

# **Decision to be made by the Leader of the Council on or after 18 January 2019**

## **Changes to the Policy on Covert Surveillance and Covert Human Intelligence Sources**

### **Recommendation**

The Leader agrees the updated policy as set out in the Appendix.

### **1.0 Background**

1.1 The policy relating to the Council's use of covert surveillance and covert human intelligence sources was last reviewed in May 2016. In August 2018 the Home Office has issued a revised Code of Practice on the use of Surveillance and Property Interference (August 2018) which is relevant to the use by local authorities of investigatory powers.

1.2 This report asks the Leader to approve a revised policy, which takes account of recommendations in the revised Code of Practice.

1.3 Further, the Investigatory Powers Act 2016 came into force on 29 November 2016, establishing the Investigatory Powers Commissioner, who took over the responsibility for oversight of investigatory powers from the Interception of Communications Commissioner's Office (IOCCO), the Office of Surveillance Commissioners (OSC) and the Intelligence Services Commissioner (ISComm) in September 2017. Updating the policy will give the opportunity to reflect this change in the policy.

1.4 The recommended amendments include:

- (i) Updating the policy to refer to the IPCO instead of the OSC and to reflect changes in WCC structure.
- (ii) Reflecting new guidance in the Code of Practice on the use of vehicle tracking devices on County Council vehicles
- (iii) Reflecting updated guidance on recording and error reporting
- (iv) New guidelines to protect material obtained through covert surveillance
- (v) The procedure to be followed when officers wish to conduct surveillance which falls outside of RIPA.

### **2.0 Timescales associated with the decision and next steps**

2.1 It is proposed that the amendments to the Policy be implemented immediately following a decision from the Leader.

## Appendix – The updated policy

### Background papers

None

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The report was circulated to the following members prior to publication:

Councillors Butlin, Boad, O'Rourke, Timms, Singh Birdi

**WARWICKSHIRE COUNTY COUNCIL**

**POLICY ON THE USE OF SURVEILLANCE AND COVERT HUMAN INTELLIGENCE SOURCES**

**1. Introduction**

Warwickshire County Council is charged with carrying out various enforcement duties which require officers to conduct appropriate investigations into allegations of suspected criminal activity. Occasionally, investigations will require officers to gather information in respect of individuals who may be unaware of what is taking place. This may be by the use of covert surveillance or, more rarely, by using an informant or an officer working undercover. In conducting these investigations it is necessary to strike a balance between the public interest and the rights of individuals. This policy sets out the County Council's approach to covert investigation techniques within the framework of the Regulation of Investigatory Powers Act 2000 (RIPA). Its aim is to ensure consistency, balance and fairness.

**2. Scope**

2.1. This policy applies to the use by Warwickshire County Council officers of covert surveillance and covert human intelligence sources as defined in RIPA.

2.2. A separate document, Warwickshire County Council's Guidance on the Conduct of Surveillance and the Use of Covert Human Intelligence Sources ("the Guidance Document") sets out the procedure to be followed by officers when applying for authorisation under RIPA to use covert surveillance and covert human intelligence sources in investigations.

2.3. Both these documents are available to all County Council Members, employees and members of the public (or their representatives) and can be obtained from the following locations:-

- the County Council's intranet; or
- Warwickshire Legal Services (where requested by the Public).

**3. Powers covered by RIPA**

3.1. RIPA is designed to regulate any proposed activity by a public body with an enforcement role, such as the County Council, when operating certain investigatory techniques as part of an investigation into criminal activity.

3.2. RIPA covers 6 investigatory powers of public authorities. Those relevant to local authorities are:

- The acquisition of communications data
- Covert surveillance in the course of specified operations
- The use of covert human intelligence sources.

This policy concerns the use of the two latter powers only.

#### **4. Aim of the Act**

4.1. RIPA aims to ensure that investigatory powers are used by public authorities in a way that respects human rights. The County Council has a duty under section 4 of the Human Rights Act 1998 to ensure that it does not act in a way which is incompatible with the rights set out in the European Convention on Human Rights. The most relevant Convention right is Article 8 – the right to privacy and respect for family life. RIPA seeks to strike a balance between protecting individuals' human rights and recognising the necessity of investigatory powers to the protection of society as a whole.

4.2. RIPA does not impose a requirement on public authorities to seek an authorisation where, under the Act, one is available. Nevertheless, where there is interference by the County Council with a person's human rights, for example, the right to a private and family life, and where there is no other source of lawful authority, the consequence of not obtaining an authorisation may be that the action is unlawful by virtue of section 6 of the Human Rights Act 1998. Obtaining an authorisation will ensure that the action is carried out in accordance with law.

#### **5. Oversight**

5.1. The use made by the County Council of the powers under Part II of RIPA is regulated by the Investigatory Powers Commissioner's Office (IPCO) who took over the audit and inspection functions of the Office of Surveillance Commissioners (OSC) in September 2017. The OSC conducted inspections of the County Council's records and procedures approximately once every three years and it is expected that the IPCO will continue with this regime.

5.2. The Home Office has issued Codes of Practice on the use of RIPA powers and the most recent versions can be found at

<https://www.gov.uk/government/collections/ripa-codes>

5.3. The County Council has appointed the Assistant Director (Governance and Policy) as Senior Responsible Officer with responsibility for the process within the County Council for the use of covert surveillance or a CHIS, compliance with RIPA and the Codes of Practice, engagement with the IPCO and implementation of any post-inspection Action Plans.

## **6. Directed Surveillance**

6.1. Surveillance covers

- Monitoring, observing or listening to persons and their movements, conversations and other activities
- Recording anything monitored, observed or listened to in the course of surveillance
- The use of a surveillance device such as a camera, camcorder, binoculars, CCTV etc

6.2. Surveillance is covert if the persons who are the subject of the surveillance are unaware that it is taking place.

6.3. Surveillance is Directed Surveillance within the meaning of the Act if

- It is not intrusive
- It is carried out for the purposes of a specific operation
- It is likely to result in the obtaining of private information
- It is not an 'immediate response to events'.

6.4. Intrusive surveillance broadly means surveillance on residential premises or in a private vehicle, either by means of an individual present on the premises or in the vehicle, or by means of a surveillance device. Local authorities are not permitted to carry out intrusive surveillance.

6.5. Recording or tracking devices may be placed in vehicles owned by the County Council (such as pool cars) for the purpose of recording movements or for safety, and may also be used for evidential purposes should the need arise, provided those

persons using the vehicles are made aware that monitoring or recording is taking place and of the reasons for this. If a device is to be used to covertly monitor or record the movements of the driver or other occupants, an authorisation for directed surveillance is required.

## **7. Covert Human Intelligence Source (CHIS)**

7.1. A CHIS includes:

- an officer who establishes or maintains a personal or other relationship with a person for the covert purpose of using the relationship to obtain information (e.g. an officer who is working undercover); and
- any other person who establishes such a relationship for the covert purpose of disclosing information obtained by the use of the relationship (e.g. an informant).

7.2. A purpose is covert if and only if 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.

7.3. In either case set out in paragraph 7.1 above there is a need to consider the safety and welfare of the CHIS. The identity of the CHIS must always be kept private and protected.

## **8. Authorising directed surveillance or the use of a CHIS**

8.1. Officers who wish to conduct covert surveillance or use a CHIS in carrying out a criminal investigation, must make an application for authorisation to a designated Authorising Officer (AO). The Guidance Document sets out in Appendix A the list of those senior managers who are approved for the time being as AOs. The AO should not be involved in the operation that requires the use of a RIPA authorisation.

8.2. The Guidance Document also sets out the procedure for making an application. It should be noted that from November 2012 local authority authorisations under RIPA for the use of directed surveillance or the use of a CHIS can only be given effect once an order approving the authorisation has been granted by a Magistrate. The Guidance Document outlines the procedure for applying for the required judicial approval.

8.3. RIPA sets out certain grounds on which covert surveillance or the use of a CHIS may be authorised.

8.4. In order to authorise directed surveillance, the AO must be satisfied that:

- The surveillance is **necessary** for the purpose of preventing or detecting crime (including offences of sale of tobacco or alcohol to underage children) or of preventing disorder (in the case of the Fire and Rescue Service, there is an alternative ground that the surveillance is in the interests of public safety); and
- The surveillance is **proportionate** to what is sought to be achieved.
- It should also be noted that a local authority can only grant an authorisation under RIPA for the use of directed surveillance where the local authority is investigating particular types of criminal offences. These are criminal offences which attract a custodial sentence of six months or more or criminal offences relating to the underage sale of alcohol or tobacco. (Therefore if during the investigation it becomes clear that the activity being investigated does not amount to a criminal offence or that it would be a less serious offence that does not meet the threshold, the use of directed surveillance should cease. If a directed surveillance authorisation is already in force in such circumstances, it should be cancelled.)

8.5. An assessment of the proportionality of the proposed surveillance will involve a consideration of the equipment proposed to be employed and its suitability for the task. This will entail AOs having knowledge of the technical capabilities of the equipment.

8.6. In order to authorise the use of a CHIS, the AO must be satisfied that:

- The use of a source is **necessary** for the purpose of preventing or detecting crime or of preventing disorder (in the case of the Fire and Rescue Authority, there is an alternative ground that use of the CHIS is in the interests of public safety); and
- The use of a source is **proportionate** to what is sought to be achieved; and additionally
- Satisfactory arrangements exist for the management of the source.

8.7. Arrangements for the management of the CHIS involve

- A risk assessment to determine the risk of the task to the CHIS and the likely consequences should the role of the CHIS become known

- The appointment of a further officer (a “handler”), who should not be the investigating officer or the AO, with day to day responsibility for the management of the CHIS, and who will also be responsible for bringing to the attention of the AO any concerns about the welfare of the CHIS.
- The appointment of a further officer (a “controller”) who is to be responsible for the management and supervision of the handler and to have general oversight of the use of the CHIS.

8.8. Following advice from the OSC Inspector in 2009, should circumstances arise in the future in which officers wish to use a CHIS, the County Council will aim to make use of the expertise of another larger local authority or the police in managing the CHIS.

8.9. As set out in 8.2 above, local authority authorisations under RIPA in relation to directed surveillance or the use of a CHIS can only be given effect once an order approving the authorisation has been granted by a magistrate. (Further detail on this procedure is found in The Guidance Document.)

## 9. Surveillance and Social Media

9.1 Use of social media and social networking sites (“SNS”) as a tool in conducting surveillance must be carried out in accordance with the Council’s Guidance and the guidance: on online covert activity set out in paragraphs 3.10 to 3.17 of the Home Office Code of Practice<sup>1</sup> issued in August 2018 which can be found at: <https://www.gov.uk/government/collections/ripa-codes>

9.2 Where use of social media amounts to Directed Surveillance officers must consider both the **necessity** and **proportionality** of accessing the data through social media and obtain an authorisation before carrying out such surveillance.

## 10. Collateral intrusion

10.1. An assessment of the proportionality of the conduct (either surveillance or the use of a CHIS) involves an assessment not only of the interference with the right to privacy of the person under investigation but also of the risk of intrusion into the

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<sup>1</sup> The Home Office **Covert Surveillance and Property Interference Revised Code of Practice, August 2018**



privacy of other persons potentially affected by the surveillance or the use of a CHIS.

10.2. Warwickshire County Council officers should consider the potential for collateral intrusion when identifying possible locations for surveillance.

10.3. Applications for authorisation of the conduct should contain a description of the measures to be taken to limit the risk of collateral intrusion.

10.4. If conduct which has been authorised unexpectedly gives rise to intrusion into a third party's privacy, the investigating officer should bring this to the attention of the AO, so that the continuation of the authorisation can be reviewed. If the collateral intrusion renders the surveillance or use of a CHIS disproportionate, then the authorisation should be cancelled.

## **11. Confidential information**

11.1. Where the authorised conduct is likely to give the investigating officer access to confidential information only the Head of Paid Service (i.e. either the Joint Managing Director (Resources)) or, in his absence, a Chief Officer acting as Head of Paid Service can authorise surveillance or the use of a CHIS.

11.2. Confidential information includes information subject to legal privilege, personal information such as medical information, communications between an MP and another person on constituency matters, or confidential journalistic material.

11.3. Where covert surveillance is likely to result in the acquisition of knowledge of matters subject to legal privilege, authorisation to carry out the surveillance should only be given if the AO is satisfied that there are exceptional and compelling circumstances that make the authorisation necessary. Examples of such circumstances might be where there is danger to life or for the purpose of preventing or detecting serious crime. The AO must also be satisfied that appropriate safeguards relating to the handling, retention, use and disclosure of material obtained through covert surveillance are in place.

11.4. Directed surveillance of legal consultations between a legal adviser and his client are treated as intrusive surveillance and can therefore not be carried out by local authorities.

## **12. Duration and Review**

12.1. Authorisations for directed surveillance last for 3 months, authorisations for the use of a CHIS last for 12 months (1 month if the CHIS is under 18). They should be reviewed regularly and cancelled if the criteria for authorisation are no longer met or the purpose for which the authorisation was granted no longer exists. The AO should determine a date by which the authorisation is to be reviewed. In reviewing the authorisation, the AO should review whether the authorisation is still necessary and proportionate. Authorisations should not be allowed to lapse. They may be renewed before they expire, or cancelled. Renewals require magistrate approval; cancellations do not. Local Authorities are no longer permitted to grant oral authorisations.

12.2. It is for the applicant to apply for the authorisation to be cancelled.

12.3. When an authorisation for surveillance is cancelled AOs should give instruction to all officers to cease the surveillance and make a record detailing the product obtained from the surveillance and whether or not the objectives of the surveillance were achieved. The AO must record the date that they instructed the officer to cease the activity.

12.4 The AO must record how any images that have been acquired as part of the surveillance or use of the CHIS will be managed.

## **13. Use of material as evidence**

13.1. Material obtained through directed surveillance or from a CHIS may be used as evidence in criminal proceedings. Investigating officers have a legal obligation under the Criminal Procedure and Investigations Act 1996 to keep full and accurate records of criminal investigations. This would include all RIPA documentation and the results of surveillance undertaken or information obtained from a CHIS. In court proceedings there may be legal obligations to disclose anything relevant to an affected party; it may also be necessary to demonstrate fairness and propriety to a court or tribunal e.g. in response to an application to exclude evidence under s78 of the Police and Criminal Evidence Act 1984 on grounds of unfairness.

- 13.2. Copies of authorisations, renewals and cancellations (marked for the attention of the RIPA solicitor) should be sent to and retained in a central record in the Law and Governance division. However, they should also be retained on the investigation file. Investigating officers should also record centrally within their department:
- An account of events observed and/or conversations overheard (preferably in an official notebook)
  - Reasons for, and the nature of, any inadvertent intrusion into a private place.
- All records should be kept in a safe and secure manner.
- 13.3. Material gathered by surveillance of the use of a CHIS which could be relevant to present or future criminal proceedings, must be retained in accordance with the Criminal Procedure and Investigations Act 1996. Material will be stored securely and will only be shared with others where necessary for authorised purposes such as for use in legal proceedings. Regard will be had to the Home Office Codes of Practice to determine whether disclosure is necessary for authorised purposes.
- 13.4. Where a case goes to court, material should be retained until there is no longer any prospect of an appeal against the court's decision (or, if a sentence of imprisonment is ordered in a criminal case, until the defendant has served the sentence). Should no action be taken in a case, surveillance material should be destroyed forthwith. The Data Protection Act 2018 requires that data is not kept longer than necessary.
- 13.5. Where confidential information is retained, it should be clearly marked as being confidential and the Inspector's attention should be drawn to it during her next visit to the Council.

#### **14. Surveillance not covered by RIPA**

There may be occasions when Warwickshire County Council officers are required to carry out surveillance which is not for the purposes of preventing or detecting crime or disorder in discharge of a core function and so will fall outside the scope of RIPA. Any such surveillance must still be necessary and proportionate to satisfy requirements under the Human Rights Act 1998. The County Council has produced application forms for use when an officer wishes to carry out surveillance which would fall outside the scope of RIPA and these are available on the intranet. An application for authorisation to carry out non-RIPA surveillance must be made to the Senior Responsible Officer who will approve or reject the application. A written

record must be kept of any decision to carry out surveillance not covered by RIPA. The SRO will regularly review surveillance carried out by Warwickshire County Council that is not covered by the scope of RIPA.

## **15. Training**

The County Council is committed to ensuring that all officers who are likely to undertake directed surveillance, to act as or to task or manage a CHIS, or to act as an Authorising Officer first undergo training to enable them to comply with RIPA and the various Codes of Practice. Further, refresher training should be organised from time to time to ensure that changes in the law are brought to the attention of relevant officers and that skills and understanding of the legislation and Codes of Practice are kept up to date.

## **16. Auditing**

- 16.1. A report on the use made by the County Council of the Act will be given to the Portfolio Holder every six months. In addition the Leader will be asked to review this Policy document if substantive alterations are proposed to be made to it, to ensure that it remains fit for purpose.
  
- 16.2. The Senior Responsible Officer will also undertake a regular review of errors made in the use of surveillance and CHIS and will report relevant errors to the Investigatory Powers Commissioner, where possible within 10 working days after it has been established that an error has occurred. Examples of relevant errors would include circumstances where surveillance activity has taken place without lawful authorisation; or where there has been a failure to adhere to the safeguards set out in the relevant statutory provisions or Codes of Practice.