

Body: Cabinet

Date: 20 March 2013

Subject: Eastbourne Borough Council's use of its powers under the Regulation of Investigatory Powers Act 2000 ('RIPA') as amended by the Protection of Freedoms Act 2012 ('POFA') and associated legislation

Report Of: Julian Osgathorpe, Deputy Chief Executive

Ward(s) All

Purpose

- (1) To inform members of a) the extent of the authority's recourse to surveillance activities regulated by RIPA and associated legislation during the 2012 calendar year and b) of the result of the three yearly review of the authority's RIPA arrangements
- (2) To inform members of the changes brought about by the Protection of Freedoms Act 2012 and related legislation.
- (3) To recommend that Cabinet adopt a revised policy with regard this authority's recourse to all types of covert surveillance.

Recommendation:

- (1) That Members note the results of the comprehensive three yearly RIPA review, and of the authority's recourse to RIPA-regulated surveillance during the 2012 calendar year.
- (2) That Members note relevant recent legislative changes in this area and their impact on local authorities' potential recourse to surveillance.
- (3) That Members adopt a policy which governs this authority's recourse to covert surveillance of all types, stating that it will be deployed only as a last resort
- (4) That Members give authority to the Lawyer to the Council to a) incorporate such amendments to the policy of this authority which are necessary to ensure that it is up to date and accords with the law, and b) to continue to review the authority's procedures, policies and training on an annual basis in consultation with the SRO for RIPA and the Cabinet portfolio holder.

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1.0 **Background**

- 1.1 Members will be aware that RIPA supplies a statutory framework within which covert surveillance may be lawfully carried out by public authorities for the purposes of enforcement. To conduct covert surveillance regulated by RIPA, prior authorisation must first be given by a member of the Council's senior management team who has previously been certified as an Authorising Officer.
- 1.2 The types of surveillance covered by the RIPA regime include directed surveillance (essentially covert surveillance in places other than residential premises or private vehicles) as well as the use of a covert human intelligence source, or 'CHIS' (this includes public informants and people who make test purchases). It also regulates the interception of some types of communications data (the 'who', 'when' and 'where' of a communication, but not the 'what' i.e. the content of what was said or written). However while the interception of communications data is also covered by RIPA, it is subject to a separate inspection regime.
- 1.3 If used correctly and proportionately and with due regard to human rights, RIPA can be useful in the investigation of serious violations of the law in situations where other investigative options have failed. This authority's current RIPA policy includes rigorous safeguards which reflect the seriousness with which this authority takes its responsibilities in this regard.
- 1.4 The last report to this Cabinet, in April 2012, noted the progress of the Protection of Freedoms Bill through Parliament, which legislation incorporated a raft of measures designed to constrain local authorities' recourse to RIPA-regulated surveillance.

2.0 **Overview of the Protection of Freedoms Act**

- 2.1 The main legislative changes of relevance to local authorities are those which aim to reduce recourse by public authorities to surveillance activity regulated by RIPA. The first of those is the requirement that all surveillance requiring authorisation under RIPA – namely directed surveillance, use of a CHIS and also the interception of communications data - be approved not only internally, by an Authorising Officer who is an appropriately trained senior manager, but also by the justices at the Magistrates' Court. This requirement came into force on 1 November 2012 and was accompanied by non-statutory guidance issued by the Home Office which lays out a procedure and process for submission of applications and renewals to justices of the peace.
- 2.2 Sections 23A(3) and (4) of RIPA set out the tests for judicial approval of a local authority authorisation or notice to obtain communications data. Essentially, the tests require approval to be given if the relevant judicial authority is satisfied that at the time of the grant or renewal there were reasonable grounds for believing that the actions proposed were reasonable and proportionate and that these grounds still remain. "Relevant conditions" must moreover be satisfied in relation to the authorisation or notice, namely that i) the relevant person was designated as such under Chapter 2 of Part 1

of RIPA, ii) the grant or renewal of any authorisation or notice was not in breach of any restrictions imposed under section 25(3) of RIPA and iii) any other conditions provided for by an order made by the Secretary of State were satisfied. In effect, the justices consider all aspects of the authorisation and have the power to refuse the application, and if so minded, to quash it.

- 2.3 Another important change is the requirement that the "serious crime test" must be met in relation to any application for directed surveillance. This requires that the offence being investigated must either be punishable by a custodial sentence of six months or more or be concerned with the sale of alcohol or tobacco to a minor. The objective of this is to ensure that RIPA-regulated surveillance cannot be conducted in investigations of more minor offences such as littering, flyposting and dog fouling.
- 2.4 Other initiatives in PoFA include the requirement that surveillance camera systems – including closed circuit television, but also automatic number plate recognition systems – be subject to greater regulation. PoFA requires the Secretary of State to prepare a new Code of Practice which local authorities will be legally bound to have regard to. A draft Code is currently being consulted upon and while it is not dealt with in detail here, it is noted that it aims to lay out twelve guiding principles for operators to have regard to as opposed to aiming to prescribe a detailed approach.

3.0 Eastbourne Borough Council's recourse to RIPA: the 2012 Returns and the remit of the Office of the Surveillance Commissioner

In accordance with the relevant Codes of Practice, the Lawyer to the Council retains a central record of all RIPA applications and authorisations made by either this authority or by its investigative partners in respect of both authorised surveillance and the use of covert human intelligence sources. Those records are held securely, although the redacted data thereon is freely available to people making FOI requests.

- 3.1 The annual returns compiled for the period 1/1/2012 to 31/12/2012 include the following data:

RIPA applications for the use or conduct of a CHIS:

Nil applications made by EBC

Nil applications by partner organisations with which the authority is working on relevant matters

RIPA applications for authorised surveillance:

Nil applications made by EBC

Nil applications made by partner organisations with which the authority is working on relevant matters.

- 3.2 The 2012 returns show that Eastbourne Borough Council's historically low usage of RIPA continues to the present time. Members will recall that there were no applications by the authority for authorised surveillance during 2011 and only two during 2010, both of which concerned serious allegations of benefit fraud.
- 3.3 It should be noted that the authority's arrangements with regard/ use of

RIPA remains subject to inspection by the Office of the Surveillance Commissioner. The next inspection is due very shortly although at time of writing a date had not been agreed. The inspection involves interviews with key personnel and other enquiries being made with the objective of providing feedback to the Chief Executive along with a written report.

- 3.4 The OSC moreover reports annually to Parliament on his findings. In his most recent annual report, the Chief Surveillance Commissioner noted a number of tendencies in local authorities and other agencies empowered to use RIPA, not all of which were positive. He and his inspectors maintain a rigorous approach to inspections and to those organisations whose arrangements do not reflect the spirit as well as the letter of the law.

4.0 This Authority's arrangements in relation to RIPA – the three yearly review

- 4.1 In 2009, Cabinet agreed that an annual audit of the authority's RIPA policies, procedures and training should take place. An external auditor comprehensively reviewed the authority's arrangements in early 2010: a process which gave rise to a series of best practice recommendations which were acted upon. While that same year the Surveillance Commissioner noted with approval a significant step change in the authority's arrangements, Cabinet nonetheless agreed that as an extra safeguard, an internal requirement to conduct a comprehensive periodic review at three yearly intervals should stand. As a result, a review of the authority's RIPA policy and procedures was conducted by the Lawyer to the Council in consultation with the Senior Responsible Officer in December 2012 / January 2013. This also considered training and related matters.

- 4.2 It was noted that while the Senior Responsible Officer ('the SRO') under RIPA continues to be the Deputy Chief Executive, the arrangement continues whereby he delegates some of his responsibilities - including retaining the central record of authorisations - to the Lawyer to the Council. He continues to receive regular briefings from that postholder and it is proposed that those arrangements continue.

- 4.3 The Authorising Officers for the purposes of the Act continue to be the authority's senior management team, as is consistent with legislative requirements. The officers currently in post have all received relevant training and have been certified to act as AOs. An update on changes in the law was supplied to them at a meeting of the core management team in November 2012, shortly after the Protection of Freedoms Act came into force, along with a briefing on the up to date position regarding the authority's usage of its powers under RIPA.

- 4.4 The enforcement officers within the authority also have a role to play not just as potential applicants but also as disseminators of best practice. At the last inspection by the OSC, the arrangements in place to share best practice between enforcement officers by means of a working group and an informal 'gatekeeper' system were noted with approval. During this review, it was considered that the role of the intranet in ensuring that all officers have access to dedicated resources, vetted by the SRO and the Lawyer to the Council, was an important plank of the new policy and procedures proposal.

At the last OSC inspection, the use of the intranet to provide a dedicated set of resources was considered effective and the importance of this in the context of agile working is ongoing.

- 4.5 In so far as training of officers is concerned, the review noted a need to specialist up to date training on the law. As a result, both Authorising Officer and applicant level officers will be receiving dedicated training on the law as it now stands from an external legal expert during Spring 2013.
- 4.6 The three yearly review also included detailed consideration of the policy and procedures document currently in force at this authority. In order to ensure that officers were aware of the changes wrought by PoFA and associated legislation, the authority's corporate policy and procedures document was amended by the Lawyer to the Council in accordance with delegated authority given by Cabinet and publish online and on the intranet. The changes made were however transitional only and it was noted that adding additional layers to an already lengthy and complex policy and procedures document over time was not likely to result in clarity. Other possible approaches to policy and procedures for this authority were therefore explored with the SRO and the Cabinet portfolio holder. This process gave rise to the policy document submitted with this report.

5.0 The revised RIPA policy

- 5.1 The RIPA regime has changed over time, not just in terms of the requirement of an additional process in the form of application to the Magistrates' Court, but also in terms of the extent of the limits now placed on recourse to RIPA regulated surveillance by local authorities. The message from central Government is clear: local authorities should have the protection of RIPA only in relation to surveillance which is adjudged to be proportionate in all of the circumstances and in the public interest, in the context of ECHR, which is (in the case of directed surveillance) part of an investigation of a serious criminal offence, where all other investigative options have failed and where the surveillance has been approved not just by an appropriately trained member of the senior management team but also by a justice of the peace.
- 5.2 This authority has demonstrated over time its desire to apply rigorous safeguards with regard RIPA-regulated surveillance. In all of the circumstances, it is proposed that the authority adopts a policy approach which states very clearly that this authority will not normally have recourse to covert surveillance but will use it only in situations of last resort, where all other options have failed and where it is adjudged necessary on the particular facts. The objective is not to fetter the authority's discretion to exercise its powers as appropriate and to be clear that each situation will be judged on its own merits, while providing clarity regarding this authority's approach. The draft policy reflects this objective.
- 5.3 In practical terms, this authority's arrangements must equip officers to understand and navigate a complex legislative framework with a clear awareness of the specific limitations imposed by the legislation and a mindfulness of the human rights concerns which doing so important. While the regulatory framework offered by RIPA is subject to external scrutiny, it is

however vital that human rights considerations are reflected in all contexts, including an important related area: covert surveillance which is not regulated by RIPA.

- 5.4 The Chief Surveillance Commissioner himself noted in his 2010/11 report that while Part II of RIPA made authorised surveillance lawful, it did not make unauthorised surveillance unlawful. It is conceivable that from time to time a situation may arise wherein non-RIPA regulated directed surveillance is a potential option in the investigation of a crime which has not yet occurred and/or does not meet the six month test. To ensure a consistent approach which is in the spirit of the law, it is therefore proposed that the tests which RIPA insists on should be applied across the board, in all types of directed surveillance. This Report thus recommends a policy approach which requires internal authorisation (by the authority's Authorising Officers, using forms which apply broadly the same criteria as those which require completion in RIPA-regulated surveillance) for all covert surveillance, whether regulated by RIPA or not. This will ensure that all covert surveillance activity is subjected to the same, appropriately rigorous, safeguards.
- 5.5 Moreover, to ensure that the policy and procedures of this authority can be readily updated as new forms and guidance are made available by the Home Office and others and as modifications are made to the law, it is suggested that the full detail of the authority's processes should sit outside the Council's policy on covert surveillance. This should ensure that the revised policy is considerably more streamlined than that which it replaces, as it requires officers to go outside it for a range of resources including the appropriate forms and up-to-date guidance on the relevant Home Office website.
- 5.6 The intention is that instead of looking to a lengthy and quickly outdated policy and procedures document, officers will bring the clearly stated aims of the policy to other more detailed resources which have been approved by the Senior Responsible Officer and the Lawyer to the Council and which are available to officers only via a dedicated resource on the intranet. This approach will equip officers engaging with this complex area with a range of resources which are regularly reviewed and updated, including copyrighted resources purchased by experts in the field and not available for wider publication by this authority.
- 5.7 In light of this, the draft policy appended hereto aims mainly to spell out the Council's approach to the usage of covert surveillance. It functions primarily as an up to date statement of the Council's fundamental position with regard covert surveillance and in particular the requirement that all officers apply an approach which is proportionate as well as lawful to all to any potential covert surveillance activity, which is considered only as a last resort.

6.0 Consultation

- 6.1 Consultation has taken place with the Senior Responsible Officer for RIPA and with the Cabinet portfolio officer.

7.0 Resource Implications

None

7.1 **Financial**

None

7.2 **Staffing**

None

8.0 Other Implications: Environmental, Human Rights, Community Safety, Youth, Anti-poverty.

8.1 The Human Rights implications of this Report have been clearly highlighted above.

9.0 Conclusion

9.1 Since RIPA was introduced in 2000, it has been incumbent on local authorities to ensure that they deploy the protection it offers only proportionally and in situations where doing so is adjudged to be strictly necessary according to rigorous criteria.

9.2 This authority's policy and procedures have been regularly reviewed and updated and our usage of the powers available to us continues to be modest. That fact does not however solve this authority of the ongoing need to review and update its arrangements in the context of a changing legal landscape.

9.3 The three-yearly review of this authority's arrangements, carried out with knowledge of the recent legislative changes, has resulted in a streamlined draft policy document being put before Cabinet. Adherence to this revised policy alongside recourse to the law and to statutory guidance as well as to other resources which sit outside it but which have been appropriately vetted, will ensure that this authority continues to act in accordance with the law.

**JULIAN OSGATHORPE
DEPUTY CHIEF EXECUTIVE**

Background Papers:

The Background Papers used in compiling this report were as follows:

The Regulatory and Investigatory Powers Act 2000

The Protection of Freedoms Act 2012

Reports to Cabinet on RIPA from 2008 to 2012

Guidance issued by the Home Office and the Office of Surveillance Commissioners

Annual Reports of the Office of Surveillance Commissioners

Other resources and guidance protected by copyright

To inspect or obtain copies of background papers please refer to the contact officer listed above.