

**Report to:** Audit and Standards Committee

**Date:** 14 November 2022

**Title:** Annual report on Covert Surveillance Management

**Report of:** RIPA Monitoring Officer

**Ward(s):** All

**Purpose of report:** To provide an overview of the Council's use of covert surveillance powers in 21/22; and to report on the recent external inspection of surveillance governance arrangements.

**Officer recommendation(s):** (1) To note the covert surveillance summary for September 2021 to September 2022

(2) To note the findings of the Investigatory Powers Commissioner's Office Inspection conducted in June 2022

(3) To consider and approve the updated Covert Surveillance and CHIS Policy

(4) To consider and approve the updated Policy on Acquisition of Communications Data

**Reasons for recommendations:** Best practice requires an annual update to the Committee on Covert Surveillance Policy adherence.

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## **1 Introduction**

1.1 This report summaries the Council's use of covert surveillance powers and online intelligence gathering during September 2021 – September 2022.

1.2 It also highlights the recommendations of the Investigatory Powers Commissioner's Office (IPCO) following their inspection of Lewes and Eastbourne Councils in June 2022.

## **2 Legislative and Policy Background**

- 2.1 Part 2 of the Regulation of Investigatory Powers Act 2000 ('RIPA') provides for the authorisation by certain public bodies, including Lewes District Council, of 'Directed Surveillance'.
- 2.2 'Directed Surveillance' is covert surveillance 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, other than by way of immediate response to events of circumstances.
- 2.3 In conducting directed surveillance, the Council must comply not just with RIPA but with the relevant Home Office code of practice and the Council's own policy, links to which are provided in paragraph 14 below.
- 2.4 In procedural terms, the most important steps under RIPA are for the directed surveillance to be authorised internally by a trained and designated senior manager, and for that authorisation to be approved by a justice of the peace, i.e. a magistrate or district judge
- 2.5 At both stages, the authorising officer and JP must be satisfied that the proposed surveillance is necessary for the prevention or detection of a crime punishable, on conviction, by a custodial sentence of at least six months; and is proportionate to what is sought to be achieved by carrying it out. This involves balancing the seriousness of the intrusion into the privacy of the subject (or any other person who may be affected) against the need for the activity in investigative and operational terms.

### **3 Governance Arrangements**

- 3.1 IPCO provides independent oversight of the use of investigatory powers by intelligence agencies, police forces and other public authorities. Its purpose is to oversee how these powers are used, taking account of the public interest and ensuring that investigations are conducted in accordance with the law.
- 3.2 IPCO's oversight includes the inspection of public authorities. Lewes and Eastbourne Councils are inspected once every three years, previously in December 2019 and most recently in June 2022. The key outcomes of this inspection are set out in paragraph 7 below.
- 3.3 Internally, the Council regulates its use of surveillance powers through specially trained managers, consisting of:
- RIPA Senior Responsible Officer – Oliver Dixon
  - RIPA Monitoring Officer – Lee Ewan
  - RIPA Authorising Officers – Tim Whelan and Linda Farley
- 3.4 To ensure continuing capability over the past 12 months, a Covert Human Intelligence Source (CHIS) training course was organised in November 2021 and attended by 8 council officers from various departments. Lee Ewan attended a RIPA Applicants and Gatekeepers course in March 2022 and two further refresher courses for RIPA Senior Responsible Officer and RIPA Authorising

3.5 Officers have been organised for Oliver Dixon and Tim Whelan in November 2022. Surveillance arrangements are also subject to periodic internal audit.

#### **4 Use of Covert Surveillance Powers between September 2021 and September 2022**

4.1 Over the period September 2021 – September 2022, one application for Directed Surveillance was authorised in respect of a Tenancy Fraud investigation. However, due to the delays with the court system the application was not seen by a justice of the peace, and subsequently withdrawn following a review of the investigation. No covert human intelligence source (CHIS) or acquisition of communications data request was made or authorised during this period.

4.2 The non-use of directed surveillance powers is in part explained by the strict criteria relating to authorisation, as detailed in paragraph 2.5 above. The Council continues to investigate suspected criminal offences (mainly fraud), breach of tenancy agreements and non-payment of fees or taxes but, in most cases, directed surveillance cannot be justified under RIPA criteria and is therefore not used.

4.3 The Council's Neighbourhood First officers wear highly visible uniforms which helps deter criminal activity in the community. Any surveillance they undertake to deter fly tipping is done using cameras mounted on lamp posts but with highly visible signage intended to make potential offenders aware. Such activity amounts to overt surveillance which falls outside of the scope of this report, as it is not regulated by RIPA 2000 or the Investigatory Powers Act 2016.

#### **5 Recent use of RIPA for Crown Court case**

5.1 The Council's counter-fraud officers began investigating a suspected fraudulent Right to Buy (RTB) applications relating to a property in the Lewes district. The RTB scheme is available, subject to certain qualification criteria, to secure tenants of local authorities, enabling them to buy their home at a price lower than the full market value. For homes outside of London, the discount is currently up to £87,200.

5.2 Officers had reason to believe that the property named in the application was not the applicant's only or principle home, meaning he did not meet a significant RTB qualification requirement. This amounted to a suspected offence under sections 1 and 2 of the Fraud Act 2006 – fraud by false representation. On conviction, a person guilty of fraud is liable to imprisonment for a term of up to 12 months if sentenced in the magistrates court; or up to 10 years if sentenced in the crown court.

5.3 Despite extensive counter-fraud investigations pointing to the applicant not using the property as his only or principal home, the evidence was thought unlikely to meet the standard of proof required for a criminal conviction, i.e. proof beyond reasonable doubt.

- 5.4 To secure the required level of proof, the investigation officers sought RIPA authorisation to conduct a three-month directed surveillance operation on the exterior of the property in question, by way of covertly mounted vision-only camera, to ascertain the level of usage by the applicant. The internal authorising officer, the Director of Service Delivery, was satisfied the proposed surveillance was necessary for the detection of a suspected crime, and was proportionate in terms of:
- i. all other reasonable non-surveillance lines of enquiry having been pursued already;
  - ii. the minimisation of 'collateral' intrusion, i.e. surveillance of person not under investigation.
  - iii. the collection of visual images only, not sound; and
  - iv. the potential saving to the council of between £78,600 and £80,900, if the RTB application were proven to be fraudulent.

Accordingly, the Director authorised the operation.

In July 2019, officers applied for and were granted judicial authority by a district judge to commence the surveillance activity.

- 5.5 Once a local authority has obtained all necessary permissions for directed surveillance, it may lawfully conduct the activity for up to three months, if the circumstances justify the activity remain. With this particular case, the authorising officer reviewed the activity after one and two months from commencement, and concluded it was necessary to continue the surveillance for the full duration in order to be certain that the applicant was not using the property as his only or principle home.
- 5.6 During the three-month surveillance period, the property in the application was shown to have not been occupied by the applicant as a sole or main principle home. This key item of evidence alongside other material established throughout the investigation was deemed sufficient to meet the criminal evidence requirement of beyond reasonable doubt.
- 5.7 In December 2021 a trial at Chichester Crown Court was heard where the applicant was found guilty of fraud by false representation for two separate RTB applications for the same property. Due to delays with the court system, sentencing wasn't handed down until April 2022 at Lewes Crown Court where the applicant was sentenced to 24 months imprisonment on both counts to run concurrently, suspended for 24 months. The applicant was also required to complete 40 hours of unpaid work within 12 months and pay the council the full prosecution costs of £15,887.00.
- 5.8 In a separate action, the council also recovered the property through civil proceedings which has now been used to re-house a household who had a genuine need of housing.

## **6 Online Surveillance**

- 6.1 Certain council teams may from time to time use open source material available on the internet to confirm the identity and circumstances of persons who (a) are in significant debt to the Council and need to be traced or (b) may be the subject of, or associated with, a counter-fraud investigation.
- 6.2 Controls are in place to minimise the risk that use of open source material to confirm an online presence (which, because it is in the public domain), does not intrude on the person's right to a private and family life) does not develop into 'directed surveillance' and therefore require express authorisation to render it a lawful interference with their right to privacy
- 6.3 Typically, online research may amount to directed surveillance if it becomes highly targeted through focused and systematic monitoring of an individual over a period of time, resulting in a profile or record of that person's activities being created and used, with a view to potential legal proceedings. Such surveillance may lawfully proceed only if it (a) meets the crime threshold – see paragraph 2.5; and (b) is authorised in accordance with RIPA procedures.
- 6.4 Controls are also in place to ensure that creating a covert profile to establish an online connection with a person whose social media profile is not open to the public may not proceed without the necessary authorisation.
- 6.5 The RIPA Monitoring Officer is meeting with the relevant Council teams to review the control arrangements and reinforce compliance.
- 6.6 Historically, the directed surveillance operations conducted by the Council have all related to fraud within the ambit of the Fraud Act 2006 and therefore liable to a penalty that would meet the crime threshold specified in paragraph 2.5 above.

## **7 IPCO Inspection**

- 7.1 In June 2022, an IPCO inspector carried out a desktop inspection of Lewes and Eastbourne Councils' governance arrangements for conducting covert surveillance. This included a review of RIPA policies and procedures, a record of training and a follow up virtual interview with Oliver Dixon and Lee Ewan.
- 7.2 The IPCO report received in July 2022 noted 'the information provided has demonstrated a level of compliance which removes, for the present, the requirement for a physical inspection'. Praise was given to the level and volume of training undertaken with an overall remark 'your authority has been found to be in a good place'.
- 7.3 The inspector noted, that although no powers were utilised between this and the previous inspection, an application for Directed Surveillance had been made by Lewes District Council. However, due to time delays with the court system this application was eventually withdrawn by the council due to changes in circumstances. The inspector undertook a review of the proposed surveillance authorisation 'which was found to have been well formed'.
- 7.4 IPCO made reference to the last inspection in 2019, on this occasion, two matters of non-compliance were identified along with several observations. The

report details all matters have been attended to, with the two, relatively minor, non-compliance matters appropriately dealt with.

7.5 The RIPA policy, was noted during the inspection to be satisfactorily formed. However, IPCO recommends amendments are made to the existing policies to incorporate the retention, review and destruction (RRD) of data gathered utilising the covert powers available. The report adds that the policies should carry clear instructions on the need to undertake RRD of covertly gather material and to comply with the safeguarding chapters found within the Home Office Codes of Practice.

7.6 The RIPA Monitoring Officer (MO) has drafted the required amendments to both the Covert Surveillance and CHIS policy and Policy on Acquisition of Communications Data for Audit and Governance Committee approval.

## **8 Financial appraisal**

8.1 There are no financial issues associated with this report.

## **9 Legal implications**

9.1 For the Council's directed surveillance, use of a CHIS or acquisition of communications data to comply with human rights legislation (specifically the right to respect for family and private life, and the right to a fair trial), it must comply with the controls and procedures set down by the Regulation of Investigatory Powers Act 2000 or the Investigatory Powers Act 2016 (as applicable). The Council must also have regard to the relevant Home Office codes of practice which set out the practical steps local authorities should follow in applying these regulatory controls.

## **10 Risk management implications**

10.1 Failure to implement IPCO's recommendations brings with it the risk of (1) non-compliance with surveillance legislation and codes of practice; and (2) censure by IPCO at their next inspection causing reputational harm to the Council.

## **11 Equality analysis**

11.1 There are no equality issues associated with this report.

## **12 Environmental sustainability implications**

12.1 There are no environmental issues associated with this report.

## **13 Appendices**

13.1 • Appendix A – Covert Surveillance and CHIS Policy

13.2 • Appendix B – Policy on Acquisition of Communication Data

## 14 Background papers

14.1 The background papers used in compiling this report were as follows:

- [Home Office Code of Practice on Covert Surveillance and Property Interference \(August 2018\)](#)
- [Home Office Code of Practice on Communications Data \(November 2018\)](#)