

REPORT TO CABINET

Title: **REGULATION OF INVESTIGATORY POWERS ACT 2000 – REVISED AND UPDATED POLICY AND PROCEDURAL GUIDANCE**

Date: 28 May 2009

Member Reporting: Councillor Hilton

Contact Officer(s): Catherine Hickman, Head of Audit and Review
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Wards Affected: All Wards

1. SUMMARY

1.1 The purpose of this report is to appraise Members of the Council's responsibilities under the Regulation of Investigatory Powers Act 2000 (RIPA) and to seek approval for a revised and updated Council Regulation of Investigatory Powers Act Policy and Guidance Notes. In addition, endorsement is sought for the officers named in paragraph 3.12 of this report to act as "Authorising Officers" for Directed Surveillance and the use of Covert Human Intelligence Sources (Refer Appendix A - Definitions). A proposed revised and updated Policy and Procedural Guidance document is available in the Members Room, Group Rooms, on the Council's web site, and also from Democratic Services.

2. **RECOMMENDATION: That the revised and updated Policy and Procedural Guidance Notes devised for the Council and the officers designated to approve surveillance work be approved and brought into force with immediate effect, to ensure compliance with the Regulation of Investigatory Powers Act 2000 and the recommendations of the Office of Surveillance Commissioners.**

What will be different for residents as a result of this decision?
Residents will be reassured that whilst the Council's officers may at times, in the course of their investigatory, regulatory and enforcement duties, need to make observations of persons in a covert manner or use a Covert Human Intelligence Source (CHIS), it will be very strictly controlled. The Council will be able to demonstrate that surveillance activity is only undertaken when it is necessary and proportionate and, where such action is needed, it will be properly regulated in order to comply with Legislation and to protect an individual's rights of privacy. In addition, independent and regular inspections by the Office of Surveillance Commissioners will reaffirm that assurance.

3. SUPPORTING INFORMATION

BACKGROUND

- 3.1 The Royal Borough of Windsor and Maidenhead's officers may at times, in the course of their investigatory, regulatory or enforcement duties, need to make observations of persons in a covert manner (i.e. carried out in a manner calculated to ensure that the persons subject to the surveillance are unaware that it is or may be taking place), or to use a Covert Human Intelligence Source (CHIS), whether the subject of the surveillance is a member of the public, an employee, owner of a business or a Council employee, or they may be required to intercept communications to obtain evidence.
- 3.2 By its very nature, this sort of action is potentially intrusive and could expose the Council to the implications set out in Section 7 to this report. "RIPA" brought into force the regulation of Covert Surveillance by a number of bodies, including local authorities. It is meant to be a tool to provide the correct balance between protecting an individual's rights to privacy and the proper use of data and surveillance to help us carry out evidence gathering. RIPA does not give the Council any new powers to undertake surveillance; it acts to regulate the Council's use of surveillance.
- 3.3 It should be noted that the RIPA powers are only used after all other avenues of investigation have been tried and exhausted. In fact, in the 2008/09 financial year to date there have only been 5 instances of its use, in 2007/08, only 2 instances and in 2006/07, 3 instances across the whole Council.
- 3.4 The Council's previous RIPA Policy and Procedural Guidance was prepared by the Head of Audit and Review in 2003 and it has recently been updated to ensure that all surveillance undertaken within the Council continues to be in accordance with the law, any changes to the RIPA legislation/guidance and supporting Codes of Practice. A proposed revised and updated Policy and Procedural Guidance document is available in the Members Room, Group Rooms, on the Council's web site, and also from Democratic Services. In addition, the Council's current restructure has required a review of officers authorised to approve surveillance activity 'Authorising Officers', to ensure that they reflect the new Council Directorates.
- 3.5 This revised and updated RIPA Policy and Guidance Notes will apply to all staff and contractors employed by the Council. All relevant Council contracts will include a term that this Policy and Procedural Guidance are to be observed by any contractor operating on behalf of the Council.
- 3.6 The Office of Surveillance Commissioners (OSC) oversees RIPA. They are tasked with ensuring that RIPA is being applied properly. Inspections are carried out at regular intervals, with the most recent one being undertaken on 13 January 2009. Following this recent inspection, which included a review of the revised and updated RBWM Policy and Guidance Notes, the Council received an excellent report. In particular, the Assistant Commissioner commented that: -

- “the Council’s RIPA structures in place are excellent.
- the revised and updated RIPA Policy and Procedural Guidance is first class and consists of the most thorough and detailed advice. Describing the document as ‘Notes’ is something of a misnomer since it consists of the most thorough and detailed advice. It is the work primarily of Ms Hickman, who deserves to be thoroughly congratulated on the result. It is a model of its kind containing clear definitions, descriptions of the requirements of RIPA, detailed internal procedures, numerous examples of types of activity requiring or not requiring authorisation and appendices containing flowcharts relating to the authorising process and very helpful diagrams describing the requirements of RIPA forms. If followed, it is difficult to see how an applicant or Authorising Officer can get the procedure wrong. The document is amongst the best seen.
- the RIPA training programme is most satisfactory.
- the RIPA Monitoring Officer (Head of Audit and Review) is aware of the responsibilities of the office, seeks to perform them with care and is fully alive to the need to discharge them effectively.”

The Assistant Commissioner was also impressed by the enthusiasm of officers who attended the meeting and commented that they were well informed.

Authorising Officers for Covert Surveillance

- 3.7 Surveillance must be necessary to achieve a listed legitimate aim and it must be proportionate before it can be authorised. Before undertaking surveillance, the investigator should therefore identify the factors and the evidence that indicates that the operation is necessary and proportionate.
- 3.8 Under Section 28(3) of the 2000 Act, an authorisation for surveillance may be granted by an Authorising Officer where they believe that the authorisation is necessary in the circumstances of the particular case: -
- a) in the interests of national security;
 - b) for the purpose of preventing and detecting crime or of preventing disorder;
 - c) in the interests of the economic well being of the UK;
 - d) in the interests of public safety;
 - e) for the purpose of protecting public health;
 - f) for the purpose of assessing or collecting and tax, duty, levy or other imposition, contribution or charge payable to a government department; or,
 - g) for any other purpose prescribed by an order made by the Secretary of State.

NOTE:- Local authorities are only empowered to use RIPA on the grounds specified in point ‘b’ – for the purpose of preventing and detecting a crime or of preventing disorder.

- 3.9 The Regulation of Investigatory Powers (Directed Surveillance and Covert Human Intelligence Sources) Order 2003 SI2003 No. 3171 lists the main authorising officers. This prescribes that in a local authority, authorisations for Directed Surveillance and the use of a CHIS should be granted to Assistant Chief Officers, Assistant Head of Service, Service Manager or equivalent. Authorising Officers should not be responsible for authorising investigations or operations in which they are directly involved, although it is recognised that this may sometimes be unavoidable in the case of small organisations or where it is necessary to act urgently. These will be designated as “Authorising Officers”.
- 3.10 In accordance with the Code of Practice on Obtaining Information (Version Two) Social Security Fraud Act 2001, local authority officers are required to be authorised by the officer designated under Section 4 of the Local Government and Housing Act 1989 as the Chief Executive or the Chief Finance Officer.
- 3.11 Cabinet endorsed the previous Authorising Officers at their meeting on 17 December 2003. However, as a result of the Council restructure, there is a need to review the current list of Authorising Officers. A number of senior officers (not so senior that they do not have time to meet all their responsibilities) who have been trained to the appropriate level should be nominated as Authorising Officers. It will be the responsibility of these officers to consider all RIPA applications and to grant or refuse authorisations, as appropriate. The number that should be authorised depends on the size of the local authority and other factors. However, in order to achieve conformity of practice and regular training, best practice guidance recommends that no more than six will be needed.
- 3.12 The following senior officers have been nominated by the Chief Executive to be the Council’s Authorising Officers for Directed Surveillance and the use of Covert Human Intelligence Sources.
- Chief Executive, Ian Trenholm (including Confidential Information)
 - Strategic Director of Environment, David Oram
 - Interim Strategic Director of Resources, David Scott
 - Head of Finance – Andrew Brooker
 - Head of Public Protection – Terry Gould
 - Head of Planning and Development, Tim Slaney
 - Head of Children’s Commissioning, Angela Wellings
- 3.13 These officers will not act as the “Authorising Officers” for Covert Surveillance if:
- The case and surveillance is to be carried out within their own unit;
 - For any reason they have a vested interest in the case.
- 3.14 In order to ensure greater independence and consistency, the power to grant, extend and discontinue authorisations will be limited to these officers only. The Head of Audit and Review, as RIPA Monitoring Officer, will maintain this list. Additions / deletions will be made with their approval only.

3.15 The Head of Audit and Review will maintain this list of “Authorising Officers” and of authorisations issued in a Central Registry.

Training

3.16 In accordance with the Code of Practice on Obtaining Information (Version Two) Social Security Fraud Act 2001, Authorising Officers **must** receive full training in the use of their powers. They must have completed appropriate training in investigative techniques, Data Protection and Human Rights Legislation. A Corporate training programme has been developed to ensure that Authorising Officers and staff undertaking relevant investigations are fully aware of the legislative framework. Training has been arranged for March/April 2009 for all new Authorising Officers and refresher awareness training for officers in those services that may undertake investigative work.

4. OPTIONS AVAILABLE AND RISK ASSESSMENT

4.1 Options

	Option	Comments	Financial Implications
1.	Approve the revised and updated Council RIPA Policy and Guidance Notes and the officers designated as “Authorising Officers” for approving surveillance activities and make lawful any conduct authorised and carried out in accordance RIPA.	<p>The implementation of Option 1, which will require officers to implement and comply with the RIPA Policy and Guidance Notes, can protect both the Authority and individual officers from the following: -</p> <ul style="list-style-type: none"> • Inappropriate surveillance without the protection and control provided by RIPA. • Inadmissible Evidence and Loss of a Court Case / Employment Tribunal / Internal Disciplinary Hearing - there is a risk that, if surveillances are not handled properly, the evidence obtained may be held to be inadmissible. • Legal Challenge - as a potential breach of Article 8 of the European Convention on Human Rights, which establishes a “right to respect private and family life, home and correspondence”, incorporated into English Law by the Human Rights Act (HRA) 1998. Any person aggrieved by the way a local authority carries out Covert Surveillance, as defined by RIPA, can apply to a 	Revenue Officer time in undertaking regulatory, enforcement and investigative work. Capital - None

	Option	Comments	Financial Implications
		<p>Tribunal under the Act for redress within a year of the act complained of, or any longer period that the Tribunal thinks it just and equitable to allow. Tribunal can quash any authorisation and can order the destruction of information held or obtained in pursuit of it. It cannot, as yet, award compensation but its findings may be of use in a Human Rights case challenge, as a defence to a case brought by the Council, in a referral to the local government Ombudsman or a complaint to the Information Commissioner, from where compensation awards can flow.</p> <ul style="list-style-type: none"> • Fine or Imprisonment - Interception of communications without consent is a criminal offence punishable by fine or up to 2 years in prison. • Censure - the OSC, who conducts regular inspections on how local authorities implement RIPA, to ensure that it is being applied properly, oversees RIPA. If a local authority is not implementing RIPA properly, then this could result in censure. 	
2.	Amend the proposals set out in Option 1 within the requirements of RIPA and the OSC.	Members may wish to request that this report amended / altered if they feel that there are material issues which have not received sufficient emphasis, within the requirements of the RIPA and OSC.	Revenue Officer time in undertaking regulatory, enforcement and investigative work. Capital - None
3.	Not approve this proposals set out in Option 1.	This may expose the Authority to unnecessary risks by not having an RIPA Framework leading exposure to the factors detailed in Option 1 (Comments Column) and adverse criticism from the OSC.	Revenue Officer time in undertaking regulatory, enforcement and investigative work. Capital - None

4.2 Risk Assessment

Risk	Uncontrolled Risk	Controls	Controlled Risk
Surveillance performed poorly or negligently leading to fines, claims, investigation delays, failure to recover debts and negative publicity.	Medium financial risk	Policy set with explicit and auditable reference to current RIPA legislative requirements. Corporate Training programme to ensure awareness and correct application of powers. Positive Inspection report from the OSC (13/01/09)	Low financial risk
Do not pursue covert surveillance as a method of investigatory, regulatory or enforcement duties. Use of other less intrusive methods in place of surveillance. Leads to reduction in quantity / quality of investigations, possible recoveries and frauds not pursued.	Medium financial risk	Undertake covert surveillance to enhance RBWM's abilities to investigate fraud and make recoveries, improve enforcements and ensure the appropriate regulations are not breached.	Low financial risk
Failure to appoint suitable Authorising Officers without reference to legislation leads to breach of RIPA. Enforcements cannot be pursued leading to lost revenue and debts not recovered.	Medium financial risk	Chief Executive approves and Cabinet endorses Authorising Officers to ensure suitability and ability.	Low financial risk
Policy is not up to date leading to inadvertent breach. RBWM actions contravene RIPA leading to punitive measures, investigations and delays.	Medium Service delivery risk	Regular inspections carried out by OSC to ensure RIPA is carried out correctly. Corporate Training programme will ensure current RIPA legislation and Codes of Practice applied.	Low service delivery risk

5. CONSULTATIONS CARRIED OUT

5.1 This RIPA Policy and Procedural Guidance has been prepared by the Head of Audit and Review, Audit and Review Unit, in consultation with the Council's Senior Management Team, Legal Services, the Data Protection Officer, the Council's Section 151 Officer, officers from the Environment Directorate and other relevant officers within the Council. Any enquiries about this Policy must be referred to the Head of Audit and Review, who is also designated as the Council's RIPA Monitoring Officer.

6. COMMENTS FROM THE CORPORATE SERVICES OVERVIEW AND SCRUTINY PANEL

6.1 Subject to the additions mentioned below, the Panel recommended that the revised and updated Policy and Procedural Guidance Notes devised for the Council and the officers designated to approve surveillance be forwarded to Cabinet for formal APPROVAL and it to be brought into force with immediate effect, to ensure compliance with the Regulation of Investigatory Powers Act 2000 and the recommendations of the Office of Surveillance Commissioners.

Corporate Services Overview and Scrutiny Panel Comment	Action
Further clarification was required with regard to the nature of the advice that would be given by officers/agents of the Council to 3rd parties to carry out covert surveillance. Notwithstanding, all Councillors should seek guidance from the appropriate officer before giving any advice to a 3rd party.	RIPA awareness training has been offered to all officers within services where surveillance may be undertaken as part of their regulatory, enforcement and investigating duties. This training is provided every two years. Part of that training includes recommendations that due to the intricacies of RIPA, in order to best protect the Council, advice should be sought from the RIPA Monitoring Officer prior to any advice/guidance being given to third parties.
Reference and source information to be provided to the guidance in R v Johnson referred to in the document.	Included as Annex 2.
Delete the last sentence in paragraph 7.14.1 relating to the oral renewal of an authorisation.	Following guidance from specialist RIPA advisors, it is requested that Cabinet reconsider the request to remove this part of the sentence. In addition, the OSC Assistant Surveillance Commissioner has reviewed the Policy and was satisfied that this sentence should be included. The reason for its inclusion is to avoid poor practices occurring and there are circumstances when such an authorisation might be required i.e. if an operation was coming to the end of its 3 month authorisation date

	<p>and then further information came to light in the last few minutes of the period in which the authorisation was valid. For example, if the subject of the surveillance suddenly came back into the country and further evidence was coming to light, then rather than loose valuable evidence, an oral renewal authorisation might be immediately required, which would be followed up in writing at the earliest opportunity. It should be noted that the requirement for such an authorisation is be extremely rare (it has never happened between 2003 to date at RBWM).</p> <p>Otherwise, in the above case, if the Policy did not allow an oral renewal authorisation to be given, the officer could cancel their 3-month authorisation at the end of the period, then could immediately request a new oral 72-hour authorisation and follow that up later with another 3-month authorisation. The Surveillance Commissioners would not view this as good practice.</p> <p>The reason for this requirement being included in the Policy is to protect the Council.</p> <p>Until the Overview and Scrutiny Panel has had the opportunity to reconsider its previous request, the Chair of that Panel has agreed that the deletion need not be made. The Chair considers that this would be entirely without risk as there are unlikely to be any oral renewals prior to the next Panel meeting. However, in the event that one should occur, it would only be authorised after very careful consideration and the details of the renewal will be explained at the next Panel meeting.</p>
Lead Member referred to in paragraph 7.16.4 should be specified (i.e. Finance)	Paragraph amended to include reference to the Lead Member for Finance.
The Panel will also receive the six monthly report identifying the number of authorisations issued.	Agreed – first report to be provided for activity over the first six months of 2009/10.

7. IMPLICATIONS

7.1 The following implications have been addressed where indicated below.

Financial	Legal	Human Rights Act	Planning	Sustainable Development	Diversity & Equality
Y(1)	Y(2)	Y(3)	N/A	N/A	N/A

1. Financial - A Corporate training programme has been developed to ensure that Authorising Officers and officers who may undertake surveillance activities as part of their regulatory, enforcement or investigative work are fully aware of the legislative framework and best practice guidance in respect of RIPA to ensure awareness and consistency in approach. Training costs will be in the region of £2,500.
2. Legal - The adoption of this Policy and Guidance Notes will ensure compliance with the Regulation of Investigatory Powers Act 2000 and supporting Codes of Practice.
3. Human Rights Act - The adoption of this Policy and Guidance Notes will ensure that surveillance work undertaken within the Authority is in compliance Article 8 of the European Convention on Human Rights, which establishes a "right to respect private and family life, home and correspondence", incorporated into English Law by the Human Rights Act (HRA) 1998.

Background Papers:

Regulation of Investigatory Powers Act 2000

Article 8 of the European Convention on Human Rights, incorporated into English Law by the Human Rights Act (HRA) 1998.

Office of Surveillance Commissioners Website

Home Office Codes of Practice on Directed Surveillance and Use of Covert Human Intelligence Sources

Definitions

Covert Surveillance

This is surveillance that is carried out in a manner calculated to ensure that the persons subject to the surveillance are unaware that it is or may be taking place. Covert Surveillance can be either Directed Surveillance or Intrusive Surveillance.

- **Directed Surveillance** is surveillance which is covert but not intrusive and which is undertaken:
 - A. for the purposes of a specific investigation or a specific operation,
 - B. in such a manner as is likely to result in the obtaining of private information about a **person** (not a business) – whether or not they are the target of the investigation/operation, and
 - C. is not carried out in immediate response to events or circumstances, which make prior authorisation not reasonably practical.
- **Intrusive Surveillance** is Covert Surveillance that is carried out in relation to anything taking place on residential premises or in any private vehicle and which involves the presence of an individual on the premises or in the vehicle or is carried out by means of a surveillance device.
- Local Authorities are **NOT** authorised to conduct Intrusive Surveillance without the consent of the Secretary of State.

Surveillance, according to Section 48 of RIPA, includes: -

- A:** "Monitoring, observing or listening to persons, their movements, their conversations or their other activities or communication (NB - In S81, communication is defined as anything comprising speech, music, sounds, visual images or data of any description and signals serving either for the impartation of anything between persons, a person and a thing or between things on actuation or for the control of any apparatus)
- B:** Recording anything monitored, observed or listened to in the course of surveillance and
- C:** Surveillance by or with the assistance of a surveillance device.

Surveillance can also include the interception of postal and telephone communications where the sender or recipient consents to the reading of or listening to or recording of the communication (as the case may be).

Covert Human Intelligence Source

A person is a **Covert Human Intelligence Source**, if -

A (s)he establishes or maintains a personal or other relationship (this must be a relationship and not a conversation) with a person for the covert purpose of facilitating the doing of anything in **B** or **C**.

B covertly using the relationship to obtain information or provide access to any information about another person or

C covertly disclosing information obtained by the use of such relationship, or as a result of its existence.

Interception of Communications

Communication includes: -

- a. Anything transmitted by means of a postal service
- b. Anything comprising speech, music, sounds, visual images or data of any description; and
- c. Signals serving for the impartation of anything between persons, between a person and a thing or between things or for the actuation or control of any apparatus.

Interception

A person intercepts a communication in the course of its transmission by means of a telecommunication system if, and only if, (s) he: -

- a. So modifies or interferes with the system or its operation;
- b. So monitors transmissions by means of the system; or,
- c. So monitors transmissions made by wireless telegraphy to or from apparatus comprised in the system.

as to make some or all of the contents of the communication available, while being transmitted, to a person other than the sender or intended recipient of the communication.