

## Regulation of Investigatory Powers Policy

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### 1. Summary

- 1.1 The Council's current Regulation of Investigatory Powers Policy, adopted in April 2009, requires updating to reflect recent legislative amendments made to the Regulation of Investigatory Powers Act 2000, recommendations made by the Office of Surveillance Commissioners (OSC) and changes to officer responsibilities within the Council.
- 1.2 This report sets out the proposed policy.

### 2. Recommendation

- 2.1 That the Council adopts, with any necessary amendments, the proposed Regulation of Investigatory Powers Policy, as detailed in **Appendix A** to the report, with effect from 1 August 2013.

## REPORT

### 3. Risk Assessment and Opportunities Appraisal

- 3.1 The preparation and publishing of the policy is not in itself a legal requirement. However, it is considered best working practice to have such a policy in place.
- 3.2 If the Council fails to prepare and publish a policy the Council will be open to criticism by the OSC and the Interception of Communications Commissioner's Office (IOCCO). It will not have in place duly authorised/designated officers to undertake the roles required by the relevant legislation. It will be more difficult to respond to challenges about the way the Council has used investigatory techniques; this may lead to service complaints to the Local Government Ombudsman, judicial review, evidence being held inadmissible in criminal legal proceedings that have been instituted by the Council and civil action being taken against the Council for acting in a way that is incompatible with a person's human rights. The reputation and professionalism of the Council would clearly be at risk.
- 3.3 Conversely, by preparing and publishing a policy, the Council will demonstrate that it takes the regulation of investigatory powers seriously, provides a defined framework within which the Council will exercise its responsibilities, makes it clear

to all stakeholders the manner in which the Council intends to operate, ensures that the Council has sufficient appropriately authorised/designated officers and provides the basis for a robust defence to any challenges that may be made to the way in which investigatory techniques are used by the Council.

- 3.4** An Equalities Impact Needs Assessment has not been undertaken as the report does not concern the implementation of a new policy. The policy proposed is a revision of the policy that was adopted when Shropshire Council was formed in 2009. The proposed revised policy follows relevant guidance issued by the Home Office and the OSC.
- 3.5** There is no anticipated environmental impact associated with the recommendations in this report.
- 3.6** The policy to which the recommendation relates is specifically aimed at ensuring that the Council's actions are not at variance with the Human Rights Act 1998 and consequently is unlikely to result in any adverse Human Rights Act implications. The recommendation is in line with relevant legislation and guidance issued by the Home Office and the OSC.
- 3.7** No legal duty is specifically placed on the Council to consult with respect to this policy. However, it is clearly good practice. Consultation has been carried out across relevant Council service areas and feedback from officers has informed the proposed policy as it is currently set out in **Appendix A**. The proposed policy was published on the Council's consultation page of the website immediately following the Cabinet meeting on 29 May 2013 and promoted to external stakeholders by means of a press release and subsequent local radio interview and newspaper coverage. Any feedback received from this process will be summarised and presented separately to the Cabinet.
- 3.8** Cabinet considered the proposed policy on the 29 May 2013 and 26 June 2013 and recommended that the Council adopt the policy with any necessary amendments.

#### **4. Financial Implications**

- 4.1** There are no financial implications associated with the recommendation.

#### **5. Background**

- 5.1** The Regulation of Investigatory Powers Act 2000 (RIPA) is the law governing the use of covert techniques by public authorities and this includes local authorities. When public authorities use covert techniques they must do so in a way that is necessary, proportionate, and avoids (or where this is not possible minimises) the impact of the covert techniques on other people who are not the subject of the operation or investigation (collateral intrusion); thus ensuring that the covert techniques used are compatible with human rights. RIPA sets out authorisation procedures to help ensure that this compatibility is achieved.
- 5.2** To provide independent oversight in respect of the way in which investigatory techniques are utilised, RIPA has also put in place the OSC, the IOCCO and the Investigatory Powers Tribunal (IPT).

- 5.3** RIPA is supported by a number of Codes of Practice (the Codes) issued by the Secretary of State pursuant to Section 71 of RIPA. Local authorities must have regard to the provisions of the Codes but non-compliance does not of itself render any person, including the Council, liable to criminal or civil proceedings. The Codes are admissible as evidence in criminal and civil proceedings. If any provisions of the Codes appear relevant to any court or tribunal considering such proceedings, or to the IPT, the OSC or the IOCCO, they must be taken into account. Local authorities may also be required to justify, with regard to the Codes, the use or granting of authorisations in general or the failure to use or grant authorisations where appropriate.
- 5.4** RIPA applies to a number of covert techniques; however, the techniques that may be authorised by a local authority are restricted to:-
- conducting covert surveillance in public places (directed surveillance), such as watching, following or listening to people
  - the use of covert human intelligence sources (CHIS), such as obtaining information about people through informants or undercover officers
  - acquiring communications data: the 'who, when and where' of communications, such as a telephone billing or subscriber details
- 5.5** RIPA applies to a wide-range of investigations. For local authorities, it applies to investigations undertaken for the purposes of the prevention of crime, the detection of crime and the prevention of disorder.
- 5.6** Although RIPA provides for the authorisation of the covert techniques listed at paragraph 5.4 above, it is not unlawful not to seek an authorisation and there is no duty on a local authority to comply with the RIPA provisions; it is permissive law. However, the Codes make it clear that there is an expectation that local authorities will comply with the requirements of RIPA.
- 5.7** A public authority may only engage RIPA when performing its 'core functions'. The core functions (referred to by the IPT) are the specific public functions undertaken by a particular authority insofar as they relate to the grounds specified under RIPA; for local authorities these grounds are limited to preventing or detecting crime or preventing disorder, and is further restricted with respect to directed surveillance. This is in contrast to the 'ordinary functions' which are those undertaken by all authorities, e.g. those involving employment issues, contractual arrangements, etc. Covert techniques in relation to ordinary functions, or for any other general purposes, are conducted under other legislation and authorisations under RIPA would not be appropriate.
- 5.8** For the reasons set out in paragraph 5.7 above, where investigations are carried out for any purpose that falls outside the RIPA regime, e.g. for the purposes of investigating internal Council disciplinary matters or where the 'crime threshold' (refer to paragraph 2.4 of the policy) is not met, the Council may still use the covert techniques described in RIPA. To ensure that the covert techniques used for these other purposes are still used in a manner that is compatible with human rights, the Council ought to have due regard to the principles of RIPA, the Codes published by the Home Office, and any relevant RIPA guidance and, in practice, apply these as if the purposes for which the techniques are being used do fall within the RIPA regime. For this purpose, these matters are also covered in the policy.

- 5.9** The Council was inspected by the OSC on 21 November 2012. The OSC's report made four recommendations; two related specifically to incorporating matters into the policy. These were to clarify the relevant statutory purposes under which the Council may authorise the use of covert techniques and to improve the practical guidance on the procedure for seeking and granting authorisations. These have been addressed in the proposed policy.
- 5.10** Recent legislation has made a number of changes to RIPA that came into effect on the 1 November 2012. These changes have been reflected in the proposed policy. In summary, in order to obtain communications data, undertake directed surveillance and use a CHIS under the RIPA regime, local authority authorisations are now also subject to judicial (magistrate's) approval. Furthermore, authorisations for directed surveillance are confined to cases that involve criminal offences that carry a maximum custodial sentence of six months or more or relate to the underage sales of alcohol and tobacco.

## **6. Additional Information**

- 6.1** It is considered best working practice that the policy is set annually by the Council's elected members and that they review the use of RIPA on a quarterly basis to ensure that it is being used consistently with the policy and that the policy remains fit for purpose. The mechanism to ensure this is undertaken is set out in the proposed policy.

### **List of Background Papers (This MUST be completed for all reports, but does not include items containing exempt or confidential information)**

1. Shropshire Council's Regulation of Investigatory Powers Policy adopted in 2009
2. Regulation of Investigatory Powers Act 2000
3. Protection of Freedoms Act 2012
4. Protection of Freedoms Act 2012 (Commencement No. 2) Order 2012
5. Regulation of Investigatory Powers (Directed Surveillance and Covert Human Intelligence Sources) (Amendment) Order 2012
6. Human Rights Act 1998 / European Convention on Human Rights
7. OSC Inspection Report – November 2012
8. OSC Procedures and Guidance December 2011
9. Codes of Practice issued by the Secretary of State pursuant to Section 71 of the Regulation of Investigatory Powers Act 2000; Code of practice on the acquisition and disclosure of communications data; Code of practice on covert surveillance and property interference; Code of practice on the use of covert human intelligence sources

**Cabinet Member (Portfolio Holder)** Cllr Steve Charmley

**Local Member** Not applicable

**Appendices - Appendix A** – Proposed Regulation of Investigatory Powers Policy