

The Highland Council

Audit and Scrutiny Committee – 26 September 2013

Agenda Item	11
Report No	AS/27/13

Inspection Report – Covert Surveillance

Report by Assistant Chief Executive

Summary

This report details the outcomes of a recent inspection of covert surveillance by the Office of the Surveillance Commissioner. The Commissioner had concluded that the Council had responded positively to the previous inspection report and that all recommendations had been discharged either fully or in part. The report identifies areas of best practice undertaken by the Council and makes some recommendations for further improvement.

1. Background

- 1.1 Highland Council was inspected on 14th June 2013 by the Office of Surveillance Commissioner (OSC) regarding the Council's compliance with legislation covering the use of covert surveillance including the Regulation of Investigatory Powers (Scotland) 2000 (RIP(S)A).
- 1.2 The inspection was part of a programme undertaken by OSC of all local authorities in the UK. The last inspection was in June 2010.
- 1.3 This report details the findings and recommendations arising from the inspection. A full copy of the Inspection Report is detailed in **Appendix 1**.

2. Summary of Findings and Recommendations

- 2.1 The OSC reported that the Council is a limited user of covert surveillance and consequently of the RIP(S)A authorisation process. Although there has been a positive response from the Council to the last Inspection Report and its recommendations, which had all been discharged either in full or in part, there remains a particular issue around the articulation of considerations of proportionality and necessity.
- 2.2 The Inspection Report identified a number of areas of strength in the way that Highland Council manages the RIP(S) process and complies with the legislation. These include:
 - a) An excellent RIP(S)A management structure with impressive, dedicated and enthusiastic officers comprising the RIP(S)A team.

- b) Good systems existed for training officers and in the establishment of RIP(S)A awareness within the Council.
- c) An excellent handbook for officers.

3. Recommendations

3.1 The OSC recommended that:-

- i) The Council address the issues arising from the Examination of the RIP(S)A Documents section of the report and fully discharge the recommendation of the previous report. This will involve Authorising Officers spending time articulating within the forms the consideration of the issues of proportionality and necessity.
- ii) That the RIP(S)A authorisation form is amended to accord more closely with the Home Office RIPA Form.
- iii) Ensure that where a CHIS (Covert Human Intelligence Source) is employed he or she is managed in accordance with current legislation.
- iv) Reduce the number of Authorising Officers.
- v) Amend the Policy, Procedures and Processes on Directed Surveillance and CHIS.

3.2 The recommendations of the OSC have been considered by the Council's RIP(S)A Management Group. It is recommended that the comments of the OSC are noted and the recommendations are accepted. External training for officers engaged in RIP(S)A applications and authorisations has already been arranged for September 17th and 18th.

4. Implications

- 4.1 **RESOURCES** – There are no resource implications arising directly from this report. The cost of training to be offered to officers will be met from within existing resources.
- 4.2 **LEGAL** – The OSC Report raises no issues regarding the Council's compliance with legislation governing covert surveillance.
- 4.3 **EQUALITIES AND CLIMATE CHANGE/CARBON CLEVER** – The OSC Report does not raise any issues relating to equalities or climate change/Carbon Clever.
- 4.4 **RISKS** – There are no risks identified in the report and delivery of the recommendations will ensure that the Council continues to comply with the legislation in dealing with covert surveillance.

Recommendation

The Committee has asked to:

- i) note the findings and recommendations of the OSC Inspection Report as detailed in Section 3 of this Report; and
- ii) agree that the recommendations be accepted and fully implemented.

Designation: Assistant Chief Executive

Date: 10 September 2013



Office of Surveillance
Commissioners

OFFICE OF SURVEILLANCE COMMISSIONERS

INSPECTION REPORT

Highland Council

14th June 2013

**Assistant Surveillance Commissioner:
HH Norman Jones QC.**

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This report contains the observations and recommendations identified by an individual surveillance inspector, or team of surveillance inspectors, during an inspection of the specified public authority conducted on behalf of the Chief Surveillance Commissioner.

The inspection was limited by time and could only sample a small proportion of covert activity in order to make a subjective assessment of compliance. Failure to raise issues in this report should not automatically be construed as endorsement of the unreported practices.

The advice and guidance provided by the inspector(s) during the inspection could only reflect the inspectors' subjective opinion and does not constitute an endorsed judicial interpretation of the legislation. Fundamental changes to practices or procedures should not be implemented unless and until the recommendations in this report are endorsed by the Chief Surveillance Commissioner.

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Office of Surveillance
Commissioners

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25th. June 2013

**INSPECTION REPORT
HIGHLAND COUNCIL**

Inspection 14th. June 2013.

Inspector His Honour Norman Jones QC.
 Assistant Commissioner

Highland Council.

1. Highland Council is responsible for the local government administration of the Scottish unitary district of Highland. It comprises the area which may be described as Northern Scotland and is geographically the largest administrative area in the United Kingdom. It comprises an area of 11,838 square miles, about one third of Scotland, with Western, Northern and much of the Eastern boundaries being seaboard. It has a population of about 232,000 with Inverness, the principal City, being by far the most heavily populated area (57,000). Thereafter the six largest towns, Fort William, Nairn, Thurso, Wick, Aness and Dingwall have populations ranging between 10,000 and 5,000.
2. The Senior Corporate Management Structure is headed by the Chief Executive, Mr. Alistair Dodds, who is supported by a Depute Chief Executive, an Assistant Chief Executive and five Service Directors. They in turn are supported by Heads of Services and Managers.
3. The Council was last inspected in July 2010 by Mr. Sam Lincoln, Chief Surveillance Inspector.
4. The Council is a limited user of *RIP(S)A* having granted eighteen authorisations over the past three years. None were refused. Seventeen were for *directed surveillance* and one for a *Covert Human Intelligence Source (CHIS)*. Three were granted under the *urgency* provisions of *RIP(S)A*. None engaged the *confidential information* or *self authorisation* provisions. All those examined were justified.
5. The Council head office is at Council Headquarters, Glenurquhart Road, Inverness, IV3 5NX.

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Inspection.

6. Mr. Stuart Fraser, Head of Legal and Democratic Services, and Ms. Sharon Wares, Solicitor, extended a warm welcome to Highland Council. This was repeated later in the inspection by Mr. Dodds who paid a brief courtesy call. Ms. Michelle Morris, Assistant Chief Executive and *Senior Responsible Officer (SRO)*, attended during the inspection as did [REDACTED] Trading Standards Manager and principal Authorising Officer. All officers provided their enthusiastic and ready assistance which was much appreciated.
7. The inspection was conducted by means of discussion/ interview and examination of a sample of the applications/authorisations, reviews, renewals and cancellations produced since the last inspection with feedback to the officers in relation to the findings arising.
8. Among the issues discussed were progress on previous recommendations, the structure of *RIP(S)A* management, the role and number of authorising officers, Trading Standards together with *Covert Human Intelligence Sources (CHIS)*, the Council *RIP(S)A* training programme, its *RIP(S)A* policy and procedures, and the role of Councillors.

Examination of *RIP(S)A* Documents

9. The Central Record of Authorisations is well maintained electronically in a spreadsheet format. It is fully compliant with the requirements of the *Code of Practice for Covert Surveillance*, 3.14 and 5.21. As a tool for the exercise of oversight and quality control it will be invaluable to the SRO, Mr. Fraser and Ms. Wares. All *RIP(S)A* forms are scanned into the computerised system and retained as an electronic as well as manual record.
10. Additional to the Central Record matrix, to which Authorising Officers do not have access, each individual Authorising Officer retains his/her own matrix to which the *RIP(S)A* management team do have access which enables errors to be rectified by the team. This matrix is valuable for the purpose of diarising events.
11. Applications for *directed surveillance* were well detailed outlining both the nature of the investigation and the intelligence basis for it. The nature of the intended surveillance was detailed. Collateral intrusion was well considered. However *proportionality* and *necessity* were less well approached. *Proportionality* considerations dealt with one or two of the essential elements but never with all three. Within *necessity* there was a failure to consider why the use of covert surveillance was necessary in the investigation. These weaknesses reoccurred in a number of the authorisations, but not all. The authorisations gave good detail of the background to the investigation but there was a regular, though not always, failure to outline what was being authorised. Review dates were set and in one case an expiry date. Cancellations were effected though they could contain more detail of what had been achieved.
12. The one Trading Standards *urgent* authorisation for a *CHIS* was of indifferent quality. This is an exceptionally unusual type of authorisation for

a local authority. However in the circumstances it could probably have been justified though there was a failure to record much of the detail upon which this decision could have been seen to be based. The operation related to an investigation concerning the sale of counterfeit goods within a [REDACTED]. The *urgent* authorisation was granted on one day and noted in the form of a full authorisation on the next. The form failed to articulate in any detail the reasons for urgency apart from there having been a "rapid development in the case". No detail was given of the nature of the [REDACTED] investigation. A note existed saying that a contact had been established and the goods would be picked up at an arranged site. The consideration given to *necessity* in the application failed to outline why the use of a *CHIS* was *necessary* save the bald statement "only option". *Proportionality* again was considered in scant detail with reference being made only to there being no other means, but not saying why this conclusion had been reached. The Authorising Officer had failed to record his consideration of either *proportionality* or *necessity*. Nor did he identify that which he had authorised. Significantly there was no evidence of a controller or handler being appointed though a senior TS officer would have had some oversight responsibility. There was a risk assessment of adequate quality. Cancellation was appropriately recorded.

13. A second urgent authorisation, this time for *directed surveillance*, was granted for a [REDACTED] operation. In this case the correct procedure requiring the drafting of a note following the grant outlining the nature of the application and authorisation was followed. This provided good detail of the investigation and what was to be done. However *proportionality* and *necessity* considerations remained inadequate. Attached, however, was a statement from the applicant detailing the reasons for the urgent application.
14. The probability is that this operation could have been continued under the the *immediate response* provisions of *Section 1(2)(c) of RIP(S)A*. [REDACTED] indicated that consideration had been given to this procedure but he had adopted a "belt and Braces" approach by authorising the operation to avoid any risks that evidence obtained would not be considered inadmissible by a court.
15. The issues of *proportionality* and *necessity* continue to require attention. It is essential that the applicant and the Authorising Officer outlines his/her reasons for considering the application to be both *necessary* and *proportionate*. It is of little value to seek at a later date to persuade a court that appropriate considerations were given when there is a duty to record them at the at the time and this has not been done. Both officers must understand that (i) *proportionality* should contain an articulated consideration of the three elements (a) *that the proposed covert surveillance is proportional to the mischief under investigation; (b) that it is proportional to the degree of anticipated intrusion on the target and others and (c) it is the only option, other overt means having been considered and discounted.* (ii) *Necessity* should embrace a consideration of *why the use of covert surveillance is necessary* in the investigation.
16. It must be recognised by officers that if they are to employ *CHIS* each *CHIS* has to be managed according to the legislation (See *RIP(S)A* Section 7(6)) and this a legal requirement which is not optional. Furthermore that if oral *urgent directed surveillance* operations are to be granted the subsequent record must be comprehensive (See *Code of Practice for Covert Surveillance* 5.16 to 5.18)

See recommendation

17. It is encouraging to note that the Council has adopted the format of the current Home Office forms and adapted them for *RIP(S)A*. However that adoption has not been complete and in one significant respect requires further attention. The boxes provided for the Authorising Officer to complete only partially follow the format of the Home Office forms excluding the box for the Authorising Officer's detail of what is being authorised. This may lead the officer to fail to record this vital information.

See recommendation

Previous Recommendations.

18. The previous report recommended:

- I. *Authorising Officers must use their own words to explain clearly what they are authorising and how they have satisfied themselves that it is necessary and proportionate to conduct the activity as described.*

Despite Ms. Wares and others having raised these issues at various meetings with Authorising Officers and others this is still not consistently being undertaken. (See **Examination of Documents** above). This recommendation has yet to be fully discharged.

- II. *Risk assessments are bespoke to the operation or investigation being considered and that they are updated when necessary and as part of each review.*

Risk assessments are no longer carried out for *directed surveillance*. The single risk assessment reviewed for *CHIS* was of appropriate content and quality for the operation being undertaken. This recommendation has been discharged.

- III. *The Council Policy and Return of Form memorandum be amended to clarify the difference between the role of the Gatekeeper (quality assurance and oversight) and the Authorising Officer (final decision to grant or reject an application).*

The Council's *Policy, Procedure and Processes on Directed Surveillance*, its sister manual relating to *CHIS* and the Return of Form now clearly indicate the specific roles of both the Gatekeeper and Authorising Officers. This recommendation has been discharged.

.See recommendation

RIP(S)A Management .

19. The prime responsibility for *RIP(S)A* within the Council rests with Ms. Morris as *SRO*. Mr. Fraser has responsibility for the day to day management of *RIP(S)A* but Ms. Wares has much of the "hands on" responsibility delegated to her. Ms. Wares has undertaken this responsibility for the Council since the promulgation of *RIP(S)A* and has wide *RIP(S)A*

experience. She is responsible for the production and editing of the Council's *RIP(S)A* handbook which is produced both electronically within the Council's *RIP(S)A* intranet site and in hard copy. In the latter form it is distributed to all who may be expected to have contact with *RIP(S)A*. The handbook contains a helpful introduction, copies of the *Codes of Practice*, the Council's policy and procedure manuals, the forms in use and useful questionnaires.

20. In practice forms are submitted by authorising officers to the Head of Legal and Democratic Services who is the "Gatekeeper" for the system. He, with the assistance of Ms. Wares, reviews all submitted documents and will comment upon them in relation to quality. Such comments are communicated back to the Authorising Officer who may either accept or reject them. The authorisation is then signed and a copy referred to the Head of Legal and Democratic Services for filing after the relevant detail has been extracted for inclusion on the Central Register. Whilst it is ultimately a matter for the Council the better practice would be for original documents to be submitted to the Central Record and copies retained within the Departments.
21. Ms. Morris, as *SRO*, exercises oversight on the whole Council *RIP(S)A* process. In her previous role within the Council she was very active with *RIP(S)A*, including chairing the Council's *RIP(S)A* Group, a regular meeting of Authorising Officers and others with a *RIP(S)A* involvement. She therefore has the benefit of wide experience of the subject. She maintains close contact with Mr. Fraser and is active in ensuring that *RIP(S)A* officers are operating at an appropriate standard. She ensures that adequate training is in place for Authorising Officers and is responsible for reporting on *RIP(S)A* issues to the leadership team of the Council and to Elected Member Committees. She is aware of the risks of unauthorised surveillance and hence has ensured a continuing focus on *RIP(S)A* within the Council.
22. Mr. Fraser is now responsible for chairing the *RIP(S)A* Group and will take to that Group any issues arising relating to *RIP(S)A* and will discuss the contents of this report with the officers. He has responsibility for the day to day oversight of the quality of *RIP(S)A* submissions with the associated advisory responsibility. He is ultimately responsible for ensuring that the Central Record is both maintained and used as an oversight tool.
23. This is an impressive management structure which should be highly beneficial to the *RIP(S)A* process within the Council. However the weaknesses perceived during the examination of some of the *RIP(S)A* documents does lead to the conclusion that the oversight exercised needs to be somewhat more robust in identifying problems and ensuring that they are communicated to and acted upon by Authorising Officers.
24. One of the functions required to be considered by those operating the system is the prevention of unauthorised covert surveillance. Much is already undertaken in this regard in relation to officers who may be anticipated to be active in the use of *RIP(S)A*. However the main risk lies with Departments which may only very rarely resort to covert surveillance. Whilst the *RIP(S)A* website and handbook is available for all officers they require an awareness of *RIP(S)A* before they will know to avail themselves of it. Such means as the cascading down of information about *RIP(S)A* from management meetings and the insertion of *RIP(S)A* "advertising" or articles

in the Council's intranet newsletter were discussed and Ms. Wares undertook to carry them further.

See recommendation
Authorising Officers

25. Some twelve officers are empowered to authorise within Highland Council and are appointed in accordance with the Council's Scheme of Delegation. However there was some imprecision in the knowledge of the officers as to how many there were precisely and their identification. This is probably because only two officers appear to be actively concerned in the authorisation process. This leads to some concern as to whether all officers are of appropriate rank (See the *RIP(Prescription of Offices, etc. and Specification of Public Authorities)(Scotland) Order 2010, SSI 2010/350*, though the officers were confident that they were so. Whilst all Authorising Officers are required to be trained before authorising it is also of concern that those who do not authorise with some regularity are likely to be found deficient when they are unexpectedly called upon to do so.

26. Since actual authorisation is currently undertaken by only about two officers it would appear that the existing numbers may be substantially reduced to those sufficient to cover the Council's needs. The CEO and his Depute require to be trained to authorise because of the CEO's responsibility as the sole Authorising Officer for the acquisition of *confidential information* and the employment of juvenile or vulnerable *CHIS*, and in his absence a Chief Officer (presumably his Depute) The *SRO* should be so trained to authorise in exceptional circumstances. Regular authorisation may conflict with her role for ultimate oversight of the process. Additionally the Council should be able to manage with no more than four regular Authorising Officers. Although the Council covers a vast geographical area communications are largely electronic and authorisations can be undertaken centrally. These officers should be clearly identified by name and rank in an addendum to the Council's policy and procedures document.

See recommendation

Training

27. There is a corporate *RIP(S)A* training programme at Highland Council. It consists of an annual training event arranged by the *RIP(S)A* Group to which all Authorising Officers and Investigating Officers are invited together with such other officers of the Council as the Directors designate. The list of officers attending the last such event was made available and showed officers from a wide range of Departments. Speakers have been recently invited from the police and the National Anti Fraud Network. Following such visits care is taken by Ms. Wares to obtain any available PowerPoint displays which she then uses for future training sessions. Two such documents were made available to the inspection. These training sessions are made available to officers in distant centres of the Council via a video conferencing link.

28. Authorising Officers should receive refresher training from external trainers at about two yearly intervals. The last, however, was in 2009 but a further session is planned for September of this year. The CEO, Legal officers and the *RIP(S)A* management team also attend. The session in September will involve some twenty four Council officers including the above.

29. The requirements for training are considered by the *RIP(S)A* Group and the management team in advance and these are communicated to the Employee Development Unit to arrange. E-training techniques were discussed as possibly of potential training value and consideration will be given to the employment of such systems.

Trading Standards

30. A useful discussion took place with ██████████ concerning both the Trading Standards authorisations which had been the subject of examination (See **Examination of *RIP(S)A* Documents** above) and the use of *RIP(S)A* in connection with social networking site (SNS) investigations. In respect to the latter ██████████ was of the opinion that such investigations were likely to become inevitable for Trading Standards Departments with the increase in sales of counterfeit goods on SNS websites. He was particularly concerned with the types of authorisation required in different SNS investigations depending upon the degree of penetration by the investigator into the site and the consequences of breaching privacy controls. The requirement for appropriate management in respect to *CHIS* authorisations was discussed (See paragraphs 12 and 16 above). ██████████ was concerned about whether authorisation was required in relation to repeated viewing by investigators of a particular site. He was advised that it was safer in those circumstances to obtain *directed surveillance* authorisation. He was alert to the requirement for a risk assessment whenever a *CHIS* was employed in an operation.

Policy and Procedures.

31. The Council produces two *RIP(S)A* Policy documents as related above. One relates to *directed surveillance* and the other to *CHIS*. They are clear and succinct guides which cover all the essential issues. They will require amendment to address the recommendations and comments made in this report particularly the advice, if adopted, to submit original documentation to the Central Record rather than copies, the recommendation to reduce the number of Authorising Officers and to identify more clearly the Authorising Officers by name and rank in an addendum to the policy and procedure documents. The authorisation form requires to be expanded to fully embrace the contents of the Home Office *RIPA* form suitably adapted for *RIP(S)A*.

See recommendation

Councillors.

32. A "Gatekeepers" report is submitted to the Audit and Scrutiny Committee at intervals of about 12/18 months. This contains information about the Council's *RIP(S)A* activities over the previous period together with information relating to likely developments and enables the Committee to assess whether the Council's *RIP(S)A* policy continues to be fit for purpose. The advisability of a more frequent statistical report was discussed. Additionally OSC reports are submitted to that Committee for its consideration. Officers are aware that Councillors may not be directly involved with individual authorisations.

Conclusions

33. Highland Council continues to be a limited user of covert surveillance and consequently of the *RIP(S)A* authorisation process. It has an excellent *RIP(S)A* management structure with impressive, dedicated and enthusiastic officers comprising a *RIP(S)A* team. Good systems exist for training of officers and for the establishment of *RIP(S)A* awareness within the Council, though the latter may be strengthened by simple further actions. In particular it should be remarked that Ms. Wares, who has considerable experience of *RIP(S)A*, has produced an excellent handbook which should be invaluable to applicants and Authorising Officers alike as an adjunct to the Council's thorough policy and procedure documents.
34. Although a number of the applications examined gave good detail of the operation and of what was required to be authorised a number of the authorisations continue to fail to detail the latter. In the light of the good management structure it was somewhat disappointing to note that there had therefore been only limited progress on the issues raised in the last report relating to the Authorising Officer's completion of the authorisation form and to considerations given by both Authorising Officers and applicants to the crucial issues of *proportionality* and *necessity*. This is partially due to the continuing weakness in the authorisation form which may be addressed by full adoption and adaption of that produced by Home Office for *RIPA*, by closer attention by the drafting officers to the elements comprising these subjects and by more robust quality control.

Recommendations.

- 35.
- I. Address the issues arising from the **Examination of *RIP(S)A* Documents** section of this report and fully discharge recommendation (a) of the previous report. In particular attention should be paid to the articulation within the application/authorisation forms of the applicant's and Authorising Officer's considerations of *proportionality* and *necessity* and the Authorising Officer's detailing of that which is being authorised. (*Paragraphs 11 to 15 and 18.1*).
 - II. Amend the *RIP(S)A* authorisation form to more closely accord with the Home Office *RIPA* form. (*Paragraph 17*).
 - III. Ensure that when a *CHIS* is employed s/he is managed in accordance with current legislation. (*Paragraphs 12 and 16*).
 - IV. Extend the processes for raising *RIP(S)A* awareness within the Council. (*Paragraph 24*).
 - V. Reduce the number of Authorising Officers. (*Paragraph 26*).
 - VI. Amend the *Policy, Procedures and Processes on Directed Surveillance* and *CHIS*. (*Paragraph 31*).

His Honour Norman Jones, QC.
Assistant Surveillance Commissioner.