



## **Report to Overview and Scrutiny Committee**

**Subject:** Covert Surveillance (RIPA) Policy Scrutiny Follow up review

**Date:** 5 August 2013

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### **Purpose**

To inform Scrutiny Members of the outcome of a follow up meeting of the above Scrutiny working group convened to assess the impact of amendments to the Council's RIPA Policy and Procedure Document.

The amendments, which were approved by Cabinet on 8<sup>th</sup> November 2012, take account of changes to RIPA legislation which came into force on 1<sup>st</sup> November 2012.

### **Background**

In February 2011 a working group of the Policy Review Scrutiny Committee met with the Service Manager, Public Protection and the Senior Solicitor to undertake an interim review of the council's powers to undertake covert surveillance in the light of the Macdonald Review and upcoming changes to the legislation. The proposed changes were at that time considered to have a potential impact on the value added by Gedling Borough Council's use of those powers. The conclusions and recommendations of that review were as follows:

#### **1.1 Conclusions: interim Scrutiny Review February 2011**

- Having undertaken a brief scan of Gedling's current use of RIPA surveillance powers, members were satisfied that the powers are being exercised under appropriate controls.
- Evidence of the numbers and nature of cases to date suggests that Gedling's use of RIPA powers to engage in covert surveillance has been proportionate.
- Use of RIPA to address fly tipping has not been fully maximised due to constraints identified by the Public Protection Manager.
- Effective partnership approaches are in place with the Police, DWP, Trading Standards and the Environment Department in applying RIPA procedures. These partnership arrangements support and enhance Gedling's statutory role to help ensure the safety of Gedling residents.

- Outcomes of the recent Government review indicate that covert surveillance procedures will become more complex in their application under forthcoming new legislation.
- The balance between the demands on officer time and council resources against the results achieved will need to be assessed once legislation and full guidance are in place.

## **1.2 Recommendations: interim Scrutiny Review 2011**

The working group made the following recommendations to Cabinet, the Portfolio Holder for Safe and Sustainable Communities and the Overarching Scrutiny Committee:

- i. That completion of this review is kept in abeyance until the new legislation and operating instructions are produced, at which point their impact can be fully evaluated.
- ii. In the meantime, Andy Callingham, Public Protection Manager, to liaise with the Scrutiny Officer with any updates.

## **1. Follow up Review March 2013**

As recommended by the earlier review, a follow up meeting was set and a new working group appointed to examine the impact that the changes to legislation have had upon the Council's use of covert surveillance powers, following the subsequent adoption of changes to the Council's RIPA Policy by Cabinet in November 2012. The background to the Council's RIPA Policy and summary of changes adopted by Cabinet November 2012 are detailed at **Appendix 4.1**.

**Working Group Members:** Councillors Miller, Ainley, Tomlinson, Parr, Paling and Barnfather.

## **2. Findings**

Members held one meeting with the Council's Senior Solicitor to observe and review the impact of the policy changes. Members were informed that use of covert surveillance over the last 3 years had followed the pattern below:

**2010/11:** 16 cases – majority ASB /Public protection, 2 benefit fraud

**2011/12:** 5 cases - 4 ASB/ public protection and 1 benefit fraud.

**2012 /13:** 5 cases – 3 ASB/ Public protection, 2 benefit fraud

These outcomes indicate a mark reduction in use of the powers over the period during which the legislation changed. Members were informed however that this may be due to factors other than the legislative impact, namely:

- That the Council's method of addressing Anti - Social Behaviour has shifted from one of enforcement to one of enablement and signposting to alternatives.

- That there has been a marked downturn in incidences of ASB in the Borough and indeed across the County.
- The fact that the Council has changed its approach to Neighbourhood working, which has meant that Covert Surveillance is no longer being deployed in priority Neighbourhood areas.
- The fact that issues in the past, where the Council was encouraged to authorise use of covert surveillance on what were in fact Police investigations, have now been addressed.

### **3. Impact of the changes to legislation**

The Senior Solicitor reported that the changes of legislation had followed exactly the outcome and recommendations of the Macdonald review, in that as of 1<sup>st</sup> November 2012, any use of covert surveillance must now be approved by a Justice of the Peace (JP) and must (for directed surveillance) satisfy the 'Serious Crime' threshold - i.e. be likely to attract a minimum custodial sentence of 6 months.

In terms of what that means to the Council in how it now applies the policy, Members were informed that the investigation of benefit fraud would pass the serious crime threshold and could be an appropriate use of RIPA, however ASB is now a grey area. Historically, when ASB cases were proposed, there had been an element of criminal damage within the ASB. The Criminal Damage would pass the serious crime threshold, however the ASB would not and the two are distinct. Now, the Legal department will need to look carefully to ensure that we are not tagging ASB onto Criminal conduct in order to pass the serious crime threshold. The Police can and should really be obtaining RIPA authorisation for purely criminal matters.

Use of the powers to address fly tipping would also be appropriate, as this can attract a 6 month custodial sentence, however the Council is not adequately resourced to undertake the monitoring involved in very many of these cases.

### **4. Conclusions**

In conclusion, Members understood the impact of the changes to mean that the Council will continue to use its' powers in the pursuance of benefit fraud cases and in specific, targeted cases of fly tipping.

In cases of ASB, use of covert surveillance is now likely to be very rare, however Members were satisfied that the Council will continue to advise victims to report incidents to the Police in cases of criminal damage, and also to encourage individuals to record ASB on diary sheets, as there needs to be evidence of considerable harm and distress to activate an Anti - Social Behaviour Order. Members are aware that if there is a breach of an ASB order this is a criminal offence, therefore covert surveillance could be applied at that point.

Members were also satisfied that the Council's RIPA Policy and procedures

are heavily scrutinised in line with statutory requirements. This includes an annual internal inspection, the outcomes of which must be reported to Cabinet along with any changes to the policy, and the assurance that the Legal department see and advise on all authorisations for the use of Covert Surveillance. There is also a 3 yearly inspection of the Council's use of RIPA by the Office of the Surveillance Commissioner. The last inspection was in September 2012.

Members were informed that a RIPA authorisation once approved by a JP has a three month lifespan, and that any reviews are done by Corporate Directors internally. An investigation can be cancelled by a Corporate Director or extended for up to three months. Any extension would require further approval from a JP

The working group was assured that the process of authorising and implementing RIPA procedures has not changed, the only difference being that the approval form now goes to the Magistrates Court rather than to a Corporate Director; therefore Members' earlier concerns that the process may become too time consuming were addressed.

Members were pleased to hear that the Council has been leading the way in enabling the Magistrates Courts to get up to speed with their new role by delivering training to the Nottingham and Mansfield Magistrates Courts' legal advisers, and that further training has been rolled out to Council officers and partners including CCTV operators and other relevant bodies.

The group was however keen to establish further clarification of the cost of such surveillance against the benefits achieved, particularly with reference to CCTV; to include equipment provision and maintenance, the scope of CCTV monitoring and associated manpower costs.

## **5. Recommendations**

The Covert Surveillance Scrutiny Working Group would like to thank the Public Protection Manager and Senior Solicitor for their input to both stages of the review, and now makes the following recommendations to the Portfolio Holder for Communications and Public Protection:

- i. That the Council continues to apply its' powers to undertake covert directed surveillance in appropriate cases where a 6 month custodial sentence is the likely outcome.
- ii. That a report is submitted to the Overview Scrutiny Committee in due course providing details of the cost/benefits of undertaking such surveillance.

## **Background to the Gedling Borough Council RIPA Policy**

The Regulation of Investigatory Powers Act 2000 is intended to regulate the use of investigatory powers exercised by various bodies, including local authorities, and ensure that they are used in accordance with human rights obligations. This is achieved by requiring certain investigations to be authorised by an appropriate officer before they are carried out. The investigatory powers open to the Council are directed covert surveillance in respect of specific operations and the use of covert human intelligence sources (CHIS). Local authorities can only undertake such activities if they are for the prevention or detection of crime.

An initial policy and procedure document was drafted by Legal Services in July 2001. The Policy document has been amended over the years following recommendations from the Office of the Surveillance Commissioner, usually as a result of their inspections of the Council which occur every 3 years.

On 6<sup>th</sup> September 2012 the Council were subject to one of those three yearly inspections by the Office of the Surveillance Commissioner. The report from the Inspector was very positive and the standard of RIPA authorisations and procedures at the Council remains high, however, the inspector did make one recommendation that the definition of CHIS in the Council's Policy document be expanded.

As of 1<sup>st</sup> November 2012 RIPA was amended following the coming into force of sections 37 and 38 of the Protection of Freedoms Act 2012 and the changes to the Regulation of Investigatory Powers (Directed Surveillance and Covert Human Intelligence Sources) Order 2010 brought in by the Covert Human Intelligence Sources (Amendment) Order 2012.

This means that from 1<sup>st</sup> November 2012 any Council authorisations to carry out directed surveillance or use a CHIS under RIPA will require approval from a Justice of the Peace at the Magistrates' Court.

The authorisation process within the Council remains the same, the Investigating Officer will complete a RIPA application form which will be passed to an authorising officer (Corporate Director or Chief Executive) who will authorise the activity if it is necessary and proportionate and for the purposes of preventing or directing crime. It is envisaged that the Investigating Officer will then take the authorisation to the Magistrates' Court and in a private hearing with at least 1 Justice of the Peace will ask for the authorisation to be approved. The Magistrates can then either:

- i. approve the authorisation, in which case the surveillance or CHIS activity would commence,
- ii. refuse the application and suggest some improvements to it, or
- iii. refuse to approve the authorisation and quash the authorisation altogether.

The timescales of RIPA remain the same and all authorisations will run for 3 months from the date the authorisation is approved by the Justice of the Peace. The authorisations should be reviewed throughout that 3 month period by the Authorising Officer in the Council. If officers wish to renew the RIPA authorisation for a further 3 month period, an authorisation for renewal will also have to be approved by the Justice of the Peace.

In addition, as of the 1<sup>st</sup> November 2012, directed surveillance will only be authorised by the Council where it is for the purpose of preventing or detecting a criminal offence where that criminal offence carries a sentence in the Magistrates' or the Crown Court of at least 6 months imprisonment or is an offence involving the sale of alcohol or tobacco to children. This is the "serious crime threshold". This does not apply to CHIS, only directed surveillance. This may impact significantly on the way this Council utilise RIPA in investigations as there is no provision for directed surveillance in respect of "anti-social behaviour".

### **1. Changes to the RIPA Policy adopted at Cabinet 8 November 2012**

Given the change in the legislative framework of RIPA from 1<sup>st</sup> November 2012 and the recommendations made by the Inspector following the 6<sup>th</sup> September inspection, Council's RIPA Policy document was amended so that it remains fit for purpose. The Policy document has been amended as follows:

- To include the information regarding judicial approval and the "serious crime" threshold.
- To expand the definition of CHIS in accordance with the recommendation of the Inspector.
- The original Appendix A to the Policy (a flow chart) has been removed as it is no longer accurate, as a result the remaining Appendices to the Policy have been re-numbered. Appendix A is now the Directed Surveillance and CHIS forms, Appendix B is now the Home Office Codes of Practice for Covert Surveillance and CHIS.
- Two new Appendices have been added to the Policy that have not previously been included, these are; Appendix C – Home Office Guidance to Local Authorities in England and Wales on the judicial approval process for RIPA and the crime threshold for directed surveillance, and, Appendix D – Home office Guidance for Magistrates' Courts in England and Wales for a Local Authority application seeking an order approving the grant or renewal of a RIPA authorisation or notice.

Cabinet adopted the amended Policy Document to enable officers to continue with their use of RIPA with the appropriate guidance in place.

In addition, given that it is suggested from the Home Office guidance that it is the "Investigating officer" rather than the authorising officer who obtains judicial approval for RIPA authorisations Cabinet

delegated the power to the Corporate Director to authorise Officers to appear at the Magistrates' court for the purposes of obtaining a RIPA authorisation approval. This authorisation can be given under s.223 of the Local Government Act 1972.