



<u>Committee and Date</u>
<b>Cabinet</b>
<b>19 January 2022</b>

<u>Item</u>
<u>Public</u>

## **Regulation of Investigatory Powers Policy and Guidance**

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### **1. Synopsis**

The Regulation of Investigatory Powers Policy and Guidance sets out the approach the Council will take with respect to the authorisation and use of surveillance activity to deliver the Council's statutory and public duties, whilst protecting individuals' right to privacy.

### **2. Executive Summary**

- 2.1. The Council's existing Regulation of Investigatory Powers Policy, which was adopted in August 2015, requires updating to reflect both legislative and organisational changes.
- 2.2. This report sets out a new Regulation of Investigatory Powers Policy and Guidance ('the Policy'), which aims to ensure that any surveillance activities undertaken by the Council are compatible with the human right to privacy by ensuring compliance with the requirements of the Regulation of Investigatory Powers Act 2000 (RIPA), the Investigatory Powers Act 2016 (IPA), the European Convention on Human Rights (ECHR) and the Human Rights Act 1998 (HRA).

- 2.3. Covert activity can result in private information being obtained about individuals without their knowledge, which, unless the Council gives full and proper consideration to such activity in accordance with RIPA and IPA and also ECHR and HRA, may lead to the Council breaching individuals' right to privacy.
- 2.4. The new Policy is designed to provide the basis upon which the Council will ensure full and proper consideration is given before, during and after any surveillance activity is undertaken.
- 2.5. The Policy addresses the use of activities that involve:
- the surveillance of individuals;
  - the use of undercover officers and informants, known as Covert Human Intelligence Sources (CHIS); and
  - the obtaining of communications data.

### **3. Recommendation**

- 3.1** That Cabinet approves, with any necessary amendments, the proposed Regulation of Investigatory Powers Policy and Guidance as set out in **Appendix 1** and agrees to adopt the Policy and Guidance with effect from 1 February 2022.

## **REPORT**

### **4. Risk Assessment and Opportunities Appraisal**

- 4.1 The Council was the subject of an inspection by the Investigatory Powers Commissioner's Office (IPCO) in April 2020, following which a recommendation was made that the Council should review and update its RIPA policy and guidance document in accordance with the 2018 Home Office statutory Codes of Practice and changes

brought about by the introduction of the Investigatory Powers Act 2016.

- 4.2 The preparation and maintenance of a policy and guidance is not in itself a legal requirement. However, it is considered best working practice and this position is reflected in the recommendation that was made to the Council following the IPCO inspection.
- 4.3 If the Council fails to prepare and maintain a policy and supporting guidance, the Council will be open to criticism from IPCO and it will fail to have in place duly authorised/designated officers to undertake the roles required by the relevant legislation.
- 4.4 Furthermore, it will be more difficult to respond to challenges about the way in which the Council has undertaken covert activities. This may lead to any one or more of the following:
- service complaints to the Local Government and Social Care Ombudsman
  - judicial review
  - evidence in cases where the Council has instituted legal proceedings being held inadmissible in court
  - civil action being taken against the Council for acting in a way that is incompatible with an individual's human rights
  - financial risks in respect of compensation for breaching an individual's human rights
  - reputational damage to the Council
  - criminal convictions for officers if communications data is obtained unlawfully
- 4.5 The increase in digital technology has created significant opportunities for Council officers to undertake covert activities for the purposes of service delivery, particularly by accessing the internet and social media platforms on mobile devices (e.g. smartphones and tablets), without realising that surveillance of

individuals is actually being undertaken. As a result, the necessary safeguards to minimise the risks relating to breaches of an individual's privacy may not be in place and the likelihood of the risks, as set out in paragraph 4.4, occurring may increase.

4.6 By preparing and maintaining a policy and guidance, the Council will:

- demonstrate it takes the regulation of investigatory powers seriously;
- provide a defined framework within which the Council will exercise its responsibilities;
- make it clear to all stakeholders the manner in which the Council intends to operate;
- ensure that the Council has sufficient appropriately authorised/designated officers;
- provide the basis for a robust defence to any challenges that may be made about covert activities undertaken by the Council; and
- support officers to act lawfully and, as far as is reasonably practicable, minimise any adverse impact on individuals' privacy.

4.7 The Policy is fundamentally based on human rights principles encapsulated in ECHR and HRA and sets out the way in which the requirements under RIPA and IPA, which are specifically aimed at protecting individuals' human rights in relation to privacy, will be undertaken.

4.8 The Policy aims to ensure that the Council's actions are not at variance with the HRA and is, therefore, unlikely to result in adverse human rights implications.

4.9 An Equality, Social Inclusion and Health Impact Assessment (ESHIA) has been undertaken and is available at **Appendix 2**.

- 4.10 The initial assessment indicates that the overall impact of the Policy in relation to equality and social inclusion in respect of all protected characteristic and other groupings is likely to be neutral. With respect to health and wellbeing, the overarching impact is likely to be positive for the community, economy and the environment, with the potential for both positive and negative impacts for individuals/population groups.
- 4.11 The processes contained within the Policy set out to provide assurance that before, during and after any surveillance activity is proposed and/or undertaken, an assessment is made to determine the necessity and proportionality of such activity and to also identify steps that will be taken to minimise the level of collateral intrusion.
- 4.12 The focus of the assessment is about protecting individuals' right to privacy and, as such, the HRA provides a useful reference point when considering the potential equality and human rights impacts for all groupings in the community. For this reason, the assessment around necessity, proportionality and minimising collateral intrusion is key to ensuring the impacts referred to in paragraph 4.10 above are at least maintained and potentially enhanced. As a result, an holistic approach will be taken and the known and/or likely circumstances of any individual or group of individuals who is/are the intended target of surveillance, as well as the circumstances of those who are not the intended targets, will be taken into account as part of the formal authorisation and management of any surveillance activity.
- 4.13 The application and authorisation processes are set out in detail within the Policy and the use of these and any surveillance activities undertaken will be reviewed and monitored by the Audit Committee. Where there are any concerns, the Audit Committee may direct that these are reported to Cabinet or, if necessary, to full Council and

may require the RIPA Senior Responsible Officer to oversee any review and revision of the Policy as necessary.

- 4.14 A governance structure is in place and is set out in Appendix A of the Policy. The officers who form the governance structure are specifically designated for the purposes of RIPA and IPA and referred to by role within the Policy; they will undertake externally provided role specific training. General awareness training for managers and staff will, over time, become embedded across the Council.
- 4.15 A central record of RIPA/non-RIPA activity is maintained and quarterly meetings of the RIPA working group will monitor this activity internally. This will include overseeing the reporting, to IPCO, of any relevant and serious errors in accordance with statutory requirements.
- 4.16 Any person who reasonably believes they have been adversely affected by surveillance activity by or on behalf of the Council may complain to the Council in accordance with the Council's Corporate Complaints and Representations Procedure and a complaint may also be made to the Investigatory Powers Tribunal (IPT), which has jurisdiction to investigate and determine complaints against the Council's use of RIPA powers.
- 4.17 An annual report of RIPA surveillance activity is submitted to the IPCO. This facilitates independent oversight, which is provided by IPCO and IPT.
- 4.18 The Policy follows relevant guidance issued by the Home Office, IPCO and the Information Commissioner's Office (ICO).

## **5. Financial Implications**

5.1. There are no financial implications associated with the recommendation.

## **6. Climate Change Appraisal**

6.1. There are no climate change implications or environmental impacts associated with the recommendation.

## **7. Background**

7.1 RIPA and IPA provide the legislative framework that governs the use of covert activities by public authorities, which includes local authorities. When public authorities use covert activities, 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 activities on other people who are not the subject of the operation or investigation (collateral intrusion); thus ensuring that the covert activities used are compatible with human rights. RIPA and IPA set out authorisation procedures to help ensure that this compatibility is achieved.

7.2 Independent oversight for both RIPA and IPA in respect of the way in which covert activities are utilised is provided by IPCO and the Investigatory Powers Tribunal (IPT).

7.3 RIPA and IPA are supported by a number of statutory Codes of Practice ('the Codes') issued pursuant to Section 71 of RIPA and Section 241 of IPA. Local authorities must have regard to the provisions of the Codes. Non-compliance does not of itself render any person, including the Council, liable to criminal or civil proceedings, unless it relates to communications data being

obtained unlawfully, in which case this may give rise to criminal offences. 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 or IPCO, 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.

7.4 RIPA and IPA apply to a number of covert surveillance activities, which are carried out in a manner calculated to ensure that the individuals subject to the surveillance are unaware that it is or may be taking place.

7.5 Surveillance involves both the:

- monitoring, observing or listening to persons, their movements, their conversations or their other activities or communications; and
- the recording anything monitored, observed or listened to in the course of surveillance, with or without the assistance of a device.

7.6 Covert surveillance that may be authorised by a local authority is restricted to:

- directed surveillance (see sections 9, 10 and 11 of the Policy);
- the use of covert human intelligence sources (CHIS) (see section 26 of the Policy), i.e. using undercover officers or informants to obtain information; and
- obtaining communications data (see section 2.8 of the Policy), i.e. the 'who', 'where', 'when', 'how' and 'with whom' in relation to a telephone call, email, social media message, website communication, postal letter or couriered parcel, etc.,



but not what is written or said (the content) within that communication.

- 7.7 For local authorities, authorisation for directed surveillance can only be granted if it is to be carried out for the purpose of preventing or detecting criminal offences that:
- meet the 'serious crime threshold', i.e. are punishable by a maximum term of at least 6 months' imprisonment; or
  - constitute an offence in relation to the sale of alcohol or tobacco to minors.
- 7.8 Authorisation for directed surveillance for the purpose of preventing disorder can only be granted if it involves criminal offences that meet the serious crime threshold.
- 7.9 The lawful grounds for a CHIS authorisation is prevention and detection of crime and prevention of disorder. The serious crime threshold does not apply to a CHIS.
- 7.10 The Council's authorisation for either directed surveillance or CHIS activity can only take effect once an Order approving the authorisation has been granted by a Justice of the Peace (JP).
- 7.11 With respect to communications data, the Council can only obtain events data<sup>1</sup> for the purpose of preventing or detecting serious crime<sup>2</sup> and, for any other type of communications data, for the purpose of preventing or detecting crime or of preventing disorder. This is undertaken through the Office for Communications Data Authorisations (OCDA) and applications are submitted to OCDA by the National Anti-Fraud Network (NAFN) on behalf of the Council.

<sup>1</sup> Events data - refer to the telecommunications definitions in IPA at section 261

<sup>2</sup> Under IPA, the definition of 'serious crime' differs to that under RIPA. Refer to IPA sections 86(2A) and 263(1) for further details.

- 7.12 Although RIPA provides for the authorisation of directed surveillance and the use of CHIS, it is not unlawful if an authorisation is not sought for these activities 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.
- 7.13 RIPA ensures that any surveillance conduct, which is undertaken following the correct authorisation and approval from a Justice of the Peace, and communications data obtained under IPA through OCDA via NAFN, is lawful. These processes protect the Council from legal challenge and renders evidence obtained lawful for all purposes.
- 7.14 A public authority may only engage RIPA and IPA 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 and IPA; for local authorities these grounds are limited to preventing or detecting crime or preventing disorder and are further restricted with respect to directed surveillance as set out in paragraphs 7.7 to 7.9 above. 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 activities in relation to ordinary functions, or for any other general purposes, are conducted under other legislation and authorisations under RIPA or IPA would not be appropriate.
- 7.15 For the reasons set out in paragraph 7.14, where covert activities are carried out for any purpose that falls outside the RIPA regime ('non-RIPA') (refer to section 21 of the Policy), e.g. for the purposes of

investigating internal Council disciplinary matters or where the 'serious crime threshold' (refer to section 14 of the Policy) is not met, the Council may still use the covert activities described in RIPA and IPA. To ensure that the covert activities used for these non-RIPA 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 and IPA, the Codes, and any relevant RIPA/IPA guidance and apply these as if the purposes for which the activities are being used do fall within the RIPA/IPA regime. For this reason, non-RIPA matters are also covered in the Policy.

7.16 The relevant Codes issued by the Secretary of State pursuant to Section 71 of RIPA and Section 241 of IPA have been revised during the period since the existing policy was adopted by the Council in 2015. The new Policy takes account of the changes contained within the Codes as well as updating officer details and responsibilities relating to the:

- Senior Responsible Officer
- RIPA Coordinator
- Appointment of officers to grant authorisations under Sections 28 and 29 of RIPA
- Authorising officers to present RIPA cases to JPs under Section 223 of the Local Government Act 1972

## **8. Additional Information**

8.1 It is considered best working practice that the policy is set by the Council's elected members and that they review the use of RIPA and IPA on a regular basis to ensure that they are being used consistently within the Policy and that the Policy remains fit for purpose. The mechanism to ensure this is undertaken is set out in sections 37 and 38 of the Policy.

## **9. Conclusions**

9.1. The approval and adoption of the revised Regulation of Investigatory Powers Policy and Guidance will:

- bring the Council’s position on surveillance up to date;
- reduce the risk of challenge associated with having an out-of-date policy and guidance in force;
- address the specific recommendation by IPCO that the existing policy and guidance be reviewed and updated; and
- provide the basis upon which officers will undertake lawful surveillance activities.

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

- Shropshire Council’s Regulation of Investigatory Powers Policy adopted on 1 October 2015
- Regulation of Investigatory Powers Act 2000
- Investigatory Powers Act 2016
- Statutory Codes of Practice issued by the Secretary of State pursuant to Section 71 of RIPA and Section 241 of IPA

**Cabinet Member (Portfolio Holder)**

Cllr Rob Gittens, Portfolio Holder for Digital, Technology, Data and Insight

**Local Member**

All Members as this report has county wide application.

**Appendices**

**Appendix 1** - Regulation of Investigatory Powers Policy and Guidance

**Appendix 2** - Equality, Social Inclusion and Health Impact Assessment