

North Yorkshire County Council

Business and Environmental Services

Executive Members

26 October 2018

Covert Activity Policy

Report of the Assistant Director - Growth, Planning and Trading Standards

1.0 Purpose of the report

- 1.1 To review the Covert Activity Policy with BES Executive Members and the Corporate Director (BES) and seek continued approval for its use.
- 1.2 To report to BES Executive Members and the Corporate Director (BES) on the use made of the Regulation of Investigatory Powers Act 2000 and covert activity during October 2017 to September 2018.

2.0 Background to the Report

- 2.1 The Regulation of Investigatory Powers Act 2000 (RIPA) provides a legal framework for the lawful interference with an individual's right to a private and family life under article 8 of the European Convention on Human Rights (ECHR) following the Convention's incorporation into UK law by the Human Rights Act 2000. The Act allows local authorities to undertake covert activities within the RIPA framework provided that it is done solely for 'the prevention or detection of crime or disorder'. The Act does not grant powers to authorities and does not prevent unauthorised covert activity taking place. However, unauthorised activity may result in a claim for breach of human rights against the County Council, and in cases where the covert activity has secured evidence for use in criminal trials, that evidence may be excluded by a judge as unfairly obtained.
- 2.2 The trading standards service uses RIPA in the course of investigations into offences contrary to consumer protection legislation and the Fraud Act 2006, and conspiracy to defraud contrary to common law. Veritau Ltd investigates theft from and fraud against the County Council and might also adopt covert techniques to secure evidence in such cases. Service departments will also investigate gross misconduct involving financial or other abuse of clients.

3.0 Covert Activity Policy

- 3.1 Executive Members and the Corporate Director (Business and Environmental Services) last reviewed the Covert Activity Policy on 20 October 2017. Since then, revised codes of practice have been issued entitled Covert Surveillance and Property Interference Revised Code of Practice (August 2018) and Covert Human Intelligence Sources Revised code of Practice (August 2018). The policy, which is produced as Appendix 1 to this report, has been updated to reflect the revisions to the codes.
- 3.2 There are a number of changes to footnotes which amend paragraph and page references to reflect the revised code and these are highlighted in red. These amendments do not change the substance of the policy.

3.3 The Covert Surveillance and Property Interference Revised Code of Practice now specifically addresses the issue of aerial covert surveillance using airborne craft or devices. The code anticipates that activity using an unmanned aircraft such as a drone is likely to be covert and to obtain private information and that accordingly, a directed surveillance authorisation should be obtained. Drones are not currently being used by the Authority to undertake covert activities, however, it is proposed that in the future such equipment could be used where it is necessary and proportionate to conduct directed surveillance. The drone operator would be licensed by the Civil Aviation Authority (CAA) and comply with the CAA's Drone Code as well as being appropriately authorised under RIPA.

4.0 Report on Covert Activity

4.1 From October 2017 to September 2018, authorisations under RIPA were granted for the following activities:

Date	Type of Authorisation	Investigation	Outcome
October 2017	Communications data – subscriber information	Mis-described car	No further action – unable to locate suspect
November 2017	Covert Human Intelligence Source (CHIS)	Storage of explosives without a licence Failure to provide required information with fireworks	Prosecution. Curfew order and costs order for £150
November 2017	CHIS	Sale of counterfeit clothing via Facebook	No further action – test purchase could not be completed
December 2017	Directed surveillance (DS)	Veritau fraud investigation	No further action
December 2017	DS	Veritau fraud investigation	No further action
May 2018	Communications data – subscriber and service use information	Details withheld	Investigation on-going
August 2018	Communications data – subscriber information	Details withheld	Investigation on-going

5.0 Legal Implications

5.1 Reviewing and reporting on the policy and its use ensure compliance with the codes of practice issued under the Regulation of Investigatory Powers Act 2000. There are no other legal implications from this report itself although ensuring that a policy is in place and properly implemented helps to protect the County Council from claims for breaches of article 8 of the European Convention on Human Rights (the right to a private and family life) and from the exclusion of evidence in criminal proceedings.

6.0 Financial Implications

6.1 There are no financial implications arising from this report.

7.0 Equalities Implications

- 7.1 A decision record sheet covering the decision not to complete an equalities impact assessment has been submitted and signed off.

8.0 Recommendations

- 8.1 That BES Executive Members and the Corporate Director (BES) note the use made of RIPA from October 2017 – September 2018.
- 8.2 That BES Executive Members and the Corporate Director (BES) approve the revised Covert Activity Policy.

MATT O'NEILL

Assistant Director - Growth, Planning and Trading Standards

Author of report: Jo Boutflower, Head of Business and Consumer Services

Background documents: None

COVERT ACTIVITY POLICY

SCOPE:

This policy applies to all employees of North Yorkshire County Council.

PURPOSE:

- To set the criteria under which authorisation of covert activity under the Regulation of Investigatory Powers Act 2000 may be granted.
- To set the criteria under which authorisation of covert activity outside the Regulation of Investigatory Powers Act 2000 may be granted.
- To designate officers who may authorise covert activity.
- To set requirements for the internal oversight of covert activity.

1. THE LEGAL FRAMEWORK

The European Convention on Human Rights (ECHR) was incorporated into UK law by the Human Rights Act 1998. Article 8 of ECHR sets out that everyone has the right to “...*respect for his private and family life, his home and his correspondence*”, and that a local authority may not interfere with this right except “...*as is in accordance with the law and is necessary in a democratic society... for the prevention of...crime...*”¹

The Regulation of Investigatory Powers Act 2000 was enacted to put a framework in place to allow for the lawful interference of an individual’s article 8 rights in compliance with ECHR. It defines three types of covert activity which may be undertaken by local authorities. These are:

1.1 Directed Surveillance

This is surveillance which is not intrusive² but which is targeted at an individual or individuals, is covert, and is likely to result in the obtaining of private information³. Private information includes any information relating to a person’s private or family life⁴, including family or professional/business relationships. Information which appears public, such as conversations in the street or material posted on social media, may still be private information as it will be likely that the individual has a reasonable expectation of privacy even though they are acting in public⁵.

1.2 Covert Human Intelligence Sources (CHIS)

A person is a CHIS if he establishes or maintains a personal or other relationship with a person for the covert purpose of facilitating:

- the covert use of such a relationship to obtain information or to provide access to any information to another person; or
- the covert disclosure of information obtained by the use of such a relationship, or as a consequence of the existence of such a relationship.⁶

¹ RIPA sets out other statutory grounds (ss. 22(2), 28(3) and 29(3)) but local authorities may only use RIPA ‘for the preventing or detecting of crime’ (see Regulation of Investigatory Powers (Directed Surveillance and Covert Human Intelligence Sources) Order 2010 and Regulation of Investigatory Powers (Communications Data) Order 2010).

² Intrusive surveillance is surveillance that takes place on residential premises or in a private vehicle by means of an individual or surveillance device on the premises or in the vehicle (S.26(3)).

³ S.26(2)

⁴ S.26(10)

⁵ [Para 3.4, page 16, Covert Surveillance and Property Interference Code of Practice \(August 2018\)](#)

⁶ S.26(8)

1.3 Acquisition of Communications Data

Communications data is the ‘who’, ‘when’, ‘where’ and ‘how’ of a communication but not the content. There are currently 3 categories of communications data:

Traffic data⁷ - which identifies the location a communication was sent from or its destination. It includes IP addresses, cell site (location by triangulation from mobile phone masts) data, online parcel tracking.

Service use data⁸ - the use made by a person of a communication service. This would include outgoing call logs or information about redirection services.

Subscriber information⁹ - the information held by a communications service provider (CSP) about who the service is provided to. Local authorities may only obtain service use data and subscriber information¹⁰. A Home Office approved single point of contact (SPOC) must examine an application for practicality and cost prior to its approval and must make all communications with CSPs to acquire the data.

1.4 Restricted Covert Activity

Local authorities may not undertake the following types of covert activity under the RIPA framework:

- intrusive surveillance¹¹,
- property interference¹², or
- the interception of communications¹³.

Intrusive surveillance is surveillance that takes place on residential premises or in a private vehicle by means of an individual or surveillance device on the premises or in the vehicle. Property interference is the entry onto or interference with property or wireless telegraphy. It would include, for example, the fitting of a tracking device to a vehicle¹⁴ or the installation of a recording device in a residential property. The interception of a communication is anything which obtains the content of that communication, for example, placing a wiretap on a phone.

1.5 Authorisation of Covert Activity under RIPA

Covert activity which meets the RIPA criteria must be authorised in accordance with the Act. An application must be made on the appropriate form¹⁵ and authorised by an officer meeting the prescribed offices, ranks, and position¹⁶. The authorisation will not be valid until judicial approval has been obtained from a magistrates’ court¹⁷ and so covert activity must not take place until both the internal authorisation and judicial approval have been obtained. Authorisations must be cancelled as soon as the activity is concluded¹⁸. Further information about the authorisation process can be found in the Covert Activity Procedures document.

⁷ Ss.21(4)(a) and 21(6)

⁸ S.21(4)(b)

⁹ S.21(4)(c)

¹⁰ Regulation of Investigatory Powers (Communications Data) Order 2010

¹¹ S.26(3)

¹² Paragraph 7.1, page 56, Covert Surveillance and Property Interference Code of Practice (August 2018)

¹³ S.2

¹⁴ It is not property interference for a vehicle owner or operator to fit such a device, see paragraph 7.49, page 66, Covert Surveillance and Property Interference Code of Practice (August 2018) for public authority vehicles

¹⁵ Current forms may be obtained from the trading standards service, legal services or Veritau

¹⁶ The list of current authorising officers & designated officers can be found at appendix 1

¹⁷ Ss. 37 & 38 Protection of Freedoms Act 2012

¹⁸ Regulation of Investigatory Powers (Cancellation of Authorisation) Regulations 2000

1.6 Authorisation of Covert Activity outside RIPA

The Investigatory Powers Tribunal has considered the authorisation and use of covert activity outside the RIPA framework. It has observed that:

“RIPA does not require prior authorisation to be obtained by a public authority in order to carry out surveillance. Lack of authorisation does not necessarily mean that the carrying out of directed surveillance is unlawful”¹⁹.

The tribunal has considered in detail the process of authorising activity outside RIPA. The case²⁰ involved the placing of a covert silent video recorder in the sitting room of a flat occupied by a severely disabled young woman in response to a number of petty thefts. The thefts did not meet the ‘serious’²¹ threshold for intrusive surveillance under RIPA. A superintendent had authorised the covert activity and had recorded her reasons:

“...the particular conduct could not be authorised under RIPA but that this did not necessarily mean that the actions proposed could not be lawfully undertaken, even though it would be without the protection that an authorisation under RIPA would afford. The Act itself states that any such deployment outside RIPA does not necessarily mean that it is unlawful.”²²

The superintendent had considered the necessity and proportionality of the activity and the risk of collateral intrusion. She had also considered guidance issued by the Office of the Surveillance Commissioner.²³

The Investigatory Powers Tribunal agreed with the submission by Cleveland Police that the force had acted “...exactly as the public would have expected it to act”. The tribunal endorsed the procedure adopted by the superintendent, “i.e. a procedure as close as possible to that which would be adopted if an authorisation could be obtained from a...relevant authorising officer [under RIPA].”

2. USE OF COVERT ACTIVITY BY NYCC OFFICERS

Covert techniques may be used by NYCC officers acting in the course of their employment only in the accordance with the table set out in appendix 2 of this policy. Where a company or individual²⁴ is contracted by NYCC to undertake covert activity, such activity must be authorised as if it was undertaken by NYCC employees and only in accordance with the table in appendix 2.

Authorised covert activity may only be undertaken in accordance with the Covert Activity Procedures. This document is maintained by the RIPA Co-ordinating Officer, from whom a copy can be obtained.

The welfare obligations arising from the use and conduct of CHIS are such that NYCC is not equipped to meet them properly. Accordingly, third party (non-employee) CHIS will only be deployed in joint operations with a police force in situations where the force concerned can source, authorise, manage and safeguard the CHIS.

¹⁹ C and the Police & Secretary of State for the Home Department IPT/03/32/H

²⁰ BA & others and the Chief Constable of Cleveland Police IPT/11/129/CH, IPT/11/133/CH & IPT/12/72/CH

²¹ Intrusive surveillance may only be undertaken in relation to ‘serious’ crime as defined by ss.80(2) &(3)

²² S.80 (general saving for lawful conduct)

²³ OSC Procedures & Guidance, December 2011, paragraphs 231-233

²⁴ Including Veritau Ltd when acting as NYCC’s internal fraud investigator

Surveillance product must be stored and disposed of in accordance with the Documents and Records Management Policy, and only used for the purpose for which it was obtained.

If covert activity concerns the acquisition of communications data, the National Anti-Fraud Network (NAFN)²⁵ must be used to fulfill the SPOC function.

3. SENIOR RESPONSIBLE OFFICER

The senior responsible officer is the Assistant Director (Growth, Planning and Trading Standards) reporting to the Corporate Director (Business and Environmental Services). He is responsible for²⁶:

- ensuring authorising officers are of an appropriate standard,
- ensuring the integrity of the CHIS process,
- overseeing the reporting of errors,
- implementing any action plans following inspections.

4. RIPA COORDINATOR

The RIPA coordinator function is provided by the trading standards service²⁷. The RIPA coordinator undertakes the following functions:

- maintains a central record or directed surveillance and CHIS²⁸,
- contacts the nominated officer in each relevant service area to obtain quarterly updates on training needs,
- manages the arrangement and provision of appropriate training,
- maintains the Covert Activity Policy and Covert Activity Procedures documents.

5. TRAINING

Any officer who intends to apply for a covert activity authorisation must receive appropriate training and all officers using covert techniques will receive on-going annual training relevant to their covert activities and responsibilities. This must be considered as part of the annual appraisal process for relevant employees. The RIPA co-ordinator maintains a register of training needs.

6. OVERSIGHT

BES Executive Members receive quarterly updates on the use of RIPA, and also consider an annual report on the Covert Activity Policy to ensure that it is fit for purpose and being implemented properly.

Activity authorised under RIPA is subject to oversight from the Investigatory Powers Commissioner's Office. In addition, an officer from Legal and Democratic Services reviews all authorisations on a six monthly basis.

²⁵ See appendix 1 for contact details to obtain access to NAFN

²⁶ Paragraph 4.41, page 39 Covert Surveillance and Property Interference Code of Practice (August 2018) and paragraph 9.1, page 55, Covert Human Intelligence Sources Code of Practice (August 2018)

²⁷ See appendix 1 for contact details

²⁸ Paragraphs 8.1 and 8.2, pages 68-69, Covert Surveillance and Property Interference Code of Practice (August 2018) and paragraph 7.1, page 35, Covert Human Intelligence Sources Code of Practice (August 2018)

APPENDIX 1

Authorising Officers

Head of Paid Service

Chief Executive

Legal & Democratic Services

Assistant Chief Executive (Legal & Democratic Services) (Acting Head of Paid Service in the absence of the Chief Executive)

Legal Manager (People)

Legal Manager (Corporate Services)

Growth, Planning and Trading Standards

Head of Business & Consumer Services

Head of Multi-agency Safeguarding Team

Senior Responsible Officer

Assistant Director (Growth, Planning and Trading Standards)

RIPA Coordinating Officer

Head of Business and Consumer Services – in respect of training and day to day management

Team Leader (Process and Intelligence) – in respect of the central record, source record and audit

To arrange authorisation to access NAFN please contact the Head of Business and Consumer Services

APPENDIX 2

Covert activity may only be undertaken in accordance with this table:

ACTIVITY ²⁹	SERVICE ³⁰	PURPOSE
DS	TS	investigations into criminal offences suspected to have been committed in connection with the supply of goods or services by a business to consumer(s) and which attract at least a maximum penalty of up to six months' imprisonment
DS	TS	investigations into suspected criminal offences arising from the sale of alcohol or tobacco products to those under the age of 18
DS	IF	investigations into theft and fraud perpetrated against NYCC
NR-IS	TS	investigations into fraud and unfair commercial practices ³¹ perpetrated in a repeated and targeted manner against vulnerable residents
NR-IS	IF	investigations into fraud or theft perpetrated against a resident of County Council residential premises.
NR-IS	IF or service depts	Investigations into gross misconduct by an NYCC employee involving financial or other abuse of NYCC clients.
CHIS	TS	to facilitate online test purchase operations involving the use of a covert identity and communication with an individual suspected of a criminal offence suspected to have been committed in connection with the supply of goods or services by a business to consumer(s) and which attracts at least a maximum penalty of up to six months' imprisonment
CHIS	TS	to facilitate face to face test purchase operations and/or to collect goods ordered online from an individual suspected of a criminal offence suspected to have been committed in connection with the supply of goods or services by a business to consumer(s) and which attracts at least a maximum penalty of up to six months' imprisonment
CD	TS	service use and/or subscriber data for investigations into criminal offences suspected to have been committed in connection with the supply of goods or services by a business to consumer(s)

²⁹ DS = directed surveillance, CHIS = use and conduct of a covert human intelligence source, CD = acquisition of communications data, NR-DS = directed surveillance outside RIPA, NR-IS = intrusive surveillance authorised outside RIPA

³⁰ TS = trading standards, IF = internal fraud investigators (Veritau Ltd)

³¹ As defined by the Consumer Protection from Unfair Trading Regulations 2008

Initial equality impact assessment screening form (As of October 2015 this form replaces 'Record of decision not to carry out an EIA')			
This form records an equality screening process to determine the relevance of equality to a proposal, and a decision whether or not a full EIA would be appropriate or proportionate.			
Directorate	BES		
Service area	Trading Standards		
Proposal being screened	Revised Covert Activity Policy		
Officer(s) carrying out screening	Jo Boutflower		
What are you proposing to do?	Introduce a revised covert activity policy which will control if, how and why covert activity may be used in the course of the County Council's business. The policy will replace the existing covert activity policy and it will cover authorisations that may be sought both under the Regulation of Investigatory Powers Act 2000 (RIPA) and authorisations which may be granted outside the RIPA framework.		
Why are you proposing this? What are the desired outcomes?	To ensure that covert activity can be undertaken in appropriate circumstances in a lawful, necessary and proportionate manner with safeguards in place to protect the human rights of third parties, and clients and employees of the County Council.		
Does the proposal involve a significant commitment or removal of resources? Please give details.	No.		
Is there likely to be an adverse impact on people with any of the following protected characteristics as defined by the Equality Act 2010, or NYCC's additional agreed characteristics? As part of this assessment, please consider the following questions:			
<ul style="list-style-type: none"> To what extent is this service used by particular groups of people with protected characteristics? Does the proposal relate to functions that previous consultation has identified as important? Do different groups have different needs or experiences in the area the proposal relates to? 			
If for any characteristic it is considered that there is likely to be a significant adverse impact or you have ticked 'Don't know/no info available', then a full EIA should be carried out where this is proportionate. You are advised to speak to your Equality rep for advice if you are in any doubt.			
Protected characteristic	Yes	No	Don't know/No info available
Age		X	
Disability		X	
Sex (Gender)		X	
Race		X	
Sexual orientation		X	
Gender reassignment		X	
Religion or belief		X	
Pregnancy or maternity		X	
Marriage or civil partnership		X	

NYCC additional characteristic				
People in rural areas		X		
People on a low income		X		
Carer (unpaid family or friend)		X		
Does the proposal relate to an area where there are known inequalities/probable impacts (e.g. disabled people's access to public transport)? Please give details.	No.			
Will the proposal have a significant effect on how other organisations operate? (e.g. partners, funding criteria, etc.). Do any of these organisations support people with protected characteristics? Please explain why you have reached this conclusion.	No.			
Decision (Please tick one option)	EIA not relevant or proportionate:	X	Continue to full EIA:	
Reason for decision	<p>The revised policy is being put in place to ensure that covert activity is only undertaken where the impact, and particularly the right to respect for private and family life under article 8 of the European Convention on Human Rights, on anyone who is the subject of, or collateral to, the covert activity has been considered and that it is considered by a senior officer that despite the risk of intrusion, the activity is necessary and proportionate bearing in mind the objective it seeks to achieve.</p> <p>The revised policy will ensure that covert activity is deployed in a consistent manner and that it is not deployed in response to an individual's protected characteristics.</p>			
Signed (Assistant Director or equivalent)	<i>Matt O'Neill</i>			
Date	16.10.2018			