

Changes to Local Authority Surveillance Powers: A Sledgehammer?

On 11th February 2011 the Coalition Government published the Protection of Freedoms Bill¹. Theresa May, the Home Secretary, announced²:

“The first duty of the state is the protection of its citizens, but this should never be an excuse for the government to intrude into peoples' private lives. Snooping on the contents of families' bins and security checking school-run mums are not necessary for public safety and this Bill will bring them to an end. I am bringing common sense back to public protection and freeing people to go about their daily lives without a fear that the state is monitoring them.”

The Bill, currently awaiting its report stage on the floor of the House of Commons³, contains proposals to curtail the powers of local authorities to carry out surveillance under the Regulation of Investigatory Powers Act 2000 (RIPA). It implements the recommendations (published on 26th January 2011) of a review⁴ conducted by the Home Office which covered six key areas including “the use of [RIPA] by local authorities, and access to communications data in general.” The review was a response to media stories of local authorities misusing “anti terror laws to investigate minor offences” and in a disproportionate manner.

Why Change?

Before the election, both coalition parties promised to overhaul RIPA which regulates, amongst others, local authorities when conducting covert surveillance on citizens and accessing communications data about them. They announced in the Coalition Government Agreement⁵:

“We will ban the use of powers in the Regulation of Investigatory Powers Act (RIPA) by councils, unless they are signed off by a magistrate and required for stopping serious crime.”

It is fair to say that a lot of the “evidence” of the need for an overhaul of RIPA came more from media headlines⁶ than authoritative research. However, in May 2010, Big Brother Watch did publish a report⁷ criticising town hall officials for the routine use of RIPA powers. Examples given included “spying” on parents to check they lived in a school catchment area and on homeowners to ensure they closed the lids on refuse bins (see later).

¹ Protection of Freedoms Bill (201011) [159]

² <http://www.homeoffice.gov.uk/media-centre/press-releases/sweeping-reform>

³ <http://services.parliament.uk/bills/2010-11/protectionoffreedoms.html>

⁴ <http://www.homeoffice.gov.uk/publications/counter-terrorism/review-of-ct-security-powers/review-findings-and-rec?view=Binary>

⁵ The Coalition: our programme for government <http://www.cabinetoffice.gov.uk/news/coalition-documents>

⁶ e.g. “Councils deploy snooping powers 200 times a week” *Daily Mail* 12 November 2009 <http://www.mailonsunday.co.uk/news/article-1227102/Councils-deploy-snooping-powers-200-times-week.html> and

<http://news.bbc.co.uk/1/hi/uk/7468430.stm>

⁷ <http://bigbrotherwatch.typepad.com/home/research.html/>

Magistrates' Approval

RIPA came into force on 2nd October 2000. It regulates, amongst others, local authorities when conducting Directed Surveillance, deploying a Covert Human Intelligence Source (CHIS) or accessing communications data. This is done by requiring applications for the doing of the same to be made in writing to a senior officer within the authority. That officer has to decide whether the surveillance is necessary and proportionate and, if so, approve the application⁸. If passed in its current form, the Bill will require an additional level of approval before surveillance can be carried out.

Chapter 2 of Part 2 of the Bill⁹ amends RIPA so as to require local authorities to obtain the approval of a magistrate (lay or legally qualified) for the use of any one of the above three surveillance techniques. An approval is also required if an authorisation to use such techniques is being renewed. In each case, the role of the magistrate is to ensure that the correct procedures have been followed and the appropriate factors have been taken account of. The new provisions allow the magistrate, on refusing to approve an authorisation, to quash that authorisation.

So what will the magistrate have to consider when deciding whether to approve an authorisation? This depends on what type of surveillance technique is proposed to be used:

Communications Data

Chapter 2 of Part 1 of RIPA allows local authorities, as well as others, to access communications data about an individual from any Communications Service Provider (CSP) (e.g. a telephone or mobile phone service provider). Often these powers are used by, amongst others, benefit fraud investigators and trading standards officers to carry out mobile phone subscriber checks and to request itemised call records of a suspect.

A new s 23A will be added to Chapter 2 of Part 1 of RIPA. In future, an authorisation or notice to obtain communications data from a CSP shall not take effect until a magistrate has made an order approving it (s 23A(2)). The magistrate must be satisfied that (s 23A(3)-(5)):

- a) There were reasonable grounds for the Designated Person (the person authorising the obtaining of the data) within the local authority to believe that obtaining communications data was necessary and proportionate and that there remain reasonable grounds for believing so.
- b) The Designated Person held the correct position as per the Regulation of Investigatory Powers (Communications Data) Order 2010 (SI 2010/480) i.e. Director, Head of Service, Service Manager or equivalent.

⁸ s 22,28 and 29

⁹ clause 37 and 38

- c) The granting or renewal of the application was only for the prescribed type of communications data to be acquired for the prescribed purpose as set out in the above Order (i.e. subscriber and service use data (e.g. mobile phone subscriber information and itemised call records) to be acquired only for the purpose of preventing or detecting crime or preventing disorder)
- d) Any other conditions set out in an order made by the Secretary of State under Chapter 2 of Part 1 of RIPA are satisfied¹⁰

Directed Surveillance and CHIS

Clause 38 of the Bill makes similar provision for magistrate approval of local authority authorisations for the use of Directed Surveillance and the deployment of a CHIS. It does this by adding a new s 32A to Part 2 of RIPA.

Directed Surveillance is often conducted by local authorities to, amongst other things, investigate a benefit fraud or to collect evidence of anti-social behaviour. Typical methods include covertly following people, covertly taking photographs of them and using hidden cameras to record their movements.

A CHIS is a covert human intelligence source. It is defined in s 26(8) of RIPA as someone who establishes or maintains a personal or other relationship with a person for the covert purpose of using the relationship to provide or obtain information. Typical examples in a local authority context include the use of a relationship by an informant to obtain and disclose information about benefit fraudsters working in a factory or by a witness on a housing estate to disclose information about anti social behaviour.

Once again the internal authorisation for such surveillance methods is not to take effect until such time (if any) as a magistrate has made an order approving it (s 32A(2)). Approval can only be given if the magistrate is satisfied that: (s 32A (3)-(6))

- a) There were reasonable grounds for the authorising officer approving the application to believe that the Directed Surveillance or deployment of a CHIS was necessary and proportionate and that there remain reasonable grounds for believing so.
- b) The authorising officer was of the correct seniority within the organisation i.e. a Director, Head of Service, Service Manager or equivalent as per the Regulation of Investigatory Powers (Directed Surveillance and Covert Human Intelligence Sources) Order 2010 (SI 2010/521)
- c) The granting of the authorisation was for the prescribed purpose, as set out in the above Order i.e. preventing or detecting crime or preventing disorder.

¹⁰ none at present

- d) Any other conditions set out in any order under Part 2 of RIPA are satisfied¹¹

In addition to the above, where the authorisation is for the deployment of a CHIS, the magistrate must be satisfied that :

- e) The provisions of s 29(5) have been complied with. This requires the local authority to ensure that there are officers in place to carry out roles relating to the handling and management of the CHIS as well as the keeping of records (as per the Regulation of Investigatory Powers (Source Records) Regulations 2000 (SI 2000/2725)).
- f) Where the CHIS is under 16 or 18 years of age, the requirements of the Regulation of Investigatory Powers (Juveniles) Order 2000 (SI 2000/2793) have been satisfied. This sets out rules about parental consent, meetings, risk assessments and the duration of the authorisation. Note that the authorisation of such persons to act as a CHIS must come from the Chief Executive as per the above Order.
- g) Where the application is for the renewal of a CHIS authorisation, a review has been carried out by the local authority and the magistrate has considered the results of the review.

The new provisions make it clear that the authorising officer is not required to apply in person and there is no need to give notice to either the subject of the authorisation or their legal representatives (s 23B(2) and 32B(2)). This reflects the covert nature of the exercise of the investigatory powers under RIPA.

The Serious Offence Test

The Home Office Review also recommended that where local authorities wish to use RIPA to authorise Directed Surveillance, this should be confined to cases where the offence under investigation carries a custodial sentence of six months or more. This recommendation is to be put into effect by an order made under RIPA itself (s 30(3)(b) of RIPA).

There is an exception to the new rule. The Review recommends that because of the importance of Directed Surveillance in corroborating investigations into underage sales of alcohol and tobacco, the Government should not seek to apply the six month threshold in these cases. This concession seems to be a direct result of lobbying by the Local Government Association¹² and will be welcome news to trading standards officers.

The Home Office says that the six month threshold test will mean “minor offences” will not be the subject of surveillance any more. But what is a minor offence? Dog fouling may not seem as serious as benefit fraud but these offences are the subject

¹¹ none at present

¹² <http://www.lga.gov.uk/lga/core/page.do?pagelid=16470818>

of daily complaints to local authorities and ward councilors up and down the country. Dog excrement can carry serious diseases and so is a public health hazard.

This view seems to be shared by the Chief Surveillance Commissioner, the Rt. Hon Sir Christopher Rose, who is in charge of inspecting public authorities to ensure that they comply with Part 2 of RIPA. Sir Christopher gave a speech to the Commonwealth Club on 10th February 2009¹³ where he referred to press reports the previous year that some councils were using RIPA to investigate dog fouling:

"The headline 'Anti-terror laws used against dog fouling' encapsulates in a few words all that is worst in popular journalism," said Sir Christopher. "It is inaccurate, emotive and grossly misleading. The legislation is, expressly, for many purposes other than fighting terrorism." He said he understood that "dog excrement carries a parasite which can cause blindness in children. On this basis I suspect that a reasonable, well-informed, member of the public would approve of covert surveillance necessary to reduce dog-fouling in children's playgrounds."

A Sledgehammer?

New codes of practice under RIPA will be required to accompany the Bill's changes to the local authority surveillance regime. They will spell out precisely how the magistrate approval process will work. The Home Office, in its impact assessment of the Bill, states that each application will take twenty minutes to hear. In reality a much longer time will be required, certainly in the early days, for magistrates to understand this complex piece of legislation and to ensure they get the balance right between the privacy of the citizen and the rights of wider society.

Many local authorities will feel that the changes to RIPA in this Bill are a disproportionate response to inaccurate media stories. They are more about the Coalition Government wanting to be seen to take a tough stance on civil liberties rather than any well placed concern about the misuse of RIPA powers. The writer's experience, in advising and training many local authorities on RIPA, suggests that most authorities only use their powers in a handful of cases each year and only when there is no other viable means of investigating offences and then in a reasonable and proportionate manner. For example, Kirklees Council conducted Directed Surveillance seven times in 2010 and made no use of CHIS¹⁴.

The latest available annual report by the Office of Surveillance Commissioners (OSC) (2009/2010)¹⁵ provides real evidence of a decreasing use of RIPA by local authorities. In the year ending 31st March 2010, law enforcement agencies granted 15,285 directed surveillance authorisations. Other public authorities though only granted 8,477 of such authorisations. This is a significant decrease on the previous year when 9,894 authorisations were granted. Of the 8,477 authorisations over 50% were by government departments. The report goes on to state:

¹³ <http://surveillancecommissioners.independent.gov.uk/>

¹⁴ <http://www.examiner.co.uk/news/local-west-yorkshire-news/2011/01/27/kirklees-council-s-use-of-ripa-surveillance-revealed-86081-28063149/>

¹⁵ http://surveillancecommissioners.independent.gov.uk/about_annual.html

“Generally speaking, local authorities use RIPA/RIP(S)A powers sparingly with over 50% granting five or fewer directed surveillance authorisations during the reporting period. Some 16% granted none at all.”

In terms of deployment of CHIS, there were 5,320 CHIS recruited by law enforcement agencies during the same year. Other public authorities though only recruited 229. During the previous year 234 were recruited. Again just over half of CHIS usage was by government departments. The reports states:

“The light use of RIPA/RIP(S)A powers by local authorities is even more pronounced in relation to CHIS recruitment. 97% recruited five or fewer and 86% did not use CHIS.”

So it seems that despite the sensational media headlines, local authorities have, over the years, used RIPA very sparingly. So what is the need for the changes to the RIPA regime set out in the Bill? Do we really need magistrates to approve every single surveillance authorisation? Will they be able to provide a more effective scrutiny regime than exists at present? There is already an internal review process built into RIPA through the Authorising Officer. The OSC has a robust inspection regime which highlights any deficiencies and over reliance on RIPA powers. OSC inspection reports are generally available to the public (and the media) through Freedom of Information requests.

Furthermore, individuals who are aggrieved at the way a local authority carries out surveillance on them have a free standing right to make a complaint to the Investigatory Powers Tribunal which has the power to quash any authorisation and award damages. (Section 65 onwards of RIPA). The Tribunal is a very effective check on local authorities' over zealous use of surveillance under RIPA as Poole Council discovered last year. In *Jenny Paton and others v Poole Borough Council (2010) IPT/09/01/C*¹⁶ the Tribunal found that, investigating a potentially fraudulent school application by doing covert surveillance was neither necessary nor proportionate, and consequently the Council's actions had breached a family's rights under Article 8 (right to privacy) of the European Convention on Human Rights.

The changes to the local authority surveillance regime, in the Protection of Freedoms Bill, are a knee jerk reaction to ill informed media comment which has been dressed up as a considered attempt to role back “the surveillance state”. Sensational media headlines seem to have been the catalyst for a policy, which will significantly increase the regulatory burden on local authorities at a time of significant budget cuts. Local authorities could, quite conceivably, decide to stop using surveillance as an investigatory tool due to the time and resource implications of seeking magistrates' approval. If this results in more rogue traders and illegal fly tippers evading justice, who will take the blame?

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¹⁶ <http://www.ipt-uk.com/default.asp?sectionID=17>