

North Tyneside Council Report to Cabinet 12 December 2016

ITEM 6(f) Annual Review of Council Policy on Covert Surveillance

Portfolio(s): Elected Mayor

Cabinet Member(s): Mrs N Redfearn

Report from Service Area: Law and Governance

Responsible Officer: Vivienne M Geary, Head of Law and Governance (Tel: 0191 643 5339)

Wards affected: All

PART 1

1.1 Executive Summary:

This report seeks Cabinet's approval of an updated Covert Surveillance Policy. In accordance with the Codes of Practice applying to the Regulation of Investigatory Powers Act 2000 (RIPA) the Authority has to review its use of RIPA and set the general surveillance policy at least annually. The report also explains that there have been no RIPA authorisations granted in the last year.

A copy of the updated draft Policy is attached at Appendix 1.

1.2 Recommendation(s):

It is recommended that Cabinet:

1. approve the Authority's draft Policy on Covert Surveillance (attached at Appendix 1); and
2. note the use of surveillance by the Authority in the preceding year.

1.3 Forward plan:

Twenty eight days notice of this report has been given and it first appeared on the Forward Plan that was published on 14 November 2016.

1.4 Council plan and policy framework

This report relates to the following priorities in the 2016-19 Our North Tyneside Plan:

Our people will:

- Be cared for and safeguarded if they become vulnerable

1.5 Information:

1.5.1 Introduction

The Authority's current Surveillance Policy was approved by Cabinet in November 2015 and is subject to annual review. The Policy has been subject to a review and the revised draft policy is now attached at Appendix 1. The draft Policy has been considered by the

Regulation and Review Committee and has been referred to Cabinet for further consideration and, if appropriate, approval.

The aims of the Authority's Policy are to:

- Set out the Authority's arrangements for complying with RIPA; the relevant Codes of Practice and guidance issued by the Home Office; and guidance from the Office of the Surveillance Commissioner (OSC) and the Interception of Communications Commissioner's Office (IOCCO);
- Give effect to the rights of citizens to respect for their private and family lives (pursuant to the Human Rights Act 1998); and
- Protect the Authority from legal challenge when undertaking surveillance.

1.5.2 The RIPA Shield

The Regulation of Investigatory Powers Act 2000 (RIPA) puts covert surveillance on a statutory basis. RIPA enables certain public authorities, including this Authority, to carry out surveillance operations with statutory protection from legal challenge. It is often referred to as the "RIPA shield".

Three covert investigatory techniques are available to local authorities under RIPA:

- i. the acquisition and disclosure of communications data such as telephone billing information or subscriber details e.g. to tackle rogue traders;
- ii. directed surveillance - covert surveillance of individuals in public places e.g. to tackle criminal activity arising from anti social behaviour; and
- iii. covert human intelligence sources (CHIS) such as the deployment of undercover officers.

The RIPA provisions may only be used to authorise surveillance activities in order to detect and prevent serious crime and any authorisation is subject to a requirement to seek authorisation from an 'Authorising Officer' and to obtaining judicial approval from a Justice of the Peace before any surveillance is undertaken. The Authorising Officers within the Authority are:

Patrick Melia – Chief Executive;
Paul Hanson – Deputy Chief Executive; and
Colin MacDonald – Senior Client Manager

Officers from Law and Governance accompanied by the relevant Authorising Officer will present any authorisation to a Justice of the Peace for judicial approval. All authorisations will be subject to an internal scrutiny process prior to being submitted for such approval.

Local authorities may undertake surveillance for other purposes but such surveillance will not benefit from the RIPA shield and will leave a local authority vulnerable to challenge. For this reason all surveillance activity undertaken by the Authority, whether within the RIPA regime or not, must be appropriately authorised by one of the Authorising Officers and is subject to central monitoring and challenge.

Use of Social Media for the collection of personal information

The application of the requirements of RIPA to the use of informants via, in particular, social media is a developing area of surveillance law. Social Media provides the opportunity for the Authority to monitor for example individual rogue traders who trade on-line in the context of trading standards investigations. The continued monitoring of the activities of an individual or the development of a relationship with a trader with the purpose of eliciting information from the trader may fall within the RIPA regime.

As stated above this is an area which is continuing to be monitored as it develops and Officers from Law and Governance and Trading Standards are considering how such activities should actually be undertaken and whether those activities go as far as requiring a RIPA authorisation.

The most recent Office of Surveillance Commissioner's Guidance does provide some limited guidance on this matter and refers to the implications of interference through such activities with an individual's rights to a private and family life under Article 8 of the Human Rights Act 1998.

In addition as mentioned above the Authority may undertake such surveillance for activities that could not benefit from the protection of the RIPA shield i.e. the activity being investigated would not meet the serious crime test. In these circumstances whilst the surveillance is not unlawful it leaves a local authority more vulnerable to challenge as it still entails the collection information about an individual. For this reason the Authority requires that all surveillance activity undertaken by the Authority outside of the RIPA regime must be appropriately authorised by one of the Authorising Officers and is subject to central monitoring.

Further information has been provided to Heads of Service to raise awareness of RIPA, the circumstances when a RIPA authorisation is necessary and those circumstances where surveillance activity outside of the RIPA regime must still be appropriately authorised.

1.5.3 Central Register

The Authority has a Central Register of all RIPA and non-RIPA surveillance activity. The Central Register is maintained and monitored by the Head of Law and Governance.

1.5.4 Inspection

Organisations using RIPA are subject to regular inspection by:

1. The Office of Surveillance Commissioners (OSC) in relation to the use of direct surveillance and CHIS; and
2. The Interception of Communications Commissioner's Office (IOCCO) in relation to the interception of communications data.

The Authority last received an inspection visit from the OSC in April 2013. The issues raised in the inspection have been addressed. The actions focussed in the main on raising awareness of the requirements of the RIPA regime amongst Authorising Officers.

1.5.5 Summary of Use of Surveillance, Acquisition of Communications Data and CHIS

It should be noted that following the changes to the RIPA regime from 1 November 2012, reported to Cabinet in November 2012, there have been no authorisations granted. The ground most commonly used for authorising covert surveillance addressing anti-social behaviour was removed on 31 October 2012. Authorisations may now only be sought on the grounds that it relates to the prevention and detection of serious crime. Serious crime is defined as crime punishable, whether on summary conviction or on indictment, by a maximum term of at least 6 months of imprisonment, or would constitute an offence under sections 146, 147 or 147A of the Licensing Act 2003 or section 7 of the Children and Young Persons Act 1933. The latter are all offences involving sale of tobacco and alcohol to underage children.

1.5.6 Corporate Responsibilities

The Codes of Practice advise that a Senior Responsible Officer (SRO) should be identified to ensure the Authority has appropriate policies and processes that accord with RIPA and the related Codes of Practice.

The Officer Delegation Scheme places the Senior Responsible Officer role with the Head of Law and Governance.

Each Head of Service is responsible for ensuring effective and legally compliant systems and procedures are in place for surveillance work within their Service Areas.

All employees connected with surveillance and handling of evidence are responsible for ensuring that they act only in accordance with their level of responsibility and training and in accordance with this Policy and associated documents. To assist in this an 'Employee Handbook: Use of Covert Surveillance, Covert Human Intelligence Sources and Communications Data', has been prepared. The Handbook provides key information for Officers and directs them towards key sources of detailed guidance. It will be kept under review and revised as necessary to ensure it reflects current procedures and best practice.

If Officers wish to undertake surveillance that falls outside of the RIPA regime they must take legal advice and seek appropriate authorisation. Information regarding surveillance (whether under RIPA or not) must be held centrally by the Senior Responsible Officer to enable the Authority to have an overview of all surveillance activities being undertaken by the Authority.

1.5.7 Compliance and Oversight

The Codes of Practice indicate that elected members of a local authority should review its use of RIPA and set the general surveillance policy at least annually. A local authority should also consider internal reports on the use of RIPA to ensure that it is being used consistently in compliance with the Authority's Policy and that the Policy remains fit for purpose.

To meet these requirements the Policy Statement provides that:

- Cabinet receives an annual report covering the Authority's use of RIPA powers, and review of the Policy for the following year;
- Reports are presented to the Regulation and Review Committee on the Authority's use of RIPA powers. The Committee's role is to look at compliance, oversight and use of RIPA. The Committee will also consider whether the Policy remains fit for purpose and recommend changes to the Policy as appropriate for Cabinet's consideration; and
- The Elected Mayor who has responsibility for RIPA related activities receives regular updates from the Senior Responsible Officer regarding the use of the Authority's powers.

1.6 **Decision options:**

Option 1

Cabinet may:

1. Approve the Authority's Policy on Covert Surveillance (attached as Appendix 1); and
2. Review and note the use of surveillance by the Authority in the preceding year.

Option 2

Cabinet may ask Officers to revise the draft Policy and/or provide additional information regarding any matters contained in the report.

Option 1 is the recommended option.

1.7 Reasons for recommended option:

Approving the Authority's Policy on Covert Surveillance will secure adherence to the recommended best practice contained within the Codes of Practice. In particular, the Code of Practice – Covert Surveillance and Property Interference indicates that elected members should review the Authority's use of Part II of the Regulation of Investigatory Powers Act 2000 and set the policy at least once a year.

1.8 Appendices:

Appendix 1: Authority Policy on Covert Surveillance (draft)

1.9 Contact officers:

Stephen Ballantyne, Lawyer Specialist – Governance and Employment (0191 643 5329)
Alison Campbell, Finance Business Manager (0191 643 7038)

1.10 Background information:

The following background papers/information have been used in the compilation of this report and are available at the office of the author:

Employee Handbook: Use of Covert Surveillance, Covert Human Intelligence Sources and Communications Data

2014 Home Office Code of Practice - Covert Human Intelligence Sources

<https://www.gov.uk/government/publications/covert-surveillance-and-covert-human-intelligence-sources-codes-of-practice>

2014 Home Office Code of Practice - Covert Surveillance and Property Interference

<https://www.gov.uk/government/publications/covert-surveillance-and-covert-human-intelligence-sources-codes-of-practice>

2015 Home Office Guidance of Acquisition and Disclosure of Communications Data

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/426248/Acquisition_and_Disclosure_of_Communications_Data_Code_of_Practice_March_2015.pdf

PART 2 – COMPLIANCE WITH PRINCIPLES OF DECISION MAKING

2.1 Finance and other resources

The provisions of the Policy can be implemented within the Law and Governance Service's existing resources.

2.2 Legal

The Policy has been prepared with reference to the relevant law and Codes of Practice. A number of Statutory Instruments and Codes of Practice published by the Home Office govern the operation of RIPA.

The Authority may only authorise directed surveillance where it is both necessary and proportionate to the investigation or operation being undertaken and to what is being sought to achieve in terms of evidence gathering. Senior Officers are appointed as

Authorising Officers and have a key role in carefully scrutinising all applications for the use of RIPA powers under a specific authorisation.

Authorising Officers must ensure that authorisations are granted only in appropriate cases and that the extent of all authorisations are clearly set out.

The Authority cannot authorise intrusive surveillance under RIPA. Intrusive surveillance would involve placing an investigator on residential premises or in a private vehicle or allowing the use of an external surveillance device outside of the premises or vehicle that gives the same quality of information as if it was on the premises or in the vehicle.

The Policy, together with the Employee Handbook covers the procedures to be followed in seeking authorisations, maintaining appropriate oversight of the Policy and the central record of decisions.

2.3 Consultation/community engagement

The Policy is aimed at ensuring adherence to the best practice contained within the Codes of Practice and feedback from the Office of Surveillance Commissioners and the Interception of Communications Commissioner's Office as well as the law.

Internal consultation has taken place with officers with responsibility for the management and supervision of surveillance activity as well as the Regulation and Review Committee.

2.4 Human rights

Human rights implications are addressed within the report and the Policy. RIPA provides a framework under which surveillance activity can be authorised and conducted in a way that is compatible with the rights of individuals.

The Authority must also ensure that activity that falls outside of the RIPA regime is subject to careful scrutiny and authorisation to ensure that human rights are respected and the activity is lawfully undertaken.

2.5 Equalities and diversity

There are no equalities and diversity implications directly arising from the report.

2.6 Risk management

The Authority's Policy and the procedures contained in the Employee Handbook are designed to ensure the Authority complies with the law and Codes of Practice and thereby reduce the risks associated with surveillance activity.

2.7 Crime and disorder

RIPA may only be utilised by the Authority for the purposes of detecting and preventing crime.

2.8 Environment and sustainability

There are no environment and sustainability implications directly arising from this report.

PART 3 - SIGN OFF

- Deputy Chief Executive x
- Head(s) of Service x
- Mayor/Cabinet Member(s) x
- Chief Finance Officer x
- Monitoring Officer x
- Head of Corporate Strategy x