

Agenda Item No: 9.5 **Report No:** 5/17
Report Title: Updated Policy on Use of Powers under the Regulation of Investigatory Powers Act 2000
Report To: Cabinet **Date:** 4 January 2017
Cabinet Member: Cllr Andy Smith
Ward(s) Affected: All
Report By: Catherine Knight, Assistant Director of Legal & Democratic Services
Contact Officer(s)-
Name(s): Oliver Dixon
Post Title(s): Lawyer
E-mail(s): oliver.dixon@lewes.gov.uk
Tel No(s): (01273) 471600

Purpose of Report:

To seek Cabinet approval for an updated policy on the use of powers under Part 2 of the Regulation of Investigatory Powers Act 2000.

Officers Recommendation(s):

- 1 That Cabinet approve the updated policy on the Council's use of powers under Part 2 of the Regulation of Investigatory Powers Act 2000 ('RIPA'), set out in full at Appendix 1.
- 2 That Cabinet note the procurement of refresher training for RIPA authorising officers; and approve the purchase of a policy and procedures toolkit to assist the Council in complying with its statutory duties under RIPA.
- 3 That the Assistant Director of Legal & Democratic Services continues in the role of Senior Responsible Officer for matters concerning RIPA.

Reasons for Recommendations

- 1 The Council's existing covert surveillance policy is 6 years old and needs updating to reflect current legislation and codes of practice. Also, to support the Joint Transformation Programme, Lewes District Council and Eastbourne Borough Council are looking to align policies wherever possible. The proposed updated policy at Appendix 1 closely matches the policy recently adopted by Eastbourne Borough Council.

Information

2

- 2.1** Part 2 of the Regulation of Investigatory Powers Act 2000 ('RIPA') regulates the Council's use of 'directed surveillance' – see further at 2.4-2.6 below; and the conduct and use of covert human intelligence sources ('CHIS') – see further at 2.7 below.
- 2.2** In common with all district councils in England and Wales, Lewes District Council may only carry out certain types of surveillance, and may only deploy a CHIS, if it has complied with the relevant provisions of RIPA. This is to ensure that investigations involving covert surveillance are exercised in a manner compatible with the European Convention on Human Rights.
- 2.3** Legally and practically, it is important to distinguish between 'surveillance' and 'directed surveillance', as it is *only the latter which requires authorisation under RIPA*.
- 2.4** RIPA defines 'surveillance' as:
- monitoring, observing or listening to persons, their movements, their conversations or their activities or communications;
 - recording anything monitored, observed, or listened to in the course of surveillance; and
 - surveillance by or with the assistance of a surveillance device
- 2.5** Under RIPA, 'directed surveillance' occurs where:
- the surveillance is for the purpose of a specific investigation or a specific operation
 - the operation is covert
 - the surveillance is carried out in a way likely to get private information about a person
 - the operation is not an immediate response to events or circumstances for which the Council could not reasonably be expected to get an authorisation for the carrying out of surveillance.
- 2.6** Authorisation of directed surveillance may only be granted where the investigation relates to an offence which attracts a maximum custodial sentence of six months or more, or offences relating to the under-age sale of tobacco or alcohol.
- 2.7** Under RIPA, a covert human intelligence source is a person who, at the request of a designated public authority such as the Council, establishes

or maintains a personal relationship with a person for the covert purpose of facilitating either of the following activities:

- covertly using such a relationship to obtain information or to provide access to any information to another person; or
- covertly disclosing information obtained by the use of such a relationship, or as a consequence of such a relationship.

2.8 As well as complying with RIPA, the Council must have regard to statutory codes of practice issued by the Office of Surveillance Commissioners. Under these provisions, the key requirements are that directed surveillance and the deployment of CHIS be *necessary* and *proportionate* and, following authorisation from a designated Council officer, approved by a magistrate.

2.9 Due to the strict controls imposed by the legislation and codes of practice, it is envisaged that the Council would make use of its powers under RIPA in exceptional circumstances only. Authorisation must be proportionate and a measure of last resort, where all other investigative options were deemed insufficient. This approach is reflected at paragraph 8 of the proposed policy.

2.10 The Council's existing policy on the use of directed surveillance and CHIS dates from 2010, since when both RIPA and related codes of practice have been amended. The two key changes are the need for prior approval by a magistrate and guidance on surveillance involving social media. Both of these elements are covered in the proposed updated policy at Appendix 1.

2.11 The updated policy makes reference to the Senior Responsible Officer. The Code of Practice on Covert Surveillance considers it good practice for public authorities permitted to exercise powers under Part 2 of RIPA to appoint a Senior Responsible Officer ('SRO') responsible for:

- the integrity of the process within the authority to authorise directed surveillance
- compliance with Part 2 of RIPA
- engagement with the Surveillance Commissioners and inspectors when they conduct their inspections
- overseeing implementation of any post-inspection plans and recommendations

Catherine Knight, Assistant Director of Legal & Democratic Services, is the Council's designated SRO for the purposes of RIPA, and it is recommended that she continues to be so.

2.12 The updated policy also makes reference to Authorising Officers. By law, only council officers of a specified rank may authorise an application

to carry out directed surveillance or to use a CHIS. These are prescribed as: a director, head of service, service manager, or equivalent.

- 2.13** Training for Authorising Officers is a requirement of the policy. A refresher workshop for officers in this role is to be held in February 2017 at a cost to the Council of £700.
- 2.14** To enable the Council to comply with the very technical and exacting requirements of RIPA when applying for and granting authorisation for directed surveillance or the use of CHIS, it is recommended that the Council invest in an authoritative policy and procedures toolkit. The approximate cost of procuring this from a reputable source is £300-400.
- 2.15** The toolkit would complement the 'Procedures and Guidance' manual (2014) issued by the Office of Surveillance Commissioners, detailing oversight arrangements for covert surveillance and CHIS activity.

3

Financial Appraisal

The total cost of procuring refresher training for officers and a policy and procedures toolkit is expected to be a maximum of £1,100. This cost can be met from existing budgets for corporate initiatives and taxi licensing (the service which is likely to gain most benefit from this activity).

4

Legal Implications

Where the Council wishes to carry out directed surveillance or to deploy a CHIS, the exercise of such powers will be lawful only if compliant with the obligations imposed by Part 2 of RIPA and relevant secondary legislation – for example, the requirement detailed in paragraph 2.12 is prescribed under the Regulation of Investigatory Powers (Directed Surveillance and Covert Human Intelligence Sources) Order 2010. Due regard must also be had to Home Office guidance relating to surveillance and undercover work of this type.

Legal ref: 005383-JOINT-OD. Date of advice: 07.12.16

5

Risk Management Implications

I have completed a risk assessment.

The following risks will arise if the recommendations are not implemented, and I propose to mitigate these risks in the following ways:

- (i) Failure to secure internal authorisation and the approval of a magistrate for each surveillance exercise and/or use of CHIS is likely to render such activity unlawful, which would make it exceedingly difficult for the Council to rely on any evidence gathered by those means. The updated policy makes

it a requirement that magistrate approval is sought and obtained in every instance.

- (ii) If an investigation involves intelligence gathering via social media, this may require prior authorisation in accordance with RIPA, without which the operation may be unlawful. The updated policy requires all officers involved in such activity to have full regard to the need for proper authorisation if the intelligence gathering amounts to directed surveillance.

No new risks will arise if the recommendations are implemented.

6

Equality Implications

I have completed the initial Equality Impact Assessment screening exercise and no potential negative impacts were identified as a result of these recommendations; therefore a full Equality Impact Assessment is not required.

7

Background Papers

Covert Surveillance and Property Interference Code of Practice (December 2014), issued by the Home Office

Covert Human Intelligence Sources Code of Practice (December 2014), issued by the Home Office

Procedures and Guidance: oversight arrangements for covert surveillance conducted by public authorities and to the activities of relevant sources (December 2014), issued by the Office of Surveillance Commissioners

8

Appendices

Appendix 1: Updated policy on use of powers under Part 2 of RIPA