

Waverley Borough Council

Report to: Audit and Risk Committee

Date: 11 September 2023

Ward(s) affected: All

Report of Director: Governance & Policy

Author: Jayne La Grua – Deputy Borough Solicitor

Tel: 01483 523263

Email: jayne.lagrua@waverley.gov.uk

Lead Councillor responsible: TBC

Report Status: Open

Review of Waverley Borough Council's Covert Investigative Powers Policy and alignment with the Policy of Guildford Borough Council

1. Executive Summary

- 1.1 The Audit and Risk Committee is asked to adopt the draft policy in Appendix 1 to this report. The Committee is also asked to note that the Executive at Guildford Borough Council has been asked to recommend an identical policy to Guildford Borough Council, with a view to both councils updating their current policies to reflect best practice, and to put the councils in the position of separate but aligned policies. This would reflect the current position of maintaining sovereignty but the policy being aligned to support and facilitate future collaboration between the councils should that be forthcoming.

- 1.2 The Regulation of Investigatory Powers Act 2000 (RIPA) (as amended by the Protection of Freedoms Act 2012 (POFA)) and the Investigatory Powers Act 2016 (IPA) set out a regulatory framework for the use of covert investigatory techniques by public authorities who must also adhere to the published Codes of Practice. The purpose of the legislation is to regulate powers to access information in a manner that is compatible with the Human Rights Act 1998, particularly Article 8 - the right to respect for private and family life.
- 1.3 Interference with these rights must be necessary and proportionate. Waverley Borough Council is committed to implementing the provisions of RIPA (and associated legislation) to ensure that any covert surveillance and/or obtaining of Communications Data is undertaken lawfully and is necessary and proportionate to alleged offences.
- 1.4 It should be noted that the Council only uses covert surveillance powers exceptionally. In the last five years, the Council has only used its powers twice, once in February 2019 and once in August 2021. Both uses were in relation to directed surveillance.
- 1.5 The proposed policy:
 - describes the investigative techniques local authorities are allowed to use and the limited circumstances in which they can be used;
 - outlines the need for authorisation, training and identifies examples of what exactly would constitute regulated activity; and
 - seeks to outline the roles and responsibilities of various officers under the policy to ensure best practice and a consistency in approach when exercising RIPA and IPA powers.
- 1.6 The legislation and Codes of Practice are frequently amended, and this policy seeks to give up-to-date details of those changes. It will help the Council to comply with the requirements of the Investigatory Powers Commissioner's Officer (IPCO) Inspectorate and also provide guidance to those who use these powers.

- 1.7 As there is now a Joint Management Team, some roles described within this policy, are shared across both Waverley and Guildford Councils and it makes sense for the policy to reflect this, and for Waverley and Guildford to have aligned policies so the responsibilities of shared officers are clear and consistent.
- 1.8 The draft policy draws the best parts and examples from each individual policy into one shared document.

Options considered:

- Maintaining two different policies, one for each council. (This is not recommended as both policies needed updating and as some of the personnel needed to fulfil these roles are based across the councils; it therefore makes sense to have the same policy and consistency).
- Adopt a joint policy for Waverley and Guildford – this is not recommended at the current time as it would not reflect the current status of two separate councils with limited collaboration in place, restricted to the Joint Management Team.
- Adopt two separate policies for Waverley and Guildford which are aligned – to reflect the separate sovereignty but enable and facilitate collaborative working whilst providing consistency and clarity for the roles and responsibilities of joint senior officers - in its current drafted form at Appendix 1. This is the recommended course of action.

2. Recommendation to Audit and Risk Committee

- 2.1 That the draft Policy in Appendix 1 to this report be adopted, subject to the same policy being adopted by Guildford Borough Council.

3. Reasons for Recommendation:

- 3.1. To align the policies of Waverley and Guildford and to improve consistency in reporting, monitoring and approval of covert surveillance and acquisition of communications data.
- 3.2. To ensure the integrity of the processes in place for the use of directed surveillance, covert human intelligence sources (CHIS) and acquiring communications data.
- 3.3. To maintain compliance with the Legislation and Codes of Practice that govern Investigatory powers and the Human Rights
- 3.4. To ensure collaborative engagement with IPCO and their inspectors
- 3.5. To ensure staff are fully trained and aware of their powers, duties and the authorisation process.

4. Exemption from publication

- 4.1 This report is not exempt from publication.

5. Purpose of Report

- 5.1. To inform the Council of proposed changes to the Covert Surveillance Policy and to agree a Policy that can be adopted by Waverley with the same policy being adopted by Guildford.
- 5.2. To streamline and update the Policy to reflect the most recent changes in law and changes in personnel responsible for different roles.

6. Strategic Priorities

- 6.1. To be a trusted, efficient, innovative, and transparent Council by publishing the framework we will operate under.
- 6.2. To ensure local, open, participative government

6.3. To comply with our value that we ensure that our councillors and staff uphold the highest standards of conduct.

6.4. To use all techniques available to ensure effective regulation and enforcement.

7. Background

7.1 Historically, both Waverley and Guildford have had their own separate and quite different policies in relation to covert surveillance. Waverley had a relatively short policy document, which referred to a detailed procedural document. They also had a separate social media guidance document. Both policies were somewhat out of date in respect of Communications Data terminology and procedure as implemented by the IPA. Guildford's Policy combined policy with practice and procedure and had some good examples to help illustrate when the power came into play. However, the policy was lacking in detail in some areas, particularly in relation to error reporting and social media usage guidance.

7.2 The draft policy at Appendix 1 aims to combine the best parts of both councils' documents into a coherent policy, which covers policy, practice, procedure, examples and social media guidance.

7.3 This policy applies to all employees of Waverley Borough Council, including those working from home or at non-Council locations. It also applies to councillors, consultants, agency staff and contractors working for the Council and external organisations working with the Council, whilst engaged on Council business. Provided the same Policy is adopted by Guildford Borough Council, that too will also apply to all their employees, councillors, consultants, agency staff and external organisations working on Council business. Hence, there will be clarity and consistency of both councils having an identical policy for employees and others employed jointly by the two councils or working collaboratively on joint or shared services or projects. The two councils having an identical policy will also put them in a strong position to support any future decisions to progress and extend the current collaborative working.

- 7.4 This policy applies to the authorisations of directed surveillance, CHIS and acquisition of communications data and other related activities.
- 7.5 The IPCO regularly inspects councils on their usage and compliance with the legislation and the contents of this draft policy has sought to address concerns raised in past inspections. It should be noted that Waverley Borough Council underwent an inspection from the IPCO in June 2023 and there were no matters of non-compliance raised. Guildford Borough Council is expecting an inspection from the IPCO in 2023-24.
- 7.6 By outlining different roles, responsibilities and procedure and training requirements it is hoped that there will be more clarity in the safe use of the councils' powers under these Acts, which are in turn a very useful enforcement tool to uphold the regulatory and enforcement duties of the councils.

8. Consultations

- 8.1. Liaison has taken place between Waverley and Guildford Legal Services and the Data Protection Officer for Guildford and Fraud Investigative Officer at Waverley.

9. Key Risks

- 9.1. Non-compliance with RIPA and associated legislation or the Human Rights Act, leading to non-admissibility of evidence, claims for compensation, maladministration, or criminal sanctions.
- 9.2. Criticism and negative results in IPCO inspections.

10. Financial Implications

- 10.1 Training costs of approximately £2,000 - in order to comply with the training requirements in the policy. (NB. it is proposed these costs will be shared with other councils across Surrey.)

11. Legal Implications

- 11.1 Having a policy which is not up to date with legislation and Codes of Practice, could lead to non-compliance with RIPA and associated legislation or the Human Rights Act.
- 11.2 If data is obtained unlawfully this could lead to non-admissibility of evidence, which would affect our ability to prosecute offences.
- 11.3 New criminal offences have been enacted under the IPA in relation to obtaining or disclosing data unlawfully.

12. Human Resource Implications

- 12.1. None identified.

13. Equality and Diversity Implications

- 13.1 We have had due regard to the aims of the Public Sector Equality Duty (Equality Act 2010) and our statutory duty under section 149 of the Equality Act 2010, when drafting this policy.
- 13.2 This duty has been considered in the context of this report and it has been concluded that any equality and diversity implications are adequately addressed in the processes outlined.
- 13.3 The policy itself does seek to safeguard juvenile and vulnerable sources and warns against employment of covert techniques in a disproportionate manner.
- 13.4 The considerations and authorisations that any application for the use of covert techniques must pass, will mean that any use will be necessary and proportionate, and consideration will have been given to collateral intrusion and the Human Rights Act.
- 13.5 Therefore, when the policy and legislative framework is followed, powers can only be employed in a balanced and non-discriminatory way. Powers can only be employed in a specific range of circumstances and checks and balances are in place.

14. Climate Change/Sustainability Implications

14.1. There are no direct climate change or sustainability implications arising from this report. The Council must manage risk effectively, especially risks relating to programmes and projects, to achieve its goal of being net-zero carbon by 2030.

15. Summary of Options

15.1 The officers' preferred option is that the Council adopts the new policy as drafted (Appendix 1), which is up to date as to current legislation and helps to align the two councils' policies on usage of investigatory powers. Once approved by both councils, this document will replace:

1. GBC's Covert Surveillance Policy and Procedure version 1 (2022)
2. WBC's RIPA Policy version 2.0 (2023)
3. WBC's Regulation of Investigative Powers Act 2000 – Procedural Guide (2023)
4. Waverley social media in investigations procedure and guidance note.

15.2 The Audit and Risk Committee could adopt the new aligned policy with such amendments as it may see fit. However, the Committee should be mindful that any amendments it makes may not be adopted by Guildford Borough Council which would negate the benefits of having an aligned and identical policy.

15.3 The Audit and Risk Committee could refuse to adopt the new policy and keep the separate and different policy framework for each borough Council. Along with not aligning to two authorities, there is also a risk that the policies are not compliant with the current guidance.

16. Conclusion

16.1 It is recommended that the new aligned policy is agreed and adopted as it contributes to consistent Practice across both Boroughs

and updates the policies in line with changes in legislation and personnel.

17. Background Papers

RIPA 2000 - [Regulation of Investigatory Powers Act 2000 \(legislation.gov.uk\)](https://www.legislation.gov.uk)

IPA 2016 - [Investigatory Powers Act 2016 \(legislation.gov.uk\)](https://www.legislation.gov.uk)

NAFN – Investigatory powers guidance booklet [NAFN Investigatory Powers Act Guidance Booklet.pdf \(local.gov.uk\)](https://www.local.gov.uk)

Protection of Freedoms Act 2012 - [Protection of Freedoms Act 2012 \(legislation.gov.uk\)](https://www.legislation.gov.uk)

Excerpts from the HRA 1998: [Human Rights Act 1998 \(legislation.gov.uk\)](https://www.legislation.gov.uk)

RIPA codes of Practice - [RIPA codes - GOV.UK \(www.gov.uk\)](https://www.gov.uk)

RIPA Forms - [RIPA forms - GOV.UK \(www.gov.uk\)](https://www.gov.uk)

18. Appendices

Appendix 1: Proposed Waverley Covert Surveillance and Investigative Powers Policy and Procedure