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| Agenda Item | 7 |
| Report No | AS/5/17 |

Inspection Report – Covert Surveillance

Report by Depute Chief Executive and Director of Corporate Development

SUMMARY

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

1. Background

- 1.1 Highland Council was inspected on 3rd November 2016 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 previous inspection was undertaken in June 2013.
- 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 continues to be a modest user of covert surveillance and consequently of the RIP(S)A authorisation process. Further there has been a positive response from the Council to the previous Inspection Report and its recommendations, which had all been discharged in full.
- 2.2 The Inspection Report identified a number of areas of strength in the way that Highland Council manages the RIP(S)A process and complies with the legislation. These include:
 - a) A clearly appointed and knowledgeable Senior Responsible Officer (Depute Chief Executive)
 - b) Policies and procedures in place with trained staff and a regular programme of training and awareness for key personnel.

3. Recommendations

- 3.1 The OSC recommended that:-

i) the Council should put procedures in place to report matters of RIP(S)A policy to elected members in accordance with the Covert Surveillance and Property Interference Code of Practice..

ii) Applications for directed surveillance should provide the authorising officer with an assessment of the actual collateral intrusion risks which are inherent in the activity being authorised.

iii) When granting an authorisation for directed surveillance authorising officers should be specific with regards to whom directed surveillance is to be conducted against, the nature of the directed surveillance being authorised and the locations where known, where directed surveillance may take place.

3.2 The recommendations of the OSC have been considered by the Council's Senior Responsible Officer and members of the RIP(S)A Management Group. It is recommended that the comments of the OSC are noted and the recommendations are accepted in full. The recommendations will be discharged by introducing regular biannual reporting to the Council's Audit and Scrutiny Committee and undertaking a review of the current policies and procedures.

4. Implications

4.1 RESOURCES – There are no resource implications arising directly from this report.

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/RURAL – The OSC Report does not raise any issues relating to equalities, rural 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 is asked to:

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

Designation: Depute Chief Executive

Date: 15 February 2017

File ref: OSC/INSP/074

The Rt. Hon. Lord Igor Judge
Chief Surveillance Commissioner
Office of Surveillance Commissioners
PO Box 29105
London
SW1V 1ZU

4th November 2016

OSC INSPECTION REPORT – HIGHLAND COUNCIL

1. Date of inspection

1.1 3rd November 2016

2. Inspector

2.1 David Buxton.

3. Chief Executive/Managing Director

3.1 The Chief Executive of Highland Council (the council) is Mr Steve Barron. The Council Head Offices and the address for correspondence is The Highland Council, Glenurquhart Road, Inverness, IV3 5NX.

4. Introduction

4.1 Highland Council is one of the 32 local government authorities of Scotland. Highland Council is responsible for the local government administration of the Scottish unitary district of Highland which is the largest administrative area in the United Kingdom. It comprises an area of 11,838 square miles. It shares borders with the council areas of Aberdeenshire, Argyll and Bute, Moray and Perth and Kinross. The Highland area equates to the size of Belgium and covers most of the mainland and inner-Hebridean parts of the former counties of Inverness-shire and Ross and Cromarty, all of Caithness, Naimshire, Sutherland and parts of Argyll and Moray. The 2010 census of Highland indicates a population of 232,000.

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- 4.2 The Chief Executive of the council is supported by a Depute Chief Executive and four other Directors who collectively comprise the Senior Leadership Team. At the time that this inspection was conducted the council was in the midst of a programme of internal change as a result of challenges to its budgetary position and an ambition to further localise decision making and service delivery.
- 4.3 The council was last inspected by the Office of Surveillance Commissioners (OSC) on 14th June 2013 by Assistant Commissioner, His Honour Norman Jones.

5. Inspection approach

- 5.1 The purpose of this inspection was twofold; firstly to review and report upon the exercise and performance of Highland Council in relation to the powers provided pursuant of those sections of the Regulation of Investigatory Powers (Scotland) Act 2000 (RIPSA) which fall under the responsibility of the Chief Surveillance Commissioner, and also to review and report upon the performance of those persons upon whom the powers and duties of the legislation are conferred or otherwise imposed.
- 5.2 The inspection process was agreed with the council in advance of the inspection. The Chief Executive and Depute Chief Executive extended a cordial welcome and thereafter I had discussions with a number of council staff and examined documentation and a selection of RIPSA related authorisations, policies and procedures. At the conclusion of the inspection I met with the Depute Chief Executive and provided feedback as to my initial observations.
- 5.3 Since the last OSC inspection of this council was conducted there have been 19 authorisations granted for directed surveillance and CHIS. In the 12 month period preceding this inspection the council had granted eight authorisations for directed surveillance and two authorisations for CHIS. Three directed surveillance authorisations and one CHIS authorisation were examined as part of this particular inspection.

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6. Review of Progress against 2013 Recommendations

- 6.1 The previous OSC inspection gave rise to six recommendations which are detailed in the following paragraphs. The progress reported by the council against those recommendations is also provided.
- 6.2 Recommendation 1 - *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.*
- 6.3 This recommendation may be **discharged**. An examination of RIPSAs documentation revealed that considerations which had been applied to the questions of necessity and proportionality were satisfactory. The wording of authorisations by the authorising officer however was not to an acceptable standard. Further detail appears later in this report together with an appropriate recommendation for further consideration.
- 6.4 Recommendation 2 - *Amend the RIPSAs authorisation form to more closely accord with the Home Office RIPA form.*
- 6.5 The RIPSAs authorisation form had been suitably amended and this recommendation is **discharged**.
- 6.6 Recommendation 3 - *Ensure that when a CHIS is employed s/he is managed in accordance with current legislation.*
- 6.7 The council reported that its Trading Standards department was the primary user of CHIS within the council and appropriate training had been provided as to the requirement for a handler and controller where a CHIS application is made in accordance with sections 7(6)(a) and 7(6)(b) RIPSAs. It was evident in the CHIS authorisation documents which I later examined, that a controller and handler had been appointed in that particular case, however the identity of the officers performing those statutory functions had not been included in the application or authorisation text. This recommendation is **discharged** and further observation regards this issue is made later in this report.
- 6.8 Recommendation 4 - *Extend the processes for raising RIPSAs awareness within the Council.*
- 6.9 The council reported that it provides RIPSAs training to relevant staff on an annual basis, the most recent occasion being earlier during this particular

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year when an external service provider delivered appropriate training. I was provided with copies of the training material and found it to be satisfactory. This recommendation is **discharged**.

6.10 Recommendation 5 - *Reduce the number of Authorising Officers.*

6.11 The council has reduced the number of authorising officers from twelve to three. The "primary" authorising officer who had developed a good deal of experience in the role within the council had recently retired. The three council officials, who had been identified as being authorising officers, had received training in the subject of RIPSAs and had not at that time, granted an authorisation under the provisions of the legislation. This recommendation is **discharged**.

6.12 Recommendation 6 - *Amend the Policy, Procedures and Processes on Directed Surveillance and CHIS.*

6.13 The documentation had been amended in accordance with the recommendation made. The recommendation is **discharged**.

7. Policies, Procedures and Training

7.1 There is a corporate approach to RIPSAs training at Highland Council. This largely amounts to an annual training event to which all Authorising Officers and Investigating Officers are invited together with such other officers of the council as necessary. Training was last provided on 27th and 28th June 2016 by a company called *ITS Training (UK) Ltd*. The list of officers attending the last such event was made available to me by Ms. Sharon Wares. I acknowledge the investment in a regular programme of RIPSAs training by the council to its staff as being an example of good practice.

7.2 The council has policy and guidance material which addresses directed surveillance and also Covert Human Intelligence Sources (CHIS). This information is available to all relevant council staff and maintained to a good standard by Ms Wares.

8. Issues Highlighted

Governance

8.1 The Depute Chief Executive is the Senior Responsible Officer (SRO) for RIPSAs. She had attended the RIPSAs training course provided earlier during the year and appeared to have a good understanding as to her role

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- and responsibilities. The three authorising officers had all received training for their role and have been provided with letters signed by the Chief Executive making their designation in this function a formally documented decision. The central register of authorisations is meticulously maintained by Ms Sharon Wares who is also the "Gatekeeper" for the council RIPSAs functions. I examined the central record and it contained all the information required by the RIPSAs Codes of Practice.
- 8.2 The process within the council for obtaining a RIPSAs related authorisation is that in the first instance an applicant will seek advice from an authorising officer. They will then complete an application electronically and obtain a reference number from Ms Wares. The authorising officer will complete his/her authorisation and supporting rationale and the documents are recorded on the central record and held centrally by Ms Wares. The applicant has responsibility for ensuring that all reviews, renewals and cancellations are completed diligently and expeditiously.
- 8.3 The council does not report matters of RIPSAs policy to elected members in accordance with paragraph 3.29 of the Covert Surveillance and Property Interference Code of Practice (the Code) though I was told that some periodic reporting has taken place. It is recommended therefore that the council should put procedures in place to report matters of RIPSAs policy to elected members in accordance with paragraph 3.29 of the Code.

RECOMMENDATION MADE

Directed Surveillance

- 8.4 I examined a sample of applications and found that the documents were completed with an appropriate level of detail which set out the issue which required to be addressed by means of directed surveillance. The key elements required to be addressed by RIPSAs of necessity and proportionality were recorded to an appropriate standard. The vulnerability within the documents examined was that the relevant collateral intrusion risks were not set out by the applicant. Rather than a brief account being provided by the applicant as to the collateral intrusion anticipated as a result of directed surveillance being conducted in accordance with the application, the applicant merely set out an indication as to how collateral intrusion risks would be managed. It is a fundamental requirement for an authorising officer to consider the collateral intrusion risks associated with a directed surveillance application when considering the necessity and proportionality of granting an authorisation for directed surveillance. He/she cannot adequately do this if such information is not faithfully reported; it is a recommendation of this report therefore that applications for directed surveillance should provide the authorising officer with an assessment of the actual collateral intrusion risks which are inherent therein.

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RECOMMENDATION MADE

- 8.5 In the case of each authorisation examined they were found to be deficient in that they were not specific with regards to the detail as to against whom the directed surveillance activity was to be targeted, where the surveillance activity was to take place, and the nature of surveillance activity being authorised. The authorisations which had been granted made reference to the application which is not appropriate as an authorisation should be capable of "standing alone" without making reference to other documents or sections of documents. These are the most basic elements of a directed surveillance authorisation and it was difficult to understand how officers working under the parameters of the authorisations granted could be clear and confident as to what those parameters were. By means of example; directed surveillance authorisation reference number: HC DI TS 2015 16/06 related to an application made by a member of the council Trading Standards department. The application sought to conduct directed surveillance in support of a juvenile test purchase operation at local retail premises. It was clear from the application that officers wanted to conduct directed surveillance at the retail premises concerned, that surveillance activity was to be targeted towards members of staff and others working in those premises, and would be so conducted by means of monitoring and recording their movements and other activities using visual observations and a covertly worn video recorder. The authorisation granted simply provided that, "*I (name of authorising officer) hereby authorise the directed surveillance investigation as detailed above.....*" It is a recommendation of this report that when granting an authorisation for directed surveillance, an authorising officer is specific with regards detail as to against whom directed surveillance is to be conducted, the nature of the directed surveillance being authorised and the location(s) where known, where directed surveillance may take place. Note 84 OSC Procedures and Guidance provides further assistance in these matters.

RECOMMENDATION MADE

- 8.6 In all other regards the documentation which I examined was to an appropriate standard and had been managed in a timely manner.

CHIS

- 8.7 There were no CHIS authorisations extant at the time of my inspection. I was told that the one CHIS authorisation which had been in place earlier during the year had been cancelled in April (2016) as the authorising officer was retiring at that time and there was no suitably experienced replacement for him. I examined the documentation relevant to this

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circumstance (reference number HC DI TS 2015 16 10). A use and conduct authorisation was granted on 11/12/15 for a Trading Standards officer to act as a CHIS using a false persona to conduct on-line research and engagement with others suspected of committing offences of interest to the Trading Standards department. The documents were completed to an appropriate standard and a handler and controller had been appointed. The authorisation was reviewed three times before being cancelled on 18/04/16.

8.8 There was no current intention to repeat this operation evident within the council, however there is some learning from the documents which the council may wish to reflect upon. Specifically:

- a. An application should provide a pertinent intelligence case with regards the individuals who are suspected of committing offences, the nature of those offences, why it is necessary and proportionate to engage them via a CHIS using social media sites, which sites, and details as to the false persona(s) being utilised. Simple reference to the fact that the internet is used by those who commit crime is not sufficient and the collateral intrusion risks inherent in such activity should be recorded.
- b. The name of those persons undertaking the roles of handler and controller pursuant of sections 7(6)(a) and 7(6)(b) RIPSAs should be clearly set out in the application and authorisation.
- c. A bespoke risk assessment should be prepared which sets out the risks to the operative as part of the relevant operation and includes reference of the training, experience and competency of the officer to act as a CHIS in that operation.
- d. The authorising officer should provide clarity as to how additional subjects who are to be made the focus of the CHIS activity are to be notified to him/her.
- e. Reviews should provide the authorising officer with information which includes as a minimum the detail of the social media sites visited, the details of the subjects engaged, the nature of the information obtained and the use made of such information, the collateral intrusion caused as a result of the CHIS activity conducted, and any particular risks which have been encountered.

Cyber Considerations

8.9 The council undertakes a limited amount of covert on line research over the internet using false personas. The council had obtained advice from

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the Crown Office in 2011 when considering such activity. The council was also cognisant of the OSC Procedures and Guidance regarding these matters. The advice obtained from the Crown Office was seemingly at odds with the OSC guidance in that it provided that where "*deception or subterfuge*" is to be used in connection with open source research then, "*If open source i.e. target's profile is open to all with no privacy settings applied no authorisation is required to obtain information*". The SRO is responsible for ensuring that appropriate controls are in place within the council which ensures that the covert research of social media sites is conducted in accordance with RIPSAs where necessary and otherwise that appropriate guidance is available for all staff who are required to conduct activity of this nature. In that regard the council would benefit from reflecting upon the operational requirement for such activity across the council and revisit its RIPSAs and open source guidance, to ensure that any such guidance is up to date, fit for its intended purpose and appropriately cognisant of the OSC Procedures and Guidance in such matters.

CCTV

- 8.10 The council owns a public space CCTV infrastructure which is located at nine sites across the council area. The main CCTV sites are at Inverness and Fort William and dedicated monitoring arrangements at these two sites are outsourced to a private company called "Enigma". Monitoring is conducted for a 16 hour period each day and this includes weekends in the case of Inverness. I was told that the CCTV operators receive awareness provision with regards RIPSAs as part of their initial training.
- 8.11 CCTV monitoring facilities are located within local police stations and the police are able to access, direct and control the systems where necessary.
- 8.12 With regards to requests for access to local authority CCTV by the police I was told that in the case of Inverness and Fort William, if the police require to use the council owned CCTV in connection with a directed surveillance authorisation, council contracted operators are given the reference number of the directed surveillance authorisation by the police, but not shown the actual authorisation (suitably redacted where necessary). Operators should see this document before any such surveillance activity takes place. I was separately told that such a process was in place with the police but may have fallen into disrepute; in any event the council should review its processes in this regard and ensure that it is afforded sight of the actual wording of a directed surveillance authorisation granted by the police before any such surveillance activity is conducted. In that way the operatives will see the extent of activity permitted by the authorising officer.

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- 8.13 There was no clarity as to the position agreed with the police in relation to circumstances whereby the police make use of the council CCTV system to conduct directed surveillance under the terms of an authorisation, when council operators are not on duty. The council may wish to reflect upon whether it would benefit from having an MoU or similar with the police which sets out the basis of their mutual agreement as to how surveillance activity which intrudes upon the privacy of their communities is conducted by the police using council CCTV resources.

9. Conclusions

- 9.1 In many respects this was a positive inspection. The council are at best, a modest user of the legislation and given the unfamiliarity which comes with infrequent exposure the council demonstrated that it was in an appropriate state of preparedness to deal with its responsibilities under the terms of RIPSA. It had a clearly appointed and knowledgeable SRO, policies and procedures, trained staff and a regular programme of RIPSA training and awareness provision for key personnel. It also benefits from the considerable experience of Ms Wales who has encountered every OSC inspection conducted of this council.
- 9.2 The general quality of the documentation examined was above what I would have expected to encounter given the low volume of exposure to RIPSA authorisations, albeit there is room for improvement, particularly with regards the quality the authorisations granted for directed surveillance.
- 9.3 The continued investment of the council in providing training to its staff is acknowledged as being good practice and I would encourage such an approach to continue. The knowledge levels of staff with regards RIPSA is a significant element of the council's ability to deliver appropriate standards of legal compliance and reduce the risk of breaches of the legislation occurring. The ability of the council to demonstrate that it can act lawfully and with integrity when intruding upon the rights and freedoms of its citizens in accordance with a piece of legislation which is sixteen years old is a matter of public confidence. There is no correlation between the burden of responsibility which the council has to deliver appropriate standards of compliance with RIPSA, and the volume of activity which it conducts in accordance with the provisions of the legislation.
- 9.4 I wish to record my thanks to the members of the council whom I encountered as part of my inspection discussions and in particular I thank

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Ms Sharon Wales for her work in preparing for, and facilitating the inspection.

10 Recommendations

- 10.1 Recommendation 1 - The council should put procedures in place to report matters of RIPSA policy to elected members in accordance with paragraph 3.29 of the Covert Surveillance and Property Interference Code of Practice.
- 10.2 Recommendation 2 - Applications for directed surveillance should provide the authorising officer with an assessment of the actual collateral intrusion risks which are inherent in the activity being authorised.
- 10.3 Recommendation 3 - When granting an authorisation for directed surveillance, authorising officers should be specific with regards to whom directed surveillance is to be conducted against, the nature of the directed surveillance being authorised and the location(s), where known, where directed surveillance may take place. Note 84 OSC Procedures and Guidance refers.

David Buxton
Surveillance Inspector