



Agenda Item:
Environmental Excellence Policy Development Panel
9th February 2023

Adoption of updated Regulation of Investigatory Powers Policy

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Portfolio: Environmental Excellence

Ward(s) Affected: All wards

Purpose of the Report:

To present for consideration and adoption a proposed updated Regulation of Investigatory Powers Act (RIPA) Policy.

Recommendations:

1. That Regulation and Planning Committee recommends 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.

1. Summary

- 1.1 The Council conducts a range of investigatory activities for which it last updated its Regulation of Investigatory Powers Policy in 2015, and this policy requires updating to reflect both legislative and organisational changes.
- 1.2 This report proposes an updated Regulation of Investigatory Powers Policy ('the RIPA 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 and the Human Rights Act 1998. Suitable officer guidance is being prepared to support the updated RIPA Policy going forwards.
- 1.3 Covert investigation and surveillance activity, meaning investigation activity that it is not overtly declared in advance to the subject of investigation, can result in private information being obtained about individuals without their knowledge. This could be something as simple as monitoring a fly tipping hot spot to observe who visits and may unlawfully deposit waste materials. Alternatively, it could involve a substantial investigation into suspected fraud or other criminal offences. When the Council gives full and proper consideration to such activity in accordance with the legal requirements mentioned at 1.2 above, the Council is working to uphold and will not breach individuals' right to privacy.
- 1.4 The proposed updated RIPA 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.
- 1.5 The proposed updated RIPA Policy addresses the Council's undertaking of activities that involve:
 - a) The surveillance of individuals,
 - b) Any use of undercover officers and informants, known as covert human intelligence sources, and
 - c) The obtaining of communications data.

2. Background

- 2.1 A range of the Council's functions require investigations and sometimes surveillance activity to be undertaken. Often, the person affected will be informed in advance and doing so would make it an 'overt' activity, for example if a letter is sent advising that neighbour noise may be recorded if the Council has to investigate complaints received. In some cases however and for good reason, some investigation activities are not declared in advance to the subjects of investigation. Examples may include suspected serious regulatory breaches or benefit fraud. Where subjects are not informed in advance then the Council's activity could be termed 'covert'.
- 2.2 The Regulation of Investigatory Powers Act 2000 ('the RIPA Act') and the Investigatory Powers Act 2016 ('the IPA Act') provide the legislative framework

that governs the use of covert activities by public authorities including local authorities.

- 2.3 The RIPA and IPA Acts 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. Surveillance may involve both the:
- a) Monitoring, observing or listening to persons, their movements, their conversations or their other activities or communications, and
 - b) The recording anything monitored, observed or listened to in the course of surveillance, with or without the assistance of a device.
- 2.4 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. The RIPA and IPA Acts set out authorisation processes to help ensure that this compatibility is achieved.
- Covert surveillance falling under the Acts that may be authorised by a local authority is restricted to:
- a) Directed surveillance,
 - b) The use of covert human intelligence sources, such as undercover officers or informants, to obtain information, and
 - c) Obtaining communications data such as 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, but not what is written or said (the content) within that communication.
- 2.5 Independent oversight for both RIPA and IPA in respect of the way in which covert activities are used is provided by the Investigatory Powers Commissioner's Office (IPCO) and the Investigatory Powers Tribunal (IPT).
- 2.6 The RIPA and IPA Acts are supported by a number of statutory Codes of Practice ("the Codes") issued pursuant to Section 71 of the RIPA Act and Section 241 of the IPA Act. The Codes, listed in the proposed updated RIPA Policy, have been revised during the period since the existing policy was adopted by the Council in 2015. 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 Investigatory Powers Tribunal 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.

- 2.7 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:
- a) Meet the 'serious crime threshold', i.e. are punishable by a maximum term of at least 6 months' imprisonment; or
 - b) Constitute an offence in relation to the sale of alcohol or tobacco to minors.

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.

- 2.8 Although the RIPA Act provides for the authorisation of directed surveillance and the use of covert human intelligence sources, 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 Act 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 the RIPA Act.
- 2.9 Compliance with the RIPA Act requirements helps the Council to ensure that any surveillance conduct, which is undertaken following the correct authorisation and approval from a Justice of the Peace, and communications data obtained under the IPA Act through communications data authorisations via the National Anti-Fraud Network, is lawful. These processes protect the Council from legal challenge and render the evidence obtained admissible and lawful for the Council's required purposes.
- 2.10 A public authority may only engage the formal RIPA and IPA Act powers and processes when performing its 'core functions' for which there are grounds specified under the Acts. For local authorities, these grounds are limited to preventing or detecting crime or preventing disorder and are further restricted with respect to directed surveillance. This does not apply to the 'ordinary functions' of public authorities, such as those involving employment issues or contractual arrangements. Covert activities in relation to these 'ordinary functions' are conducted under other legislation and authorisations, not under the RIPA or IPA Acts which would not be appropriate.

3. Current position/findings

- 3.1 The Council last received a formal inspection by IPCO in 2018, prior to the formalisation in January 2020 of the shared service delivery structure with South Norfolk Council. A subsequent light touch desktop review by an IPCO inspector was received during the Covid-19 pandemic. IPCO has recommended that the Council should:
- a) Review and update its RIPA Policy, including a section dealing with social media enquiries. Make provision of 'non-RIPA' approaches that mirror the formalised requirements of the legislation and Codes of Practice. Support the

revised Policy with updated officer guidance and administrative and management processes.

- b) Establish further officer training, beyond the ongoing refresher training, to feature specific induction training and training for authorising managers, to support implementation of the RIPA Policy.
 - c) Provide regular reporting to elected members to ensure effective policy oversight of surveillance activities.
- 3.2 The preparation and maintenance of an updated RIPA policy and associated officer guidance is not in itself a legal requirement. It is, however, considered best working practice and this position is reflected in the advice and recommendations that was made to the Council following the IPCO inspection.
- 3.3 By updating its RIPA Policy, and the associated officer guidance, the Council can best respond to any challenges about the way in which it has undertaken covert investigation and surveillance activities.
- 3.4 The increase in digital technology has created significant opportunities for Council officers to undertake covert enquiry and investigation activities for the purposes of service delivery, particularly by accessing the internet and social media platforms on mobile devices. Ongoing safeguards are necessary to ensure full awareness that surveillance of individuals is being undertaken.

4. Proposed action

- 4.1 By updating the Council's existing RIPA Policy, and the associated operating processes and guidance, the Council will:
- a) Continue to demonstrate that it takes the regulation of investigatory powers seriously.
 - b) Update its defined framework within which the Council will exercise its responsibilities.
 - c) Make clear to stakeholders the manner in which the Council intends to operate.
 - d) Ensure that the Council has sufficient appropriately authorised / designated officers.
 - e) Provide the basis for a robust defence to any challenges that may be made about covert activities undertaken by the Council.
 - f) Support officers to conduct necessary and proportionate activities lawfully and, as far as is reasonably practicable, minimise any adverse impact on individuals' privacy.
- 4.2 The proposed updated RIPA Policy at Appendix 1 is fundamentally based on human rights principles encapsulated in the European Convention on Human Rights and in the Human Rights Act and sets out the way in which the requirements under RIPA and IPA Acts, which are specifically aimed at protecting individuals' human rights in relation to privacy, will be undertaken. The RIPA Policy, as updated, aims to ensure that the Council's actions are not at variance

with the Human Rights Act and is, therefore, unlikely to result in adverse human rights implications.

- 4.3 The updates to the RIPA Policy take account of the changes contained within the Codes as well as updating officer details and responsibilities relating to the:
- a) Senior Responsible Officer
 - b) RIPA Coordinator
 - c) Appointment of officers to grant authorisations under Sections 28 and 29 of RIPA
 - d) Authorising officers to present RIPA Act cases to justices of the peace under Section 223 of the Local Government Act 1972
- 4.4 The processes supporting the Council's proposed updated RIPA Policy have been prepared 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. The focus of that assessment is to protect individuals' right to privacy and the Human Rights Act 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 above are at least maintained and potentially enhanced. As a result, a 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.
- 4.5 The Council's formal RIPA application and authorisation processes will closely reflect the proposed updated RIPA Policy's requirements.
- 4.6 A governance structure is set out in Appendix A of the proposed updated RIPA Policy. The officers who form the governance structure are specifically designated for the purposes of the RIPA and IPA Acts and referred to by role within the Policy. They will undertake externally provided role-specific training. General awareness training for managers and staff will be embedded across the Council and access to this training will be maintained online.
- 4.7 Where covert activities are carried out for any purpose that falls outside the RIPA Act, for example if required to investigate internal Council disciplinary matters or an external regulatory matter where the 'serious crime threshold' is not met, the Council may still use the covert activities as they are defined in the RIPA and IPA Acts. To ensure that the covert activities used for these non-RIPA purposes are still used in a manner that is compatible with human rights, local authorities are encouraged to have due regard to the principles of the RIPA and IPA Acts, and 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 and IPA Acts regimes. For this reason, what are termed "non-RIPA" matters are also covered in the proposed updates to the Council's RIPA Policy.

- 4.8 A central record of both RIPA formal activity and 'non-RIPA' activity will be maintained. Quarterly meetings of a RIPA Working Group will monitor this activity internally. This will include overseeing the reporting to IPCO of any relevant and serious matters arising in accordance with statutory requirements.
- 4.9 An annual report of RIPA surveillance activity will continue to be submitted to IPCO. This facilitates independent oversight, which is provided by IPCO and the Investigatory Powers Tribunal.
- 4.10 The proposed updated RIPA Policy follows relevant guidance issued by the Home Office, IPCO and the Information Commissioner's Office.

5. Other options

- 5.1 Cabinet could decide not to adopt the proposed updated RIPA Policy, either relying on the pre-existing RIPA Policy or deciding not to maintain such a policy. The preparation and maintenance of a RIPA Policy 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.
- 5.2 If the Council does not prepare and maintain a RIPA Policy and appropriate supporting officer guidance, the Council would be open to criticism from IPCO and it might fall short of having in place the necessary arrangements and duly authorised and designated officers to undertake the roles as required by the relevant legislation.
- 5.3 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). The proposed updated RIPA Policy and associated guidance and arrangements would provide the necessary safeguards against individual officers not realising that surveillance of individuals is actually being undertaken, and ensuring that the risks relating to breaches of an individual's privacy are sufficiently prevented and minimised.

6. Issues and risks

- 6.1 **Resource Implications** – A small resource requirement has been identified for commissioning officer training and it is expected that this will be provided for within existing budgets from 2023/24 onwards.
- 6.2 **Legal Implications** – The proposed updated RIPA Policy takes into account the current framework and requirements of legislation and statutory guidance, and will help to ensure the Council's relevant activities are undertaken lawfully. No specific legal implications have been identified.
- 6.3 **Equality Implications** – No equality implications have been identified.
- 6.4 **Environmental Impact** – The proposed updated RIPA Policy will help generally to safeguard proper conduct of investigation and surveillance activity, including

environmental regulation. There are no climate change implications associated with the recommendation.

- 6.5 **Crime and Disorder** – The proposed updated RIPA Policy will help generally to safeguard proper conduct of investigation and surveillance activity, which is supportive of the Council's work to tackle crime and disorder.
- 6.6 **Other risks** – If the Council decided not to prepare and maintain an updated RIPA Policy and supporting guidance, it would be open to criticism from IPCO and could fail to have in place duly authorised / designated officers to undertake the roles required by the relevant legislation.

7. Conclusion

- 7.1 It is necessary now to update the Council's RIPA Policy to reflect changes in legislation and guidance, together with recommendations for good practice. The proposed updated RIPA Policy is suitable for adoption. It will be supported by a corresponding updated set of operational management and administrative arrangements, training and guidance.

8. Recommendations

- 8.1 That Regulation and Planning Committee recommends 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.

Background papers

Broadland District Council's existing RIPA Policy was last revised 2015.