

APPENDIX D

WAVERLEY BOROUGH COUNCIL

EXECUTIVE – 25 MAY 2010

COUNCIL – 20 JULY 2010

Title:

REVIEW OF REGULATION OF INVESTIGATORY POWERS ACT 2000

COVERT SURVEILLANCE POLICY

**[Portfolio Holder for Community Safety: Cllr Mrs Carole King]
[Wards Affected: All]**

Summary and purpose:

To update Members on the outcome of the Home Office's consultation paper in respect of the Regulation of Investigatory Powers Act 2000 ("RIPA"), and to present an amended Covert Surveillance Policy for the approval of the Executive and adoption by the Council.

How this report relates to the Council's Corporate Priorities:

Improving the quality of life for all, particularly the more vulnerable in our society, is one of the Council's Corporate Priorities. The effective investigation into and prosecution of criminal activity within the Borough will help in improving the quality of life for both individuals and businesses.

Equality and Diversity Implications:

There are no equality and diversity implications in this report.

Resource/Value for Money implications:

The impact of RIPA on budgetary resources is neutral.

Legal Implications:

The investigative procedures of the Council accord fully with the provisions of RIPA and supporting secondary legislation, and records of compliance support probity and provide evidence in the event of challenge in a particular case.

Amendments to the law and supporting codes of practice mean that the Council should revise its policy in order ensure that it is legally compliant.

Introduction/Background

1. The Regulation of Investigatory Powers Act 2000 (“RIPA”) came into force on 25 September 2000 and introduced a regulatory framework within which public authorities, including the Council, use covert investigatory techniques.
2. The introduction of the Human Rights Act 1998 meant that public authorities were obliged by law to justify any interference with the Article 8 right to a private and family life of the subjects of any investigation. There was at that time no regulatory system in place to govern the use of covert investigatory techniques, and so RIPA was introduced in order to address this gap in the law.
3. RIPA sets out a regulatory framework under which public authorities must justify their interference with the Article 8 right, and RIPA also dictates which covert techniques each public authority is able to use, and the purposes for which those techniques can be used. In the Council’s case, the only ground on which it may authorise the use of covert techniques and intrude on private and family life is the “legitimate aim”, as defined by the 1998 Act, of the “prevention and detection of crime or the prevention of disorder.”
4. RIPA dictates that the Council can use the following three covert techniques:

Directed Surveillance: Covert surveillance that is not intrusive but is carried out in relation to a specific investigation or operation in such a manner as is likely to result in the obtaining of private information about any person, and which is undertaken otherwise than as an immediate response to events or circumstances such that it is not reasonably practicable to seek authorisation under RIPA. Examples include observation of movements, photographing or filming, tracking vehicles in person and recording of noise escape from premises.

Acquisition of Communications Data: Information about a communication, such as telephone numbers involved and the time and place a call was made, but not the content of the communication. The same applies in respect of an email. Local authorities are currently permitted to intercept service use data and subscriber data.

Covert Human Intelligence Sources: A person authorised by a local authority to establish or maintain a relationship in order covertly to obtain information and disclose it to that local authority. The person acting as a 'CHIS' can be an undercover officer or a tasked informant (eg. a member of the public).

5. It is important to note that if the Council wishes to use any of the above investigatory techniques, it must be sure that it is necessary and proportionate to do so in the circumstances of each individual case.

Home Office Consultation

6. On 7 July 2009 the Executive received a report setting out the detail of a Home Office consultation paper regarding RIPA and its supporting legislation and codes of practice. The consultation sought views on the extent of the use of RIPA by public authorities, as well as ways in which the RIPA authorisation and oversight process could be strengthened. The Executive, having noted comments received from the Community Overview and Scrutiny Committee, endorsed the Council's response to the consultation as set out in the July 2009 report. A copy of the Council's response is attached at Annexe 1.
7. The consultation closed on 10 July 2009 and the Government recently published revised RIPA Orders and codes of practice, which all came into force on 6 April 2010.
8. The Regulation of Investigatory Powers (Directed Surveillance and Covert Human Intelligence Sources) Order 2010:
 - consolidates previous orders which set out who within each public authority can authorise directed surveillance;
 - maintains the ground for which an authorisation could be granted by a local authority – i.e. for the purpose of preventing or detecting crime or of preventing disorder;
 - revises the level of officer that can sign such authorisations to “Director, Head of Service, Service Manager or equivalent.” This includes any more senior positions.
9. The Regulation of Investigatory Powers (Communications Data) Order 2010 consolidates all earlier Orders relating to communications data and prescribes the same ground and levels of authorisation in respect of communications data as are set out in the preceding paragraph in respect of directed surveillance and CHIS.
10. The revised codes of practice (available to view on the Home Office website at <http://security.homeoffice.gov.uk/ripa/making-an-app-under-RIPA/codes-of-prac/>) entitled ‘Covert Surveillance and Property Interference’ and ‘Covert Human Intelligence Sources’ provide expanded guidance on fundamental RIPA considerations such as necessity, proportionality and collateral intrusion, and are more user-friendly than previous versions. The Codes also introduce new responsibilities into the RIPA framework, namely the ‘Senior Responsible Officer’ and an enhanced role for councillors (see below).
11. The revised Codes now set out a number of practical examples intended to assist those involved in the authorisation process when deciding whether a RIPA authorisation is appropriate in a particular case. One such example relates to the investigation of relatively minor offences such as littering, leaving waste out for collection a day early, or permitting dog fouling in a public place without clearing up afterwards, and the Covert Surveillance Code suggests that a RIPA authorisation would not be appropriate in such circumstances. Members will remember that much of the negative publicity surrounding local authorities’ use of covert surveillance centred on the use of RIPA to investigate minor offences such as dog fouling.

12. The 'Acquisition and Disclosure of Communications Code of Practice' was not subject to the consultation and remains unchanged.

Senior Responsible Officer

13. The Codes relating to directed surveillance and CHIS state that it is considered good practice for every public authority to appoint a Senior Responsible Officer ("SRO"), who should be responsible for:
 - the integrity of the process in place within the local authority to authorise directed surveillance and interference with property;
 - compliance with RIPA and the Codes of Practice;
 - engagement with the Office of Surveillance Commissioners ("OSC") and its inspectors when they conduct inspections; and
 - where necessary, overseeing the implementation of any post-inspection action plans recommended or approved by a Commissioner.

The SRO should be a person holding the position of an Authorising Officer within the public authority, and the Codes state that within local authorities the SRO should be a member of the corporate leadership team and should be responsible for ensuring that all Authorising Officers are of an appropriate standard in light of any recommendations made by the OSC.

14. The 'Acquisition and Disclosure of Communications Code of Practice' states that it is considered good practice for every public authority to appoint a Senior Responsible Officer in respect of communications data, with responsibilities almost identical to those set out in paragraph 12. The only difference being that the Interception of Communications Commissioner's Office conducts inspections in respect of this aspect of RIPA.

Oversight by Elected Members

15. As a result of the consultation, the revised directed surveillance and CHIS Codes now state that it is best practice for elected Members to review the Council's use of RIPA and set its policy at least once a year. Further, they should also consider internal reports on the use of RIPA on at least a quarterly basis to ensure that it is being used in a manner consistent with the Council's policy and that the policy remains fit for purpose. However, the Codes state that Members should not be involved in making decisions on specific RIPA authorisations.
16. The Code relating to communications data contains no such similar provision in respect of elected Members. However, there is no reason why the Council should not adopt the same best practice approach by reporting to Members on the Council's use of RIPA in respect of communications data.

The Council's Use of RIPA

17. Since the date of the report to the July 2009 Executive the Council has not granted any RIPA authorisations in respect of any of the three permitted investigatory techniques. During the 2009 calendar year a single authorisation was granted for the use of directed surveillance, details of which

were included in the previous report. Although the Council is permitted under RIPA to authorise both the interception of communications data and the use of CHIS, it has not done so since RIPA came into force.

18. In short, the Council continues to use covert investigatory techniques sparingly, and only when considered absolutely necessary and proportionate in the circumstances of each individual case.

The Council's Policy

19. The Council adopted a revised Covert Surveillance Policy, and approved a revised list of Authorising Officers, on 11 December 2007. That revision followed an inspection of the Council by, and subsequent recommendations from, the Office of Surveillance Commissioners in April 2007. The current policy is attached at Annexe 2.
20. A proposed revised Policy is attached at Annexe 3. In summary, the suggested changes are as follows:
 - Appointment of a Senior Responsible Officer with responsibility for the matters set out in paragraph 12 above.
 - Introduction of an oversight process by elected Members.
 - A revised list of Authorising Officers (see the Appendix to the Policy) that reflects the intervening internal Council restructure and accords with the revised RIPA Orders.
 - Updated references to the relevant RIPA Orders.
 - Minor amendments throughout the Policy to reflect the distinction between covert surveillance (directed surveillance and CHIS) and the acquisition of communications data. The title of the Policy has also been amended to make this distinction clearer.
21. There is scope for the Council to reduce its number of Authorised Officers, given the Council's limited use of RIPA, without impacting on the robustness of the authorisation process. Reducing numbers would ensure that requests for authorisations are considered by the more senior ranks prescribed by the legislation. A smaller pool of Authorised Officers would also ensure that each of the Authorised Officers is more likely to assess a request for authorisation and therefore put into practice relevant training provided by the Council and maintain practical knowledge of the authorisation process. This would in turn reduce annual training costs by reducing the number of Officers for whom such training would be required.
22. All Authorised Officers are subject to the same annual training covering the key issues of proportionality, necessity and collateral intrusion, and should therefore be able to assess issues of necessity, proportionality and collateral intrusion, whether or not the authorisation comes from an officer within their Service. However, there is a need for the Authorised Officer to be familiar enough with any equipment in order to be able identify any operational risks, and therefore investigating officers are again more likely to seek authorisation from their Head of Service or Director.

23. Members should note that the Council's internal RIPA working procedures for Officers are also being updated so that they accord with the changes to the legislation and codes of practice.

Conclusion

24. The revisions to RIPA and its supporting secondary legislation and codes of practice have a significant bearing on the Council's internal oversight of its use of RIPA for criminal investigations. It is therefore vital that the Council's Covert Surveillance Policy accords with the amended legislation and Codes.

Recommendation

It is recommended that

1. the Executive agrees to quarterly update reports being submitted to the Executive in respect of the Council's use of RIPA; and
2. the Council approve and adopt the revised Covert Surveillance Policy and the revised list of Authorised Officers, and appoint the Chief Executive as Senior Responsible Officer and the Deputy Chief Executive as Deputy.

Background Papers

There are no background papers (as defined by Section 100D(5) of the Local Government Act 1972) relating to this report.

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