

Cabinet

15 November 2023

Regulation of Investigatory Powers Act 2000

Annual Review of the Council's use of powers



Report of Helen Bradley, Head of Legal and Democratic Services

Councillor Richard Bell, Deputy Leader of the Council and Portfolio Holder for Finance

Purpose of the Report

- 1 To inform Cabinet about the Council's use of its powers under the Regulation of Investigatory Powers Act 2000 ('RIPA') during the period of 1 April 2022 to 31 March 2023.
- 2 To seek approval of the Council's Corporate RIPA Guidance, which has been subject to an annual review.

Executive summary

- 3 The Regulation of Investigatory Powers Act 2000 (RIPA) enables local authorities to carry out certain types of surveillance activity provided that specified procedures are followed.
- 4 Directed surveillance is covert surveillance that is not intrusive and 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. Directed surveillance must be authorised in accordance with RIPA unless it is undertaken by way of an immediate response to events or circumstances (for example, an Officer on duty observes an offence being committed) such that it is not reasonably practicable to seek authorisation under the 2000 Act.
- 5 Local authorities are permitted to conduct Directed Surveillance in respect of criminal offences, which have a minimum sentence of six months imprisonment or related to underage sales of alcohol and tobacco or nicotine inhaling products.
- 6 A Covert Human Intelligence Source (CHIS) is a person who establishes or maintains a personal or other relationship with another person for the covert purpose of:

- (a) Using such a relationship to obtain information, or to provide access to information to another person, or
 - (b) Disclosing information obtained by the use of such a relationship or as a consequence of such a relationship.
- 7 The relationship is used covertly if, and only if, it is conducted in a manner calculated to ensure that the person is unaware of its purpose.
- 8 The Local Authority is able to rely upon the information obtained from those surveillance activities within court proceedings.
- 9 The report includes an overview of the Council's use of its powers under RIPA for the period of 1 April 2021 to 31 March 2022, including updates on any training which has been delivered or will be delivered to Officers.
- 10 An annual review of the Corporate RIPA Guidance has been undertaken. In addition, an abridged version of this guidance has been drafted, which subject to approval by Cabinet will be published on the Council's website.
- 11 In previous years, the Corporate Overview and Scrutiny Management Board have had oversight of the annual review of the Council's Corporate RIPA Guidance. However, to ensure that the Council's arrangements fully reflect the Code of Practice on Covert Surveillance and Human Intelligence Sources (Code of Practice) this year the review of the Corporate RIPA Guidance has been presented to Corporate Overview and Scrutiny for consideration and comment prior to it being presented to Cabinet for approval. Corporate Overview and Scrutiny Management Board were supportive of the proposed changes.

Recommendation(s)

- 12 It is recommended that Cabinet:
 - (a) consider and note the Council's use of RIPA during the period 1 April 2022 to 31 March 2023;
 - (b) approve the proposed changes to the Council's Corporate RIPA Guidance; and
 - (c) approve the abridged RIPA policy document.

The Council's use of RIPA between 1 April 2022 to 31 March 2023

- 13 For the period reported, 1 April 2022 to 31 March 2023, there were three directed surveillance authorisations and one CHIS authorisation.
- 14 The operations have all been cancelled with all premises on the schedules visited. A summary of the operations is set out below.

Operation 15 July 2022

- 15 This operation related to the underage sales of alcohol and tobacco. The authorisation for directed surveillance was granted on 15 July 2022 and was cancelled in accordance with the legislation on 5 August 2022.
- 16 Officers from the Trading Standards team carried out a series of inspections at 18 retail premises in order to establish compliance with the relevant procedures in place, preventing the sale of age restricted products to those under the relevant legal age.
- 17 Four premises on the schedule carried out a sale and a subsequent operation/ exercise was carried out to follow up on those premises included in the initial authorisation. The remaining premises did not make a sale and therefore the complaints were closed.

Operation 20 October 2022

- 18 This operation also related to the underage sales of alcohol and tobacco. The authorisation for directed surveillance was granted on 20 October 2022 and was cancelled on 11 January 2023.
- 19 The surveillance covered a total of 28 premises, including the four premises previously referred to in operation 15 July 2022 where sales had been made. Advice and guidance were given to these premises prior to their second inspection and no further sales were made from these premises.
- 20 There was one premises (not previously visited) that made an underage sale during this directed surveillance operation, but the Trading Standards team have since revisited this premises and provided advice and guidance and no further underage sales were made during the operation.

Operation 9 February 2023

- 21 This operation related to the sale of illicit tobacco products and concerned one premises. The authorisation for a CHIS was granted on 9 February 2023 and was cancelled on 14 June 2023.
- 22 A series of covert test purchases were conducted as part of the operation to obtain evidence of the sellers, their activities and associations. As a result of obtaining this evidence, an entry warrant was obtained from the magistrate's court and an enforcement operation was undertaken at the premises. This resulted in the seizure of illicit cigarettes and hand rolling tobacco.
- 23 Officers have since made a successful application to the court for a closure order against the premises, which were closed for three months. The individuals involved in the sale of the products are the subject of an ongoing criminal investigation which may lead to prosecutions.

Operation 23 March 2023

- 24 This operation related to underage sales of alcohol and tobacco. The authorisation for directed surveillance was granted on 3 March 2023 and was cancelled on 25 May 2023.
- 25 The authorisation covered 36 premises, of which 24 were inspected. Out of the 24 premises inspected as part of the operation, a total of 10 premises made underage sales of tobacco, of which 9 of the 10 premises had sold vapes/ e-cigarettes and one premises had sold cigarettes.
- 26 Officers have since conducted interviews with the owners and sellers to assess the circumstances in order to determine if formal action was to be brought against them. Some of the of the owners and sellers have since been issued warning letters and some have been given advice and guidance, the remainder are subject to licencing reviews.

RIPA Officers Group

- 27 The RIPA officers group meets on a quarterly basis and is chaired by the Head of Legal and Democratic Services as the Council's Senior Responsible Officer (SRO). The group comprises Officers who make surveillance applications, Authorising Officers and representatives from each Council Directorate who may not conduct surveillance but require an awareness of what constitutes surveillance, the requirements of RIPA and the relevant Codes of Practice.

Training

- 28 The Investigatory Powers Commissioners Office (IPCO), which oversees the use of covert surveillance by designated public authorities, places a high value on training. Officers who make RIPA applications, the Council's Authorising Officers, the SRO and other members of the RIPA Officer Group completed training with an external provider in January, February and March 2023. Further training with the same provider will be provided to Officers who have since joined the Trading Standards Team and those who were unable to attend the earlier sessions before the end of 2023.
- 29 Training is also being arranged for the Chief Executive in his capacity as Senior Authorising Officer who may be required to authorise applications for surveillance which is likely to capture confidential information. Confidential information is information which is legally privileged, communications between an MP and another person on constituency matters, confidential personal information such as medical or religious information, or confidential journalistic material.
- 30 In addition to training delivered externally, the RIPA Officers Group receive informal training on a variety of issues covered by the Code of Practice such as data protection and record keeping, safeguards (for evidence) and an overview of the judicial approval process.
- 31 Training sessions providing an overview of RIPA and the requirements in respect of the use of social media for investigations have been added to the Council's Corporate Learning and Development Programme for 2023/24. This training which will be open to all Tier 4 and 5 Managers and will be delivered by the SRO and the Commercial and Corporate Governance team within legal services.

Annual Statistical Return

- 32 IPCO is required by law to gather statistical data from all public authorities on their use of Investigatory Powers available to them under the relevant legislation, including:
 - (a) Investigatory Powers Act 2016 (IPA);
 - (b) Regulation of Investigatory Powers Act 2000 (RIPA);
 - (c) Regulation of Investigatory Powers (Scotland) Act 2000 (RIPSA);
and
 - (d) Police Act 1996 (PA).

- 33 In order to discharge this duty, the IPCO annually requests a statistical return for each authority (the return). Each return covers activity for one calendar year: 1 January to 31 December 2022.
- 34 This and the information gathered in the annual statistical return informs and (with some exceptions) is published in the IPCO annual report. Some data collected as part of the statistical return may also be used to inform an inspection and wider oversight process.
- 35 The annual statistical return for 2022 was submitted on 30 January 2023 in advance of the deadline. The statistics are collated by the Investigatory Powers Commissioners Office (IPCO).

Inspection

- 36 Since the last annual report for 2022/23 the Council has recently undergone a desktop inspection. On 5 July 2023 the Chief Executive received a letter from the IPCO notifying the Council that its inspection was due and requested copies of the applications and authorisations since the last inspection in December 2020, a copy of the Council's Corporate RIPA Guidance and confirmation of the training provided to relevant officers since the last inspection. A comprehensive response was provided to the IPCO.
- 37 Having reviewed this information, the Inspector determined that it was not necessary to conduct an on-site inspection. He met with the SRO and members of the Commercial and Corporate Governance team within legal services on 18 September 2023 to provide feedback in relation to the documentation provided.
- 38 The Inspector was satisfied that the Council's corporate guidance is very good and consistent with the Code of Practice. He also commented that the level of training provided, and that the oversight/governance arrangements were also good.
- 39 The Inspector did not make any formal recommendations. However, he did provide some feedback on the authorisations for Directed Surveillance and CHIS. This feedback has been shared with the RIPA Officers Group and will be discussed in detail at its next quarterly meeting.

Changes in Legislation and National Practice

- 40 There have been no changes to legislation or national practice during the period reported. The Senior Responsible Officer and RIPA Monitoring Officer continue to monitor any changes in legislation and guidance and where necessary will implement changes in the practice to reflect those changes.

Review of the Council's Corporate Guidance on RIPA

41 In accordance with the Code of Practice, the Corporate RIPA Guidance is reviewed annually.

42 The 2023 review of the Corporate Guidance (Appendix 2) resulted in four proposed amendments:

- (a) The inclusion of a new paragraph 1.11 to ensure that there is a clear audit trail of considerations in relation to directed surveillance applications and demonstrate that Authorising Officers have proper oversight of such considerations: 'Section A – Directed Surveillance Under RIPA':

'1.11 Where an Officer has considered whether an authorisation for directed surveillance is required and concludes it is not, this must be documented and approved by an Authorising Officer.'

- (b) Historically, Member oversight of the Council's use of RIPA powers and Corporate RIPA Guidance has been undertaken by Corporate Overview and Scrutiny Management Board. These arrangements have been considered by the IPCO during inspections in 2017 and 2020 and considered to be appropriate. However, the Code of Practice states that:

'4.47 Elected members of a local authority should review the authority's use of the 1997 Act and the 2000 Act and set the policy at least once a year. They should also consider internal reports on use of the 1997 Act and the 2000 Act on a regular basis to ensure that it is being used consistently with the local authority's policy and that the policy remains fit for purpose.'

- (c) Therefore, to ensure that the Council's arrangements fully reflect the requirements of the Code of Practice, it is proposed that paragraph 18.1 'Member Oversight' is amended to provide that Corporate Overview and Scrutiny Management Board will continue to provide in-year oversight of the use of RIPA powers but changes to the Corporate RIPA guidance will be approved by Cabinet:

'18.1 Elected members of the local authority should review the authority's use of RIPA and set the policy at least once a year. This function will be overseen by Cabinet. The Council's Corporate Overview and Scrutiny Management Board will also consider internal reports on the use of RIPA on at least a quarterly

basis to ensure that it is being used consistently with the Council's Corporate RIPA guidance and that the guidance remains fit for purpose. Members must not be involved in making decisions on specific authorisations.'

- (d) A minor amendment to reassign the role of the RIPA Monitoring Officer from the Governance Lawyer to the Senior Lawyer (Commercial and Corporate Governance) following a change to the structure within legal and democratic services and;
- (e) The Neighbourhood Protection Manager has been removed as an Authorising Officer and the Fraud Manager added as an Authorising Officer for the purposes of Communications Data. Again, this change is proposed to reflect changes in staffing arrangements.

43 Cabinet are invited to approve the revised Guidance document.

Durham County Council Public RIPA Policy 2023

40 As part of this year's annual review of the Council's Corporate RIPA Guidance, an abridged version of the Guidance has been drafted which it is proposed will be published on the Council's website.

41 This will provide the public with an overview of and greater transparency in relation to the Council's use of RIPA powers and a copy of this policy can be found at Appendix 3.

42 Cabinet are invited to consider and approve this policy.

Corporate Overview and Scrutiny Management Board

43 Corporate Overview and Scrutiny Management Board considered the annual report and the proposed changes to the Corporate RIPA guidance and the abridged policy at its meeting on 23 October 2023. The Management Board were supportive of the proposed changes.

Background papers

- None

Other useful documents

- None

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Appendix 1: Implications

Legal Implications

The Council's objective is to make lawful and appropriate use of surveillance techniques where required whilst complying with the provisions of the Human Rights Act 1998 and in particular of Article 8 of the ECHR securing respect for an individual's (qualified right) to privacy.

Finance

None.

Consultation

None.

Equality and Diversity / Public Sector Equality Duty

None.

Climate Change

None.

Human Rights

Use of investigatory powers potentially engages the Human Rights Act 1998 and in particular the qualified right to private and family life under article 8 of the European Convention. This right may only be interfered with in circumstances where it is necessary and proportionate to do so in pursuit of the public interest. Oversight by the Board of the Council's RIPA operations is designed to facilitate compliance with the Human Rights Act.

Crime and Disorder

The appropriate use of an oversight of RIPA powers will enable the Council to provide evidence to support appropriate prosecutions and tackle crime.

Staffing

With the report it is recognised that there is a need for an education programme for the workforce.

Accommodation

None

Risk

None.

Procurement

None.