

## Appendix 2

### THE FOLLOWING IS A SUMMARY OF THE PROCEDURAL GUIDE

#### The Contents of the Guide

Part A Introduction and RIPA general

Part B - Surveillance, Types and Criteria

Part C - Covert Human Intelligence Sources (CHIS)

Part D - RIPA Roles and Responsibilities

Part E - The Application and Authorisation Process

Part F - Central Record & Safeguarding the material

Part G - Errors and Complaints

Appendix A Internet & Social Media Research & Investigations Guidance

Appendix B List Relevant Officers names and titles

#### **1. PART A Introduction to the Regulation of Investigatory Powers Act 2000 (RIPA)**

1.1 Local authorities carry out enforcement and prosecutions, some of which may require use of covert methods. For instance, local authorities have the powers to enforce counterfeiting, flytipping and under –age sales of alcohol.

1.2 If a public authority considers it necessary to undertake covert surveillance or use a covert human intelligence source as a means of investigating a criminal offence it must do so lawfully. It should not breach an individual's rights to privacy under Article 8 which is one of the human rights set out in Schedule 1 of the Human Rights Act 1998.

1.3 RIPA is an Act of Parliament which, together with its Regulations and Home Office Codes of Practice, prescribes a system of internal authorisation which includes the appointment of Director-level officers to oversee the process, appointment of authorising officers, the use of standard forms which includes an authorisation form showing a reasoned decision to authorise. It is also subject to a magistrate's approval.

1.4 If these procedures are followed, it is akin to an insurance policy as it ensures that the activities are deemed to be 'lawful for all purposes'.

1.5 It is also possible to use a similar system of authorisation in relation to these covert methods that would not be covered by RIPA or require a magistrate's approval. In other words, covert activity that does not qualify for RIPA's regime, for instance, in relation to directed surveillance, if what is being investigated is not deemed to be 'serious crime'. This may be seen to be more of a risk, however, Article 8 is a 'qualified' human right and therefore there are prescribed circumstances in which the Human Rights Act 1998 envisages that it is acceptable to interfere with the right.

1.6 It is generally accepted by practitioners in this area and by the Investigatory Powers Commissioner that to follow the similar process as is followed for a RIPA authorisation, this would ensure that the activities are in accordance with Article 8 and can be justified in law.

1.7 The use of such covert activities are currently very rare. This authority has not used them for some years, preferring to use overt investigative techniques. The Investigatory Powers Commissioner said in his last report that only a handful of local authorities inspected in 2019 used covert methods for such purposes as test purchases and using covert cameras.

1.8 To comply with the law and the Home Office Codes of Practice this authority has to have the frameworks in place to enable it to use such powers and officer training in the processes because failure to do so would bring it to the attention of the Investigatory Powers Commissioner who inspects local authorities every 3 years. Officers untrained in these processes risk using such covert investigative techniques inadvertently.

## **2. The Regulation of Investigatory Powers Act 2000 (RIPA) came about because of of the Human Rights Act 1998 and Article 8 the human right to privacy.**

2.1 Section 6 of the Human Rights Act 1998 states that it is unlawful for a public authority to act in a way which is incompatible with a Convention right.

2.2 Article 8 (1) states that everyone has the right of respect for their private and family life, their home and their correspondence.

2.3 Article 8 is a qualified right which means sometimes it can be interfered with for prescribed purposes. The second para of Article 8 states:

8 (2) There shall be no interference by a Public Authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society.

2.4 RIPA is that 'law' – a legal framework of internal (and external) authorisations which if complied with makes the activity lawful for all purposes. It requires an authority to have an internal procedure that is formally adopted and accessible to staff and the Investigatory Powers Commissioner's inspectors.

2.5 Under Article 8 in order to be lawful any interference has to be proportionate. It also has to be necessary in the interests of:

- national security,
- public safety
- the economic well-being of the country,
- for the prevention of disorder or crime,
- for the protection of health and morals
- for the protection of the rights and freedoms of others.
- RIPA only permits use of the prevention of crime and disorder criterion

## **3. What can Local authorities do under RIPA?**

3.1. They can authorise 'Directed Surveillance' (covert) for the purpose of preventing or detecting a criminal offence which is 'serious' as defined by RIPA as one that is punishable by a maximum term of at least six months imprisonment; or, exceptionally, where the crime does not fall into that category of seriousness but involves the illegal sale of alcohol or tobacco to children.

3.2 They can authorise the use of a covert human intelligence source also for the prevention and detection of crime and prevention of disorder – but it does not have to be ‘serious’ crime. They can do this subject to approval by a magistrate.

#### **4 Why comply with RIPA?**

- 4.1 Evidence obtained by covert surveillance and use of a CHIS not properly authorised or outside the authorisation given could be ruled inadmissible in court.
- 4.2 Without the RIPA process the local authority could be more open to claims against it for breach of the Human Rights Act leading to reputational damage, compensation and costs;
- 4.3 There is also a risk of complaints made by aggrieved individuals to the Investigatory Powers Tribunal (IPTC)
- 4.4 Under the Investigatory Powers Commissioner’s inspection regime it could amount to a ‘Reportable Error’ if you do covert surveillance or use a CHIS unprotected by RIPA in cases where it is possible to be so protected.
- 4.5 IPCO inspectors who inspect the authority have unfettered access to all the local authority processes and procedures and completed RIPA forms and on inspection will speak to the officers involved to check compliance and report formally to the Chief Executive.
- 4.6 A properly authorised covert operation is, according to RIPA, ‘lawful for all purposes’. This provides a defence to a claim against the authority if someone makes a claim that their Article 8 rights have been breached. The authorisation forms provide evidence that properly reasoned and lawful decision has been made.

## Part B - Surveillance, Types and Criteria

### 5 The definitions.

5.1. **Surveillance:** is defined as monitoring, observing or listening to persons, their movements, their conversations or their other activities or communications; and recording anything. It also includes the use of a surveillance device. Eg a camera

5.2. **Overt surveillance** is where you make sure that the subject of surveillance is aware that it is taking place.

E.g. by way of deliberately and prominently placed signage as in the use of CCTV or you have ensured that the person subject of the surveillance has been informed of the surveillance that may be taking place.

5.3. **Covert surveillance** is that which is carried out in a manner calculated to ensure subjects are unaware it is or may be taking place.

In other words you deliberately 'set out' to ensure the subject does not know you are monitoring/observing them.

5.4 What is '**Directed Surveillance**' ?

- It is covert, but not intrusive;
- It is conducted for the purposes of a specific investigation or operation;
- It is likely to result in the obtaining of private information (see private information below) about a person (whether or not one specifically identified for the purposes of the investigation or operation);
- It is conducted otherwise than by way of an immediate response to events or circumstances the nature of which is such that it would not be reasonably practicable for an authorisation to be sought.

5.5 What is '**Intrusive Surveillance**' ?

- It is covert
- Relates to anything taking place on residential premises or in a private vehicle, and
- Involves the presence of a person on the premises or in the vehicle, and
- Involves the use of a device which may not be on the premises or in the vehicle but which consistently provides information of the same quality and detail as if the device is actually on the premises or in the vehicle.
- Not available to Local Authorities – advice is to 'risk assess' devices used if high powered

5.6 What is '**Private Information**'

- Any information relating to a person's private or family life – all personal relationships with others, family and professional or business relationships,
- In a public place a person's privacy can still be breached even though they enjoy a reduced expectation of privacy.
- There is an expectation that someone may observe a person walking about in public or displaying their life publicly on social media, but not that they will go further than that. Eg listen closely to your conversations, make a record of it and/or record your personal data/photos and share the record or store notes about you (cf internet)

### 5.7 What is 'Confidential and/or Privileged information'?

- Material that has the quality of confidence in common law, for example
- confidential journalistic material and sources of journalistic information,
- medical records or spiritual counselling,
- confidential discussions between Members of Parliament and their constituents
- matters subject to legal professional privilege.
- Confidential personal information
- Directed Surveillance likely or intended to result in the acquisition of knowledge of confidential or privileged material must be authorised by the the Council's Chief Executive who must first seek legal advice from the RIPA Co-Ordinator prior to authorisation.

5.8 NB It is not possible for a local authority to contract out of its responsibilities by instructing an agency to carry out the investigation. If that agency is instructed to carry out a covert investigation it must be authorised internally under the Council's RIPA procedures and approved by a magistrate if it falls within RIPA.

## **6. Part C - Covert Human Intelligence Sources (CHIS)**

### **6.1 What are 'Covert Human Intelligence Sources'**

Someone who establishes or maintains a personal or other relationship with a person for the covert purpose of facilitating:

- the obtaining of information or
- providing access to any information or
- the disclosure of information obtained by the use of such relationship
- Includes anything 'incidental' to the relationship

### **6.2 What is a 'covert purpose for a CHIS?'**

- Where the relationship is conducted 'in a manner that is calculated to ensure that one of the parties to the relationship is unaware of the purpose'; and
- If information obtained 'is used or, as the case may be, disclosed in a manner that is calculated to ensure that one of the parties to the relationship is unaware of the use or disclosure in question'.

### **6.3 Beware the danger of straying into CHIS territory or into CHIS Criminal Conduct**

- Officers must understand the difference between a person who simply reports a crime and becomes a witness who later may provide a witness statement in criminal proceedings and a CHIS.
- If someone has reported a crime the officer must be careful not to task them as a CHIS. If he asks them for more information they must ensure that it does not involve the tasking of the witness to undertake an investigation of their own e.g. forming covert relationships with individuals or observing them covertly over a number of weeks.
- If there is a properly authorised CHIS officers in control or and handling the CHIS must ensure that the CHIS does not commit crimes or assist in the commission of crimes whilst under-cover and if that occurs or likely to occur they must report it to the RIPA co-ordinator, cease to use the CHIS safely and send the cancellation form to the RIPA Co-ordinator.

### **6.4 CHIS criterion**

- The use of a CHIS must be necessary for the prevention and detection of crime and prevention of disorder.
- No requirement that the crime under investigation has to be 'serious' – i.e. carry a penalty of 6 month imprisonment;
- Authorisations for vulnerable and juvenile sources must be by the Chief Executive
- Authorisations must define the use of the CHIS and the control of the CHIS

### **6.5 CHIS Operation**

- There must be a 'handler' with day to day responsibility for the supervision and safety of the CHIS,
- And a 'controller' with general oversight to check all is being done properly by the handler – risk assessments and record keeping all done properly and all is being done in accordance with the authorisation.

## **7. Part D - RIPA Roles and Responsibilities**

- 7.1 Senior Responsible Officer – SRO** - Responsible for: compliance, the overall integrity of the authorisation process, oversight of error reporting and correction, engagement with Investigatory Powers Commissioner’s Office , post inspection action plans and ensuring authorising officers are of an appropriate standard.
- 7.2 RIPA Co-ordinator** – General record keeping, maintaining a central record which can be inspected, monitoring each department's compliance and act on any cases of non-compliance and organise training, provide formal guidance (and daily advice on processes) disseminate and review the provisions of the Council Guidance.
- 7.3 Social Media Co-ordinator** - Authorising covert on-line accounts and ensuring record keeping around those and report to Ripa Co-ordinator – keep log of any equipment that is non-attributable.
- 7.4 Investigating officer** – Applies to Authorising officer for authorisation using correct application form and following procedures and apply to court for approval after authorisation obtained.
- 7.5 Authorising Officers x 2** – Appointed by the SRO to read and deal with RIPA applications.

### **8. Duties of Authorising officers – assessing necessity and proportionality**

A local authority can only interfere with the person’s privacy if it is lawful, necessary and proportionate – see above re Article 8

**8.2 Legal necessity** must be for the prevention and detection of crime if it is a RIPA application.

(for directed surveillance that must be serious crime that attracts a maximum sentence of 6 + months imprisonment or underage sales of alcohol or tobacco)

**8.3 Practical necessity** – the authorising officer must assess whether it is really necessary to use covert methods in a particular case – have all other overt methods been explored?

**8.4 Proportionality – if the covert activity appears excessive it should not be granted.**

The authorising officer will assess this by looking at the overall purpose of the covert surveillance/Chis and balance the need for the covert activity against the likelihood of and extent of breach of privacy.

This will include looking at the seriousness of the crime being investigated. The more serious it is the higher the level of public interest. It is necessary to assess the likely value to the case as a whole of the predicted or ‘product’ of the covert activity.

It will also include looking at the likelihood of the breach of privacy of an individual (s), the likely level of breach of privacy, the size of the covert operation, numbers of officers involved.

Collateral intrusion – the risk that other people other than the intended subjects of the surveillance CHIS will be caught in the observations/operation.

Authorising officers must also assess the level of collateral intrusion and ask if the operation can be limited to minimise intrusion and ask if it can be minimised.

### **9. Part E - The Application and Authorisation Process**

Contains all the particulars necessary for those using the process to understand which forms to complete and who to send them to. There are application forms –upon which the authorising officer will endorse his approval of refusal and reasons. There are also forms for applications for reviews and renewals.

A RIPA authorisation for directed surveillance is to last 3 months and it must be granted for 3 months – if it only carries on for 2 weeks a cancellation form must be completed. A CHIS authorisation is for 12 months and if it ceases beforehand a cancellation must be completed

### **10. Part F - Central Record & Safeguarding the material**

This section relates to record keeping and the duties of the RIPA Co-Ordinator and authorising officers must supply the information to the RIPA Co-ordinator.

### **11. Part G - Errors and Complaints**

#### **11.1 'Relevant error' could be for example:**

- the authorisation process is not followed properly or
- covert surveillance is carried out without an authorisation under RIPA or
- failure to safeguard the material,
- Staff using own device to access social media for Council enquiries

#### **11.2 Error Reporting**

S235 (6) RIPA 2016 says that a public authority, must report to the Investigatory Powers Commissioner any 'relevant error' of which it is aware. All Council employees who become aware of a relevant error must report them.

### **12. Appendix A Internet & Social Media Research & Investigations Guidance**

This is a guidance which explains that someone's on-line presence is treated no differently from their physical public presence. Surveillance of someone's public facing social media pages which contains their private information friends and family etc can still amount to a breach of Article 8. Just because they have not made those pages private does not mean that they are fair game for any public authority that needs to conduct directed surveillance by observing their public-facing pages and recording what they see for an investigation. Those individuals have no idea they are being monitored for those purposes and have a level of expectation of how their information will be viewed and by whom. They will rarely expect that it will be used to conduct an investigation into a criminal offence or indeed any investigation.

Therefore this guidance is for investigators to follow if they need to undertake some surveillance or use CHIS on line. The processes are broadly the same save that if the local authority were to require some covert equipment or process such as to set up a false social media account or to use a device that is not attributable to the Council to send messages, the Council's Social Media Co-ordinator

would need to be consulted and they will keep a record and ensure the appropriate RIPA authorisations for CHIS and Directed Surveillance are obtained.

### **13. Appendix B List Relevant Officers names and titles**

This is simply what it says – a list of those who are currently in these roles set out at para 7 above.