 2010, but must be ready to identify the need and seek them when necessary.

## **22.0 Recommendations**

22.1 To note the report and actions.

22.2 To formally adopt the suggested changes to the Council's RIPA policies and procedures.

22.3 To delegate to the Cabinet Member for Finance and Governance decisions on all matters relating to investigatory powers.

22.4 That Standards and Audit Committee receive annual reports on RIPA policy and practices.

22.5 To delegate to the Local Government and Regulatory Law Manager any necessary and consequential amendments relating to RIPA policies and procedures.

## **23.0 Reason for recommendations**

23.1 To enable the Council to operate the RIPA system effectively and as required by law and guidance.

### **Decision information**

<b>Key decision number</b>	<i>n/a</i>
<b>Wards affected</b>	<b>all</b>
<b>Links to Council Plan priorities</b>	<b>to improve the quality of life for local people</b>

### **Document information**

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<b>Background documents</b> These are unpublished works which have been relied on to a material extent when the report was prepared.	
<b>Background documents: RIPA Surveillance Policy and Inspection Report - Legal Services</b>	
<b>Appendices to the report</b>	
<b>Appendix A</b>	<b>Inspection Report Recommendations</b>
<b>Appendix B</b>	<b>Draft Amendments To Surveillance Policy</b>
<b>Appendix C</b>	<b>Draft Annual Report to Standards and Audit Committee</b>
<b>Appendix D</b>	<b>Preliminary EIA</b>