



# **Procedure for Authorisation of Covert Surveillance**

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# **1. Foreword**

## **1.1.**

The use of surveillance to provide information is a valuable resource for the protection of the public and the maintenance of law and order. In order that local authorities and law enforcement agencies are able to discharge their responsibilities, use is made of unaided surveillance and surveillance devices. Where this surveillance is covert i.e. the subject of the surveillance is unaware that it is taking place, then it must be authorised to ensure that it is lawful. CCTV systems in the main will not be subject to this procedure as they are 'overt' forms of surveillance. However where CCTV is used as part of a pre-planned operation of surveillance then authorisation should be obtained. This includes circumstances where such use is sought by the Council or by a third party such as the Police. For the use of CCTV for covert surveillance, officers should refer to paragraph 10 of the Council's CCTV Code of Practice.

## **1.2.**

A legal framework ensures that the use of surveillance is subject to an authorisation, review and cancellation procedure.

# **2. Implications of this Procedure**

## **2.1.**

In some circumstances, it may be necessary for Orkney Islands Council employees, in the course of their duties, to make observations of a person or person(s) in a covert manner, i.e. without that person's knowledge. By their nature, actions of this sort may constitute an interference with that person's right to privacy and may give rise to legal challenge as a potential breach of Article 8 of the European Convention on Human Rights and the Human Rights Act 1998 ('the right to respect for private and family life').

## **2.2.**

The Regulation of Investigatory Powers Act (2000) [RIPA], the Regulation of Investigatory Powers (Scotland) Act (2000) [RIP(S) A] and the Investigatory Powers Act 2016 ('the Acts') together provide a legal framework for covert surveillance activities by public authorities (including local authorities) and an independent inspection regime to monitor these activities.

## **2.3.**

Whilst the Acts do not impose a requirement for local authorities to seek or obtain an authorisation, where one is available, Orkney Islands Council employees will adhere to the authorisation procedure before conducting any covert surveillance.

## **2.4.**

Employees of Orkney Islands Council will not carry out intrusive surveillance within the meaning of the Regulation of Investigatory Powers (Scotland) Act 2000. This is surveillance of anything taking place on residential premises or in a private vehicle

that involves the presence of an individual on the premises or in the vehicle or is carried out by means of a surveillance device capable of providing information of the same quality and detail as might be expected to be obtained from a device actually present on the premises or in the house or vehicle.

## **2.5.**

A number of practical examples of the use of directed surveillance are contained in sections 3 and 4 of the Scottish Government's Code of Practice on Covert Surveillance and Property Interference: <https://www.gov.scot/publications/covert-surveillance-property-interference-code-practice/>

## **3. Objective**

### **3.1.**

The objective of this procedure is to ensure that all work involving directed surveillance by Orkney Islands Council employees is carried out effectively, while remaining in accordance with the law. It should be read in conjunction with the Regulation of Investigatory Powers (Scotland) Act 2000 and the Scottish Government's Code of Practice on Covert Surveillance and Property Interference ("the Code of Practice").

### **3.2.**

Definitions:

#### **3.2.1.**

Covert surveillance means surveillance that is carried out in a manner calculated to ensure that the persons subject to the surveillance are unaware that it is taking place.

#### **3.2.2.**

Authorising officer is the person who is entitled to give an authorisation for directed surveillance in accordance with section 6 of the Regulation of Investigatory Powers (Scotland) Act 2000.

#### **3.2.3.**

Private Information includes information about a person relating to his private or family life.

#### **3.2.4.**

Residential premises means any premises occupied or used, however temporarily, for residential purposes or otherwise as living accommodation.

#### **3.2.5.**

Private vehicle means any vehicle that is used primarily for the private purpose of the person who owns it or of a person otherwise having the right to use it. This does not include a person whose right to use the vehicle derives only from his having paid, or

undertaken to pay, for the use of the vehicle and its driver for a particular journey. A vehicle includes any vessel, aircraft or hovercraft.

## **4. Scope of the Procedure**

### **4.1.**

This procedure applies in all cases where 'direct surveillance' is being planned or carried out. Direct surveillance is defined in the Code of Practice as surveillance undertaken "for the purposes of a specific investigation or operation" and "in such a manner as is likely to result in the obtaining of private information about a person."

### **4.2.**

The procedure does not apply to:

- Ad-hoc covert observations that do not involve the systematic surveillance of specific person(s).
- Observations that are not carried out covertly.
- Unplanned observations made as an immediate response to events.

Particular attention should be made to Social Media Networking Sites. A separate policy is in place in connection with surveillance through social media and should be consulted as necessary.

### **4.3.**

In cases of doubt, the authorisation procedures described below should be followed.

## **5. Principles of Surveillance**

In planning and carrying out covert surveillance, Orkney Islands Council employees shall comply with the following principles.

### **5.1. Lawful purposes**

Directed surveillance shall only be carried out where necessary to achieve one or more of the permitted purposes (as defined in the Acts) namely:

- For the purpose of preventing or detecting crime or the prevention of disorder.
- In the interests of public safety.
- For the purpose of protecting public health.

Employees carrying out surveillance shall not interfere with any property or harass any person.

### **5.2. Confidential material**

#### **5.2.1.**

Particular care should be taken with applications where a significant risk of acquiring confidential material has been identified.

### **5.2.2.**

Confidential material consists of:

- Matters subject to legal privilege for example between professional legal advisor and client), in terms of the Regulation of Investigatory Powers (Modification of the Authorisation Provisions: Legal Consultations) (Scotland) Order 2015 directed surveillance carried out on premises in respect of matters subject to legal privilege is to be treated as intrusive surveillance and can only be carried out by the police.
- Confidential personal information (for example relating to a person's physical or mental health).
- Confidential journalistic material.

## **6. The Authorisation Process**

### **6.1.**

Applications for directed surveillance will be authorised by a Corporate Director (other than the Corporate Director for Strategy, Performance and Business Solutions who has a role of deputising for the Senior Responsible Officer) or in their absence the Head of Legal and Governance. In urgent or exceptional circumstances written or oral authorisation might be given by an officer of Chief Officer grade who has not been designated which should as soon as practicable be followed up by a written authorisation from the relevant official.

### **6.2.**

Authorising officers within the meaning of this procedure should avoid authorising their own activities wherever possible and only do so in exceptional circumstances.

### **6.3.**

All applications for directed surveillance authorisations will be made on form OIC/auth/ds. The applicant in all cases should complete this. In urgent cases the authorising officer may give an oral authorisation. A statement that the authorising officer has expressly granted the authorisation should be recorded on the form or, if that is not possible, in the applicant's notebook or diary. This should be done by the person to whom the authorising officer spoke (normally the applicant) but should later be endorsed by the authorising officer. The authorising officer should write out a separate authorisation as soon as practical.

### **6.4.**

All applications for directed surveillance renewals will be made on form OIC/ren/ds. The applicant in all cases should complete this where the surveillance requires to continue beyond the previously authorised period (including previous renewals). The renewal of the authorisation should be considered and signed by the authorising officer.

## **6.5.**

Where authorisation ceases to be either necessary or appropriate the authorising officer will cancel an authorisation using form OIC/can.ds submitted by the applicant.

## **6.6.**

Forms, codes or practice and supplementary material will be available from the Council Intranet.

## **6.7.**

Any person giving an authorisation for the use of directed surveillance must be satisfied that:

- Account has been taken of the likely degree of intrusion into the privacy of persons other than those directly implicated in the operation or investigation ('collateral intrusion'). Measures must be taken, wherever practicable, to avoid unnecessary intrusion into the lives of those affected by collateral intrusion.
- The authorisation is necessary (see below).
- The authorised surveillance is proportionate (see below).
- In particular when Environmental Health Investigators deploy DAT noise level monitors to assist in any enforcement action in relation to noisy neighbour complaints. These cases should be reviewed on a case by case basis and if necessary the appropriate authorisation sought.
- In relation to aerial surveillance, using, for example, drones, the same considerations should be made to determine whether a directed surveillance authorisation is appropriate. In considering whether the surveillance should be regarded as covert, account should be taken of the reduced visibility of a craft or device at altitude.

## **6.8. Necessity**

Surveillance operations shall only be undertaken where an authorisation is necessary on grounds falling within S.6(3) of RIP(S)A if it is necessary- (a) for the purpose of preventing or detecting crime or of preventing disorder; (b) in the interests of public safety; or (c) for the purpose of protecting public health.

## **6.9. Effectiveness**

Surveillance operations shall be undertaken only by suitably trained or experienced employees, or under their direct supervision.

## **6.10. Proportionality**

The use of surveillance shall be proportionate in terms of S6(2)(b) of RIP(S)A to what is sought to be achieved by carrying it out. Further there must be no other reasonable and effective way of achieving the desired objective(s).

A potential model answer would make clear that the following elements of proportionality had been fully considered:

- balancing the size and scope of the operation against the gravity and extent of the perceived mischief.
- explaining how and why the methods to be adopted will cause the least possible intrusion on the target and others.
- that the activity is an appropriate use of the legislation and the only reasonable way, having considered all others, of obtaining the necessary result.
- providing evidence of other methods considered and why they were not implemented.

## **6.11 Authorisation**

### **6.11.1.**

All directed surveillance shall be authorised in accordance with this procedure.

The authorising officer must take into account the following issues when considering an application:

- who is to conduct the operation.
- what is being proposed.
- where and when the proposed operation will take place.
- whether it is necessary and proportionate.

### **6.11.2.**

Underlying all of these considerations is the requirement for the authorising officer to be satisfied that the terms of the legislation and relevant guidance are met.

### **6.11.3.**

The case for the authorisation should be presented in the application in a fair and balanced way. In particular, all reasonable efforts should be made to take account of information which supports or weakens the case for the authorisation.

### **6.11.4.**

The authorising officer should clearly complete the “Authorising Officer’s Statement” on the application form, preferably in their own hand, and articulate in their own words what activity they are authorising.

**The Authorising Officer must state explicitly what is being authorised.**

### **6.11.5.**

The Authorising Officer must describe and specify what they are granting. This may or may not be the same as requested by the applicant. For the benefit of those operating under the terms of an authorisation, or any person who may subsequently review or inspect an authorisation, it is essential to produce, with clarity, a description of that which is being authorised (i.e. who, what, where, when and how). The Authorising Officer should as a matter of routine state explicitly and in their own words what is being authorised, and against which subjects, property or location.



#### **6.11.6.**

Mere reference to the terms of the application is inadequate. The Authorising Officer should specify the details of how and why they consider the application to be both necessary and proportionate.

#### **Authorisation different from application.**

#### **6.11.7.**

If an application fails to include an element in the proposed activity which in the opinion of the Authorising Officer should have been included (for example, the return of something to the place from which it is to be taken for some specified activity), or which is subsequently requested orally by the applicant, it may be included in the authorisation; if so, a note should be added explaining why. Conversely, if an Authorising Officer does not authorise all that was requested, a note should be added explaining why. This requirement applies equally to intrusive surveillance, property interference, directed surveillance and CHIS authorisations.

#### **The Senior Responsible Officer should avoid granting authorisations.**

#### **6.11.8.**

The role of the Senior Responsible Officer is to oversee the competence of Authorising Officers and the processes in use in their public authority. Whilst legislation does not preclude their use as an Authorising Officer, it is unlikely that they would be regarded as objective if they oversee their own authorisations.

#### **6.11.9.**

Applications for covert surveillance that may result in the acquisition of knowledge of matters subject to legal privilege within the meaning given in paragraph 1.1 of the Code of Practice should state whether the covert surveillance is likely or intending to obtain knowledge of matters subject to legal privilege. Where covert surveillance is likely or intended to result in the acquisition of knowledge of matters subject to legal privilege, an authorisation shall only be granted or approved if the authorising officer is satisfied that there are exceptional and compelling circumstances that make the authorisation necessary.

#### **6.11.10.**

Where the surveillance is not intended to result in the acquisition of knowledge of matters subject to legal privilege, such exceptional and compelling circumstances may arise in the interests of preventing or detecting serious crime.

#### **6.11.11.**

Where the surveillance is intended to result in the acquisition of knowledge of matters subject to legal privilege, such circumstances will arise only in a very restricted range of cases, such as where there is a threat to life or limb and the surveillance is reasonably regarded as likely to yield intelligence necessary to counter the threat.

## **7. Time Periods – Authorisations**

### **7.1.**

Urgent oral authorisations granted by a person who is entitled to act only in urgent cases unless renewed, cease to have effect after seventy-two hours, beginning with the time when the authorisation was granted or renewed.

### **7.2.**

In terms of the Scottish Government's Code of Practice a written authorisation granted by an authorising officer will cease to have effect (unless renewed) at the end of a period of three months beginning with the day on which it took effect.

## **8. Time Periods – Renewals**

### **8.1.**

If at any time before an authorisation would cease to have effect, the authorising officer considers it necessary and proportionate for the authorisation to continue for the purpose for which it was given, the authorisation may be renewed in writing for a further period of three months. Renewals may also be granted orally in urgent cases and last for a period of seventy-two hours. Applications should only be made shortly before the authorisation is due to expire.

### **8.2.**

Any person entitled to authorise may renew authorisations. They may be renewed more than once, provided they continue to meet the criteria for authorisation.

## **9. Review**

### **9.1.**

The Authorising Officer shall keep all authorisations under constant review and an authorisation will be cancelled immediately the requirement for surveillance ceases. The Authorising Officer should set review dates and ensure that all reviews are carried out with the review period tailored to meet the particular requirements of the investigation. Details of the review and the decision reached shall be noted on the Review Form.

### **9.2.**

During a review, the authorising officer who granted or last renewed the authorisation may amend specific aspects of the authorisation, for example, to cease directed surveillance against one of a number of named subjects or to discontinue the use of a particular tactic.

### **9.3.**

Particular attention should be given to the need to review authorisations frequently where they involve a high level of intrusion into private life or significant collateral intrusion, or particularly sensitive information is likely to be obtained. At the point when the Council is considering applying for an authorisation, it must have regard to

whether the level of protection to be applied in relation to information obtained under the warrant or authorisation is higher because of the particular sensitivity of that information.

#### **9.4.**

In each case, unless specified by the Investigatory Powers Commission, the frequency of reviews should be determined by the Council. This should be as frequently as is considered necessary and proportionate.

#### **9.5.**

In the event that there are any significant and substantive changes to the nature of the operation during the currency of the authorisation, the Council should consider whether it is necessary to apply for a new authorisation.

### **10. Cancellation**

#### **10.1.**

Those acting under an authorisation must keep their authorisations under review and notify the authorising officer if they consider that the authorisation is no longer necessary or proportionate, and so should therefore be cancelled.

#### **10.2.**

The authorising officer and the applicant must cancel an authorisation if he/she is satisfied that the directed surveillance no longer satisfies the criteria for authorisation.

### **11. Record Keeping**

Each Service or discrete location within Services must maintain a record of all applications for authorisation (including refusals), renewals, reviews and cancellations. A centrally retrievable record of all authorisations will be held by Legal and Governance and be regularly updated whenever an authorisation is granted, renewed or cancelled. An application for authorisation cannot proceed until a unique reference number (URN) has been issued by Legal and Governance and Legal and Governance must have sight of each and every application. The central register should be kept up-to-date at all times. The record should be made available to the relevant Inspector from the Investigatory Powers Commission, upon request. These records should be retained for a period of at least five years. Orkney Islands Council Policy for Authorisation of Covert Surveillance contains further details at Paragraph 8 thereof.

### **12. Security and Retention of Documents**

#### **12.1.**

Documents created under this procedure are highly confidential and shall be treated as such. Services shall make proper arrangements for their retention, security and destruction, in accordance with the requirements of data protection legislation and

Chapter 8 of the Scottish Government's Code of Practice on Covert Surveillance and Property Interference.

## **12.2.**

Dissemination or copying of material must be limited to the minimum necessary for authorised purposes. The purposes are authorised if the material:

### **12.2.1.**

Is, or is likely to become, necessary for any of the statutory purposes set out in RIPSAs in relation to covert surveillance or property interference;

### **12.2.2.**

Is necessary for facilitating the carrying out of the functions of public authorities under RIPSAs;

### **12.2.3.**

Is necessary for facilitating the carrying out of any functions of the Investigatory Powers Commission or the Investigatory Powers Tribunal;

### **12.2.4.**

Is necessary for the purposes of legal proceedings; or

### **12.2.5.**

Is necessary for the performance of the functions of any person by or under any enactment.

## **12.3.**

Legal and Governance will maintain the Central Register of Authorisations. Authorising officers shall notify Legal and Governance of the grant, renewal or cancellation of any authorisations and the name of the Applicant Officer within 1 working day to ensure the accuracy of the Central Register.

## **12.4.**

The Authorising Officer shall retain the original Authorisation and Renewal Forms until cancelled. On cancellation, the original Application, Renewal and Cancellation forms shall be forwarded to Legal and Governance with the Authorising Officer retaining a copy.

## **12.5.**

The Authorising Officer shall retain the copy forms for a period of three years after cancellation. Legal and Governance will retain the original forms for a period of five years after cancellation. In both cases these will not be destroyed without the authority of the authorising officer if practicable.

## **13. Oversight**

The Investigatory Powers Act 2016 establishes an Investigatory Powers Commission to provide comprehensive oversight of the use of the powers to which this Procedure applies. This oversight includes inspection visits by Inspectors appointed by the Investigatory Powers Commission.

## **14. Complaints**

The Investigatory Powers Tribunal has jurisdiction to investigate and determine complaints against public authority use of investigatory powers. Any complaints in respect of the use by the Council of its powers described in this Procedure should be directed to the Investigatory Powers Tribunal. Full details of how to present a complaint are available on the Tribunal's website – [www.ipt-uk.com](http://www.ipt-uk.com).

## Document control Sheet

### Review / Approval History

| Date          | Name           | Position               | Version Approved                                 |
|---------------|----------------|------------------------|--------------------------------------------------|
| 1 May 2018    | Gavin Mitchell | Head of Legal Services | V1.2– approved at General Meeting of the Council |
| 11 May 2020   | Gavin Mitchell | Head of Legal Services | V1.3                                             |
| 5 May 2021    | Gavin Mitchell | Head of Legal Services | V1.3                                             |
| 10 March 2022 | Gavin Mitchell | Head of Legal Services | V1.4                                             |
|               |                |                        |                                                  |

### Change Record Table

| Date          | Author         | Version | Status | Reason                                                                                       |
|---------------|----------------|---------|--------|----------------------------------------------------------------------------------------------|
| 11 May 2020   | Gavin Mitchell | V1.3    | Final  | Reflect observations contained in IPC Inspection Report                                      |
| 10 March 2022 | Gavin Mitchell | V1.4    | Final  | Update roles in light of approval by Council of Phase 1 of Corporate Management Restructure. |
|               |                |         |        |                                                                                              |
|               |                |         |        |                                                                                              |