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Local Authority Surveillance: The New Law

By Ibrahim Hasan

The Home Office recently published three new orders, under Part 2 of the Regulation of Investigatory Powers Act 2000 (RIPA), which will come into force, subject to parliamentary approval, on 6th April 2010. The orders are designed to ensure that covert surveillance techniques can continue to be used by public authorities when they are necessary and proportionate, but that there is no repetition of the small number of recently reported cases where they have been used in a disproportionate manner. Examples include local authorities conducting covert surveillance on parents to check their stated address on school application forms and on dog owners to ensure they comply with dog fouling laws.

The Regulation of Investigatory Powers (Directed Surveillance and Covert Human Intelligence Sources) Order 2010 consolidates four previous orders relating to covert surveillance and the use or conduct of a covert human intelligence source (CHIS) by public authorities. It sets which authorities can use such surveillance techniques, on what grounds and who has to authorise their use.

The new order revises the prescribed officers for local authorities who can sign authorisations (known as "authorising officers") to "Director, Head of Service, Service Manager or equivalent". Previously this was set at "Assistant Chief Officer, service manager or equivalent or any more senior officer". This led to criticism by the Office of Surveillance Commissioners (OSC) that more junior officers were authorising surveillance and getting it wrong. The new provisions (and the explanations on the Home Office website) suggest that all local authorities should revise their list of authorising officers to include only directors or their equivalent.

The Regulation of Investigatory Powers (Covert Surveillance and Property Interference: Code of Practice) Order 2010 and the Regulation of Investigatory Powers (Covert Human Intelligence Sources: Code of Practice) Order 2010 will bring into force revised codes of practice on Covert Surveillance and CHIS.

The main changes to both codes are the same. The references below are to the Covert Surveillance and Property Interference Code of Practice ("the new code") which covers directed surveillance, intrusive surveillance and property interference. Only the police and certain other agencies (not local authorities) have the power to do the latter two types of surveillance.

Directed Surveillance (defined in section 26(2) of RIPA) is often conducted by local authorities to investigate a benefit fraud or to collect evidence of anti social behaviour. It may involve covertly following people, covertly taking photographs of them, or using hidden cameras to record their movements. Section 28(2)(b) of RIPA states that an authorisation for Directed Surveillance should only be granted if it is proportionate to what is sought to be achieved by carrying it out. A regular criticism in OSC inspection reports is that public authority employees, when completing authorisation forms, do not give enough thought to proportionality and consequently authorisations are granted where the impact on the privacy of the target is disproportionate to the seriousness of the offence. Paragraph 3.6 states that the following elements of proportionality should be considered:

- balancing the size and scope of the proposed activity against the gravity and extent of the perceived crime or offence
- explaining how and why the methods to be adopted will cause the least possible intrusion on the target and others
- considering whether the activity is an appropriate use of the legislation and a reasonable way, having considered all reasonable alternatives, of obtaining the necessary result
- evidencing, as far as reasonably practicable, what other methods had been considered and why they were not implemented

Considering the examples in the code of surveillance activity which may not be proportionate (as well as speeches by Home Office Ministers) it seems that the days of local authorities conducting Directed Surveillance for so called “minor offences” such as dog fouling and littering have gone. This may not be comfortable reading for many for council officers who know that local taxpayers are often more concerned about these issues than so called “major crimes”.

The new code considers it good practice for every public authority to appoint a Senior Responsible Officer (SRO). This should be someone, of at least the rank of authorising officer, and who is to be made responsible for:

- the integrity of the process in place within the public authority for the management of CHIS and Directed Surveillance;
- compliance with Part 2 of the Act and with the Codes;
- engagement with the OSC inspectors when they conduct their inspections, where applicable; and
- where necessary, oversight of the implementation of post-inspection action plans approved by the relevant oversight Commissioner.

Within local authorities, the SRO should be a member of the corporate leadership team and should be responsible for ensuring that all authorising officers are of an appropriate standard.

For the first time, councillors in a local authority have been given a formal scrutiny role in relation to RIPA. The new codes states that, at least once a year, they should review the authority's use of RIPA and set the general surveillance policy. They should also consider internal reports on the use of RIPA at least on a quarterly basis to ensure that it is being used consistently as per the council's policy and that the policy remains fit for purpose. It is however emphasised that councillors should not be involved in making decisions on specific authorisations.

All public authorities need to raise awareness of the new RIPA provisions especially amongst councillors and senior officers. Policies and procedures need to be revised and key staff will need to be trained ready for 6th April 2010.

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