



Policy on Covert Surveillance

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1. Introduction

1.1.

In some circumstances, it may be necessary for council employees where evidence cannot be obtained in any other way, in the course of their duties, to make observations of a person or persons in a covert manner, i.e. without that person's knowledge. By their nature, actions of this sort are potentially intrusive (in the ordinary sense of the word) 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").

1.2.

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 by public authorities and an independent inspection regime to monitor these activities.

1.3.

The Investigatory Powers Act 2016 establishes an Investigatory Powers Commission whose remit includes providing comprehensive oversight of the use of powers to which this Policy applies.

1.4.

The Investigatory Powers Tribunal, established in terms of RIPA, has jurisdiction to investigate and determine complaints against public authority use of investigatory powers.

1.5.

The Chief Executive is the RIPSAs Senior Responsible Officer, who has oversight and scrutiny in relation to the RIPSAs function and ensures the integrity of the processes in place and acts as the main point of contact with the Investigatory Powers Commission. In the Chief Executive's absence the Executive Director of Corporate Services will deputise.

1.6.

A detailed procedure has been developed for Covert Surveillance ("the Procedure").

2. Objective

The objective of this policy is to ensure that all covert surveillance by council employees is carried out effectively, while remaining in accordance with the law. It should be read in conjunction with the Scottish Government's Code of Practice on Covert Surveillance and Property Interference ("the Code of Practice").

3. Scope of the Policy

This Policy applies in all cases where “directed surveillance” is being planned or carried out. Directed surveillance is defined in section 1(2) of the RIP(S) Act as surveillance, which is covert but not intrusive, and undertaken:

3.1.

For the purposes of a specific investigation or specific operation.

3.2.

In such a manner as is likely to result in the obtaining of private information about a person (whether or not one specifically identified for the purposes of the investigation or operation).

3.3.

Otherwise than by way of an immediate response to events or circumstances the nature of which is such that it would not be reasonably practicable for an authorisation under the RIP(S) Act to be sought for the carrying out of the surveillance. In cases of doubt, the authorisation procedures described below should however be followed.

4. Principles of Surveillance

4.1.

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

4.1.1.

Lawful purposes – covert surveillance shall only be carried out where necessary to achieve one or more of the permitted purposes (as defined in the Acts); i.e. it must be:

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

Employees carrying out surveillance shall not cause damage to any property or harass any person.

4.1.2.

Necessity – covert surveillance shall only be undertaken where there is no reasonable and effective alternative way of achieving the desired objective(s).

4.1.3.

Effectiveness – planned covert surveillance shall be undertaken only by suitably trained or experienced employees, or under their direct supervision.

4.1.4.

Proportionality – the use and extent of covert surveillance shall be as defined in section 6(2) of the RIP(S) Act – that the authorised surveillance is proportionate to what is sought to be achieved by carrying it out.

4.2.

Obtaining an authorisation under the RIP(S) Act and the 1997 Act will only ensure that there is a justifiable interference with an individual's Article 8 rights if it is necessary and proportionate for these activities to take place. The RIP(S)A first requires that the person granting an authorisation is satisfied that the authorisation is necessary in the circumstances of the particular case for one or more of the statutory grounds in section 6(3) of the RIP(S) Act for directed surveillance and in section 10(2)(a) of the RIP(S) Act for intrusive surveillance.

4.3.

Then, if the activities are necessary, the person granting the authorisation must be satisfied that they are proportionate to what is sought to be achieved by carrying them out. This involves balancing the intrusiveness of the activity on the target and others who might be affected by it against the need for the activity in operational terms. The activity will not be proportionate if it is excessive in the circumstances of the case or if the information which is sought could reasonably be obtained by other less intrusive means. All such activity should be carefully managed to meet the objective in question and must not be arbitrary or unfair.

4.4.

Intrusive surveillance – no activity shall be undertaken that comes within the definition of "Intrusive Surveillance", as defined in section 1(3) of the RIP(S) Act as covert surveillance that:

4.4.1.

Is carried out in relation to anything taking place on any residential premises or in any private vehicle.

4.4.2.

Involves the presence of an individual on the premises or in the vehicle or is carried out by means of a surveillance device.

4.5.

Collateral intrusion – reasonable steps shall be taken to minimise the acquisition of information that is not directly necessary for the purposes of the investigation or operation being carried out.

4.6.

Before authorising surveillance the authorising officer should also take into account the risk of intrusion into the privacy of persons other than those who are directly the subjects of the investigation or operation (collateral intrusion). Measures should be taken, wherever practicable, to avoid or minimise unnecessary intrusion into the lives of those not directly connected with the investigation or operation.

4.7.

Authorisation – all directed surveillance shall be authorised in accordance with the Procedure.

5. The Authorisation Process**5.1.**

The statutory purposes for which covert surveillance authorisations may be issued must reflect the functions of the Council.

5.2.

Applications for directed surveillance where knowledge of confidential information is likely to be acquired shall be authorised by an Executive Director (other than the Executive Director of Corporate Services who has a role of deputising for the Senior Responsible Officer) and in their absence the Head of Legal Services.

5.3.

An Executive Director (or in their absence) the Head of Legal Services should be designated officers to give the necessary written authorisation for the use or conduct of covert surveillance. In urgent or exceptional circumstances written or oral authorisation might be given by an officer of Chief Officer grade.

5.4.

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. Urgent oral authorisations granted by a person who is entitled to act only in urgent cases will unless renewed, cease to have effect after seventy two hours, beginning with the time when the authorisation was granted or renewed. Further details are contained in the Procedure and Chapter 5 of the Code of Practice.

6. Documents**6.1.**

The Procedure in implementation of this policy uses the following documents:

6.1.1. Covert Surveillance – Written Authorisation

This should be completed by the applicant in all cases not covered by oral authorisation (below). It is effective from the time that approval is given.

6.1.2. Covert Surveillance – Oral Authorisation

This is a record of an oral authorisation, which should be completed by the applicant. It should be used only in cases where the urgency of the situation makes the submission of a written application impractical. The authorising officer should write out a separate authorisation as soon as practical.

6.1.3. Covert Surveillance – Renewal of Authorisation

This should be completed by the applicant in all cases where surveillance is required beyond the previously authorised period (including previous renewals) and thereafter signed by the authorising officer.

6.1.4. Covert Surveillance – Cancellation

This should be completed by both the applicant and the authorising officer when the authorisation ceases to be either necessary or appropriate.

7. Security and Retention of Documents

7.1.

Documents created under this procedure are highly confidential and shall be treated as such. Services must ensure that arrangements are in place for the handling, storage and destruction of material obtained through the use of covert surveillance. Authorising officers must ensure compliance with the appropriate data protection requirements and any relevant codes of practice produced by Orkney Islands Council relating to the handling and storage of material

7.2.

The Head of Legal Services shall maintain a register of current and past authorisations. Applicant officers shall ensure that sufficient information is provided to keep this up to date.

8. Central Record of all Authorisations

8.1.

A centrally retrievable record of all authorisations should be held by the Head of Legal Services and regularly updated whenever an authorisation is granted, renewed or cancelled. 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 from the ending of the authorisation and should contain the following information:

- The type of authorisation.
- The date the authorisation was given.
- Name and rank/grade of the authorising officer.
- The unique reference number (URN) of the investigation or operation.
- The title of the investigation or operation, including a brief description and names of subjects, if known.
- Whether the urgency provisions were used, and if so why.

- If the authorisation is renewed, when it was renewed and who authorised the renewal, including the name and rank/grade of the authorising officer.
- Whether the investigation or operations is likely to result in obtaining confidential information as defined in this code of practice.
- The date the authorisation was cancelled.

8.2.

In all cases, Services should maintain the following documentation which need not form part of the centrally retrievable record:

- A copy of the application and a copy of the authorisation together with any supplementary documentation and notification of the approval given by the authorising officer.
- A record of the period over which the surveillance has taken place.
- A record of the result of each review of the authorisation.
- A copy of any renewal of an authorisation, together with the supporting documentation submitted when the renewal was requested.
- The date and time when any instruction was given by the authorising officer.