

The New RIPA Part 2 Order and Codes of Practice

By Ibrahim Hasan

Use of covert surveillance techniques by local authorities has been the subject of much controversy and adverse media stories of late. Councils have been criticised for conducting covert surveillance on dog owners to ensure they comply with dog fouling laws and on homeowners to ensure they put their refuse bins out on the right day. All this has led to calls for changes in the law to avoid the routine use of, what are sometimes seen as, draconian laws for “minor offences”.

Part 2 of the Regulation of Investigatory Powers Act (RIPA) provides a statutory framework regulating the carrying out of covert surveillance and the conduct or use of covert human intelligence sources (CHIS) by “relevant public authorities”. In April 2009 the Home Office produced a consultation paper setting out proposals to ensure that techniques regulated by RIPA can continue to be used when they are necessary and proportionate, but that there is no repetition of the small number of reported cases, involving local authorities, where they have been used in a disproportionate manner.

To implement the proposals the Home Office recently published three new RIPA orders to be laid before Parliament and to come into force, subject to parliamentary approval, on 6th April 2010. These orders can be found at <http://www.opsi.gov.uk/si/dsis2010> under “Investigatory Powers”. The last two bring into force revised codes of practice on the use of covert surveillance techniques (see later).

The Regulation of Investigatory Powers (Directed Surveillance and Covert Human Intelligence Sources) Order 2010 consolidate four previous orders relating to covert surveillance and the use or conduct of covert human intelligence sources (CHIS) by public authorities under Part 2 of RIPA.

The new order maintains the grounds for which an authorisation can be given by local authorities for the use of surveillance techniques to “for the purpose of preventing or detecting crime or of preventing disorder”(sections 28(3)(b) and 29(3)(b)). However, it 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”. 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, on 6th April 2010, revised codes of practice on Covert Surveillance and CHIS. These can be read at:

<http://security.homeoffice.gov.uk/ripa/publication-search/general-publications/ripa-cop/index.html>

The two revised codes are much more detailed and provide more guidance using real life examples. However, it is important to note (as explained in both codes) that the examples do not form part of the codes and should not be considered as precedents.

The main changes to both codes are the same. The references below are to the Covert Surveillance and Property Interference Code of Practice (hereinafter referred to as “the new

code”) which covers directed surveillance, intrusive surveillance and property interference. For the sake of brevity, I have examined the provisions of this code relating to Directed Surveillance only. This type of surveillance is conducted by most public authorities including local authorities and has been the subject of substantial debate. Only the police and certain other law enforcement agencies have the power to do the other two types of surveillance mentioned above.

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

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. The new code s much more detailed guidance on this concept. 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 given 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 may be gone for good. 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 codes consider 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 should 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 in the light of any recommendations in OSC inspection reports. Where a report highlights concerns

about the standard of authorising officers, the SRO will be responsible for ensuring the concerns are addressed.

For the first time, councillors in a local authority have been given a formal scrutiny role in relation to RIPA. The new code 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.

The code is silent as to which councillors should carry out the above tasks. My view is that the annual review and strategy setting should be done by the Cabinet Committee and the quarterly reports should be seen by the audit or scrutiny committee.

6th April 2010 will see a change in the way local authorities conduct covert surveillance under RIPA. Awareness of the new codes, especially amongst investigating officers, needs to be raised now to ensure that more adverse headlines are avoided.

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See also Ibrahim's webcasts on this topic: <http://www.actnow.org.uk/content/50>