

Agenda Item	11
Report No	AS/8/20

## HIGHLAND COUNCIL

**Committee:** AUDIT AND SCRUTINY

**Date:** 24 September 2020

**Report Title:** **Inspection Report-Covert Surveillance**

**Report By:** Executive Chief Officer Performance and Governance

### **1. Purpose/Executive Summary**

1.1 This paper details the outcomes of the recent inspection of the Council's use of covert surveillance powers by the Investigatory Powers Commissioner's Office. 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 a number of areas of best practice undertaken by the Council and highlights a number of observations to assist the Council and to increase efficiency.

### **2. Recommendations**

2.1 Members are asked to:

- I. Note the outcome of the IPCO Inspection.

### **3. Implications**

3.1 Resource: There are no resource implications arising directly from this report.

3.2 Legal: The IPCO Inspection Report identifies no issues with the Council's compliance with legislation and guidance governing the use of covert surveillance.

3.3 Community (Equality, Poverty and Rural) and Gaelic : The IPCO Inspection Report does not raise any issues relating to equalities, rural or climate change/Carbon Clever or Gaelic.

3.4 Risk: There are no risks identified in the report and the actions to be agreed by the RIPSAs management group will ensure that the Council continues to comply with the legislation and guidance in dealing with covert surveillance.

## **4. Background**

- 4.1 Highland Council was previously inspected on 3rd November 2016 by the Office of Surveillance Commissioner regarding the Council's compliance with legislation covering the use of covert surveillance including the Regulation of Investigatory Powers (Scotland) 2000 (RIP(S)A). The inspection made three formal recommendations and was reported to this Committee in March 2017.
- 4.2 The Office of the Surveillance Commissioner was merged with other offices and the Investigatory Powers Commissioner's Office (IPCO) formed. IPCO is now responsible for undertaking the programme of inspection of all local authorities in the UK.
- 4.3 Due to the ongoing Coronavirus situation the Council was subject to a remote inspection by one of the IPCO Inspectors. The inspection involved review of all relevant policies and accompanying documentation, consideration of the Council's progress against the three recommendations from the 2016 inspection and examination of a number of applications for authorisation. The inspection concluded with a remote interview of a number of Council officers. This report details the findings and observations arising from the inspection. A full copy of the Inspection Report is detailed in Appendix 1.

## **5. Summary of Findings and Recommendations**

- 5.1 The IPCO inspection reported that the Council has made use a total of 27 directed surveillance authorisations and 3 covert human intelligence source (CHIS) authorisations since the last inspection. This level of authorisation is consistent with those identified in previous inspections reflecting the Council's modest use of the powers. The inspection identified the Council's positive response to the previous Inspection Report and its recommendations, which had all been discharged in full.
- 5.2 The inspection identified several areas of strength and good practice in the way Highland Council manages the RIP(S)A process and complies with the legislation. These include:
- a) A RIPSAs Management Group chaired by the Senior Responsible Officer (ECO Performance and Governance) and attended by practitioners and authorising officers;
  - b) The Council's revised Policy and Authorisation Procedure on Covert Surveillance and Covert Human Intelligence Sources was found to be easily understood with signposting to recent codes of practice;
  - c) Comprehensive review process supporting directed surveillance and CHIS authorisations was found to be very good;
  - d) Authorising officers detailing explicitly the surveillance activity being authorised.
- 5.3 The inspection highlighted a number of current and emerging issues that IPCO has identified with authorities including ensuring that the Council has policies in place to make staff aware of the dangers of using personal social media accounts for business purposes and attention to the storage, management and retention of material obtained as a result of covert activities.
- 5.4 The SRO and RIPSAs Management Group has met to consider the outcome of the inspection. It has welcomed the positive report and has agreed a number of measures that will be taken forward to implement the emerging issues identified by the inspector.

Designation: Executive Chief Officer – Performance and Governance

Date: 6 September 2020

Authors: Kate Lackie, ECO – Performance and Governance  
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6 July 2020

Dear Chief Executive,

## Inspection of The Highland Council

*Please be aware that IPCO is not a “public authority” for the purpose of the Freedom of Information (Scotland) Act (FOISA) and therefore falls outside the reach of the FOISA. It is appreciated that local authorities are subject to the FOISA and that they may receive requests for disclosure of our reports. In the first instance the SRO should bring the matter to the attention of the IPCO Data Protection Officer (at: [info@ipco.org.uk](mailto:info@ipco.org.uk)), before making any disclosure. This is also the case if you wish to make the content of this letter publicly available.*

Due to the ongoing Coronavirus situation your authority was recently subject to a remote inspection by one of my Inspectors, [REDACTED]. All the documentation and arrangements necessary for my Inspector to carry out the process was provided by Mr. Stewart Fraser, Head of Corporate Governance, who acts as the RIP(S)A Co-ordinator for your authority. This enabled an examination of all relevant policies and an assessment of the progress made against the three recommendations from the last inspection in November 2016. Mr. Fraser along with other Council officers, including the Senior Responsible Officer (SRO) Ms. Kate Lackie, Executive Chief Officer, Mr. David McKenzie, Trading Standards Manager, and Mr. Willie Paul, Trading Standards Officer were interviewed by telephone. From the documentation examined and the information provided during the telephone interview the good level of compliance shown by your authority removes, for the present, the requirement for a physical inspection.

At the last inspection your authority received three formal recommendations, and I note from the information provided measures were implemented to enable these recommendations to be discharged. In respect of recommendation 1, annual reporting to Elected Members on the Audit and Scrutiny Committee, in line with the requirements of the relevant codes of practice<sup>1</sup>, is now in place. The standard of these reports is good and informative to allow those Members to exercise oversight of the Council's use of the powers.

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<sup>1</sup> Scottish Government Code of Practice on Covert Surveillance and Property Interference, December 2017, para. 4.43 and Scottish Government Code of Practice on Covert Human Intelligence Sources, December 2017, para. 3.27

The RIP(S)A Management Group, chaired by the SRO and attended by Authorising Officers and a representation of practitioners, is good practice to provide a forum allowing discussion around the effectiveness of the covert tactics deployed in investigations, the review of relevant policies and guidance, as well as enabling the SRO to discharge her oversight responsibilities. I am also aware that the separate policies you had in respect of directed surveillance and covert human intelligence sources (CHIS) are now reconciled into the single *Policy and Authorisation Procedure on Covert Surveillance and Covert Human Intelligence Sources* which was commented upon as easily understood with some signposting to the most recent codes of practice<sup>2</sup>.

Other notable areas of good practice include the delivery of relevant training from an external provider to Authorising Officers and practitioners, and the raising of general RIP(S)A awareness via the Information Governance Board. The issue of online directed surveillance was discussed at length and it is apparent that considerable focus is placed on this tactic, as well as the availability of open source research and social media as an investigative resource. The members of staff represented from Trading Standards displayed an acute awareness of the topic and of the associated risks, although an observation is made that more guidance should be provided on the topic, and that appropriate signposting in your policy to paragraphs 3.11 to 3.16<sup>3</sup> and 4.7 to 4.14<sup>4</sup> will assist in that regard. It was encouraging that the SRO is proactive in ensuring there are processes in place to ensure that any use of the tactic is lawful and only performed in circumstances where a legitimate and proportionate aim is being pursued. This is especially important in instances where the tactic cannot be afforded the protection of RIP(S)A but may be useful for other areas of Council business. Appropriate messages are cascaded to wider areas of the Council via a staff newsletter and the Information Governance Board and, given the focus being placed upon the use of the tactic by local authorities from privacy groups, a practice which should be complimented.

The Investigatory Powers Tribunal's decision in *BA & others v Chief Constable of Cleveland IPT/11/129/CH (13 July 2012)* was highlighted to your staff by my Inspector, where the IPT commended the adoption in non-RIPA cases "a procedure as close as possible" to that required by the legislation. A documented record and audit trail would reduce the risk of there being a disproportionate use of social media in these circumstances and helps ensure legitimate aims are being pursued. It is also important that the policies you have in place highlight to staff the dangers aligned to using personal social media accounts for business purposes, especially those of a covert nature, and that they are cognisant of their own personal online security and of the vulnerabilities attached to using any insecure or personal online platform.

Since the last inspection, a total of 27 directed surveillance authorisations and three CHIS authorisations have been granted. Three directed surveillance authorisations and three CHIS authorisations were examined by my Inspector, all granted in furtherance of Trading Standards investigations targeting online sellers of counterfeit goods via Facebook. All directed surveillance authorisations related to the monitoring of specific Facebook accounts of subjects identified as advertising counterfeit goods for sale, whilst CHIS authorisations are aimed at developing opportunities within the operations to engage with suspects online to potentially make a test purchase of a suspect item, either by post or through a physical transaction.

The standard of the authorisations was generally good which enables recommendations 2 and 3 from 2016 to be discharged. Some observations are made below by my Inspector to highlight good practice and ensure adherence with the codes of practice.

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<sup>2</sup> *Scottish Government Code of Practice on Covert Surveillance and Property Interference and Scottish Government Code of Practice on Covert Human Intelligence Sources, December 2017*

<sup>3</sup> *Scottish Government Code of Practice on Covert Surveillance and Property Interference, December 2017*

<sup>4</sup> *Scottish Government Code of Practice on Covert Human Intelligence Sources, December 2017*

1. The comprehensive review process supporting directed surveillance and CHIS authorisations is very good, with a strict policy of monthly reviews in place clearly meeting the criteria in paragraphs 4.34 to 4.39<sup>5</sup>.
2. Comprehensive intelligence cases are provided, and applicants and Authorising Officers tackle the requisite elements of necessity, proportionality and collateral intrusion very well.
3. Directed surveillance applications outline well the intention to use CHIS to support the operation when necessary, and Authorising Officers explicitly warn against any online interaction until a CHIS authorisation is granted.
4. Reviews for directed surveillance authorisations need not repeat contents of previous reviews and should focus on the period under review, and the practice of submitting a formal review in conjunction with a renewal is unnecessary. A renewal must always be submitted if the operation is to continue, in line with paragraphs 5.13 to 5.17<sup>6</sup>. In 129/HC-CD-TS-2017-01 [REDACTED] a review was submitted at the renewal point as opposed to a formal renewal.
5. Authorising Officers provide good considerations on reviews and provide instruction where necessary should there be no operational activity (see Review 2 of 126/HC-DI-TS-2016-17-3).
6. Good practice by Authorising Officers, who detail explicitly the surveillance activity they are authorising in line with paragraph 4.8<sup>7</sup> and the obligations laid down by *R v SUTHERLAND*<sup>8</sup>.
7. Cancellations of directed surveillance authorisations should contain detail of the type and extent of the product and material obtained, and how it is to be managed in accordance with the provisions contained within Chapter 8<sup>9</sup>. Authorising Officers should articulate some direction or instruction for the management of product, as described in Chapter 8 of the code of practice<sup>10</sup>.
8. CHIS authorisations should be accompanied by a specific risk assessment for each operative authorised, which is relevant to their tasking and takes into consideration welfare and security as per paragraphs 6.12 to 6.14<sup>11</sup>.
9. Overarching CHIS authorisations are granted to support operations targeting the regulatory priorities of Trading Standards, and whilst all contained the requisite detail of the use and conduct of the CHIS, if a specific investigation is known at the time of application this should be included in the application, as per paragraph 5.10<sup>12</sup>.
10. The formulation and use of Tasking Information Sheets is good, although the Council should consider point 8 above.
11. CHIS authorisations must be cancelled as per paragraphs 5.29 to 5.30<sup>13</sup> and not allowed to expire without adequate consideration being given by Authorising Officer.

I am aware that you have received my letter dated 1<sup>st</sup> May 2020 outlining IPCO's Data Assurance Programme and that your RIP(S)A policy incorporates some guidance on the storage, management and retention of material obtained as a result of covert tactics. This topic was discussed at length during the remote inspection and it was emphasised as being an area of compliance which IPCO will focus on more deeply in future inspections. It would be beneficial if the relevant sections of Chapter 8 within each of the Scottish Government Codes of Practice on Covert Surveillance and Property Interference and Covert Human Intelligence Sources are appropriately referenced within your policies to ensure that practitioners are fully cognisant of their responsibilities in this regard.

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<sup>5</sup> *Scottish Government Code of Practice on Covert Surveillance and Property Interference, December 2017*

<sup>6</sup> *Ibid*

<sup>7</sup> *Ibid*

<sup>8</sup> *R v SUTHERLAND (2002) EW Misc 1 (EWCC)*

<sup>9</sup> *Scottish Government Code of Practice on Covert Surveillance and Property Interference, December 2017*

<sup>10</sup> *Ibid*

<sup>11</sup> *Scottish Government Code of Practice on Covert Human Intelligence Sources, December 2017*

<sup>12</sup> *Ibid*

<sup>13</sup> *Ibid*

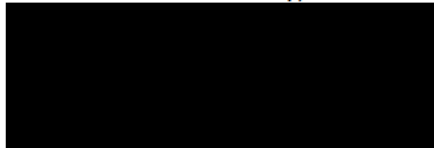
I am pleased to report that I am satisfied that the Council has suitably strong governance processes in place to ensure compliance with the legislation and codes of practice, and I am pleased that some good practice has been identified. I would highlight that the observations made herein are designed to assist your organisation and enable your staff to be more efficient in their respective roles whilst applying the legislation to covert investigative techniques.

I note your authority is registered and makes use of the services provided by the National Anti-Fraud Network (NAFN), and that practitioners are aware of the changes brought about by the Investigatory Powers Act 2016, allowing additional data to be acquired which may provide additional investigative benefit.

I hope that you find the outcome of this remote inspection helpful and constructive, and my office is available to you should you have any queries following the receipt of this letter, or at any point in the future. Contact details are provided below. I shall in any case, be interested to learn of your proposed response to any of the observations made within the attached report.

The Inspector would like to thank Mr. Stewart Fraser and Mr. Willie Paul for their enthusiastic engagement with the remote inspection process and for providing the necessary documentation to enable it to be achieved.

Yours sincerely,

A large black rectangular redaction box covering the signature of The Rt. Hon. Sir Brian Leveson.

**The Rt. Hon. Sir Brian Leveson**  
The Investigatory Powers Commissioner