

Report to the Cabinet

Meeting to be held on Thursday, 15 June 2017

Report of the Director of Governance, Finance and Public Services

Part I

Electoral Divisions affected:
All

Report on the Outcome of the Office of Surveillance Commissioner's Triennial Inspection

(Appendices 'A' to 'C' refer)

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Executive Summary

On 28 February 2017 the Office of Surveillance Commissioners (OSC) undertook its triennial inspection of the Council's use of covert surveillance in accordance with the Regulation of Investigatory Powers Act 2000 (RIPA).

The Inspector's report is attached at Appendix 'A'. Please note that the report has been redacted to remove sensitive or confidential information about specific investigations. The Cabinet is asked to consider the suggestions and one recommendation contained in the report and to agree amended policies to take account of his comments. Cabinet is also recommended to agree the approach to be taken in relation to the use of social media.

Recommendation

The Cabinet is recommended to:

- (i) Note the OSC Inspection Report at Appendix 'A',
- (ii) Approve the amended corporate policies on RIPA and Shadow RIPA to take account of the Inspector's comments, and
- (iii) Agree that a policy for the use of social media in connection with investigations be developed for appropriate services and presented to Cabinet for approval.

Background and Advice

On 28 February 2017 the Office of Surveillance Commissioners (OSC) undertook its triennial inspection of the Council's use of covert surveillance in accordance with the Regulation of Investigatory Powers Act 2000 (RIPA).

The inspection report was received in March 2017. Taken as a whole the Inspector's report is positive and the use of RIPA authorisation over the past 3 years since the last inspection is believed to be appropriate.

However, there are a number of issues that the Council has been asked to consider as follows:

RIPA and Shadow RIPA Authorisations

The RIPA regime is permissive, ie it is not necessary for a public authority to seek authorisation to conduct Directed Surveillance or to use a Covert Human Intelligence Source. However, if authorisation is obtained, conduct under that authorisation is lawful for all purposes, and therefore provides protection to the Council in a case where an allegation of infringement of human rights is made.

Local Authorities may only apply for authorisation on the grounds of prevention or detection of crime for offences for which the penalty is at least 6 months imprisonment, or offences involving the sale of alcohol and tobacco to under 18s, and must also now obtain approval from the Magistrates' Court.

The current Corporate Policy and Guidance on RIPA requires that any Council investigation not involving the prevention or detection of crime related to a public function of the Council i.e. where the public authority is the prosecuting authority for that investigation/offence, must use a "shadow RIPA" process if covert surveillance is to be conducted. This requirement was introduced as a result of case law and advice offered during a previous OSC inspection.

This has led to the development of a Shadow RIPA regime in cases which do not meet the statutory criteria, for example where Council officers wish to carry out investigations in relation to counter fraud or child protection. In those circumstances the Council would not be the prosecuting authority and where evidence is uncovered it would be passed on to the police or used in evidence in court proceedings under the Children Act 1989.

The Shadow RIPA policy enables the Council to demonstrate that, when it uses covert investigatory techniques for non-trading standards investigations, any potential interference with an individual's human rights is addressed in accordance with the principles laid down in RIPA so that issues such as necessity, proportionality and impact on third parties are properly taken into account.

However, the inspector who carried out the most recent inspection disagreed with this aspect of the policy and considered that use of RIPA was not limited to statutory functions involving the prevention and detection of crime. He recommended that there needs to be a case by case assessment, and a recognition that some investigations may meet the criterion of "preventing or detecting crime". The inspector referred in particular to cases of child abuse or neglect but the comment could be equally relevant to cases involving employee fraud, and abuse of vulnerable people.

The policy has therefore now been revised to take account of the need for a case by case consideration, and the Shadow RIPA Surveillance Policy has also been amended to reflect these changes. It is still envisaged however that the majority of surveillance that takes place outside the Trading Standards Service will be under the Shadow RIPA policy.

Social Networking Checks and Surveillance Policy

The Inspector made a single recommendation in his report which relates to the development in recent years of social media, and the availability of private information on the internet, which can be accessed by Council officers in connection with investigations.

It was recommended that the guidance provided in the Covert Social Networking Checks and Surveillance Policy should be more detailed and should provide specific information relevant to a range of Council functions. In view of the recommendation it is proposed that further work be carried out in relation to this with the help of an employee working group from selected services to develop an appropriate policy and related guidance to be brought back to Cabinet for approval in due course.

Central Record of Authorisations

The inspector made a minor suggestion with regard to the central record of authorisations, namely that the records for CHIS and Directed Surveillance should be separate, and that Shadow authorisations should be maintained together with RIPA authorisations. This suggestion has now been implemented.

Formal Oversight of Authorisations

The inspector suggested that there be closer objective oversight, despite the fact that all authorisations are subject to magistrate's approval and therefore independent scrutiny. In addition, the Director of Finance, Governance and Public services already views the small number of authorisations on a quarterly basis, as well as providing advice, together with the Director of Legal and Democratic Services, in the event of any novel aspects of an authorisation. It is believed that this approach is proportionate given the number of authorisations sought and their nature.

Consultations

N/A

Implications:

This item has the following implications, as indicated:

Risk management

- Financial

There are no material financial implications at this stage.

- Legal/Human Rights/Crime and Disorder

Failure to consider necessity, proportionality and collateral intrusion in carrying out covert investigations such as directed surveillance and use of CHIS may lead to legal challenges under the Human Rights Act 1998 and potential investigation by the Investigatory Powers Tribunal. The risks attached are therefore reputational and also could involve the exclusion of relevant evidence in court proceedings.

In relation to the use of RIPA as opposed to Shadow RIPA: where the Council is relying upon formal RIPA authorisation, this requires approval by the Magistrates Court. Use of Shadow RIPA requires authorisation by the Director of Legal and Democratic Services.

List of Background Papers

None

Reason for inclusion in Part II, if appropriate

N/A