

Appendix A1 - Non-RIPA Surveillance

From time to time Rotherham Borough Council may wish to undertake covert surveillance that is not regulated by RIPA. This is fine as RIPA is permissive legislation.

Authorisation under RIPA affords a public authority a defence under Section 27 i.e. the activity is lawful for all purposes. However, failure to obtain an authorisation does not make covert surveillance unlawful. S. 80 states:

“Nothing in any of the provisions of this Act by virtue of which conduct of any description is or may be authorised by any warrant, authorisation or notice, or by virtue of which information may be obtained in any manner, shall be construed -
(a) as making it unlawful to engage in any conduct of that description which is not otherwise unlawful under this Act and would not be unlawful apart from this Act;
(b) as otherwise requiring—
(i) the issue, grant or giving of such a warrant, authorisation or notice, or
(ii) the taking of any step for or towards obtaining the authority of such a warrant, authorisation or notice,
before any such conduct of that description is engaged in; or
(c) as prejudicing any power to obtain information by any means not involving conduct that may be authorised under this Act.”

This point was explained more fully by the Investigatory Powers Tribunal in the case of C v The Police (Case No: IPT/03/32/H 14th November 2006):

“Although RIPA provides a framework for obtaining internal authorisations of directed surveillance (and other forms of surveillance), there is no general prohibition in RIPA against conducting directed surveillance without RIPA authorisation. RIPA does not require prior authorisation to be obtained by a public authority in order to carry out surveillance. Lack of authorisation under RIPA does not necessarily mean that the carrying out of directed surveillance is unlawful.”

The Council may wish to do such “Non-RIPA Surveillance” for the following reasons:

1. Child/Vulnerable Adult Protection

It may be necessary and proportionate to conduct covert surveillance for the purposes of child/vulnerable adult protection. For example, to gather evidence for use in court proceedings to verify the account given by a parent where there is reasonable cause to doubt that account and which raises significant safeguarding concerns in relation to the child in question.

2. Employee Surveillance

Most employee surveillance will not be authorisable under RIPA, if a previous decision by the Investigatory Powers Tribunal is to be followed.

In C v The Police and the Secretary of State for the Home Department (14th November 2006, No: IPT/03/32/H), C, a former police sergeant, retired in 2001 having made a claim

for a back injury he sustained after tripping on a carpet in a police station. He was awarded damages and an enhanced pension due to the injuries.

In 2002, the police instructed a firm of private detectives to observe C to see if he was doing anything that was inconsistent with his claimed injuries. Video footage showed him mowing the lawn. C sued the police claiming they had carried out directed surveillance without an authorisation. The Tribunal first had to decide if it had jurisdiction to hear the claim. The case turned on the interpretation of the first limb of the definition of directed surveillance i.e. was the surveillance “for the purposes of a specific investigation or a specific operation?”

The Tribunal ruled that this was not the type of surveillance that RIPA was meant to regulate. It made the distinction between the ordinary functions and the core functions of a public authority:

“The specific core functions and the regulatory powers which go with them are identifiable as distinct from the ordinary functions of public authorities shared by all authorities, such as the employment of staff and the making of contracts. There is no real reason why the performance of the ordinary functions of a public authority should fall within the RIPA regime, which is concerned with the regulation of certain investigatory powers, not with the regulation of employees or of suppliers and service providers.”

The Tribunal also stated that it would not be right to apply RIPA to such surveillance for a number of reasons:

- 1) RIPA does not cover all public authorities, and there was no sense in police employee surveillance being conducted on a different legal footing than, for example, the Treasury, which does not have the same surveillance rights under RIPA.
- 2) The Tribunal has very restrictive rules about evidence, openness and rights of appeal. The effect of these would lead to unfairness for employees of RIPA authorities when challenging their employers’ surveillance as compared to those who were employed by non RIPA authorities.

This case suggests that, even where employee surveillance is being carried out on one of the grounds in section 28(3), the question has to be; is it for a core function linked to one of the authority’s regulatory functions? In the local authority context this would include, amongst others, trading standards, environmental health and licensing. If it is not being done for one of these purposes it will not be directed surveillance.

Human Rights Compliance

Covert surveillance done without a RIPA authorisation will not have the protection of RIPA (i.e. the defence in section 27). However it will still be able to be undertaken as long as it is done in accordance with the European Convention on Human Rights (ECHR) which is directly enforceable against public authorities pursuant to the Human Rights Act 1998. Article 8 of the ECHR states:

“Everyone has the right to respect for his private and family life his home and his correspondence.

There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the rights and freedoms of others.”

To satisfy Article 8, the covert surveillance must be both necessary and proportionate. In deciding whether it is, the same factors need to be considered as when authorising surveillance regulated by RIPA.

The flowchart at the end of this Appendix will also assist.

Data Protection Compliance

When doing covert surveillance of employees not regulated by RIPA, the Data Protection Act 1998 (DPA) will apply as personal information about living individuals will be being processed e.g. their movements, photographs etc.

The Information Commissioner has published a Data Protection Employment Practices Code of Practice (available at www.ico.gov.uk). Part 3 of this code covers all types of employee surveillance from video monitoring and vehicle tracking to email and internet surveillance. It gives guidance on how to do employee surveillance in a way which complies with the DPA. Whilst the code is not law, it can be taken into account by the Information Commissioner and the courts in deciding whether the DPA has been complied with.

The code states that employee monitoring should take place for a clear justified purpose and employees should be aware that it is taking place. With regard to covert surveillance it states that it will be rare for such monitoring to be justified. It should therefore only be used in exceptional circumstances e.g. prevention or detection of crime or serious malpractice.

One of the other main recommendations of the code is that senior management should normally authorise any covert monitoring of employees. They should satisfy themselves that there are grounds for suspecting criminal activity or equivalent malpractice. They should carry out an impact assessment and consider whether the surveillance is necessary and proportionate to what is sought to be achieved.

The code sets out other rules that local authorities (and others) need to consider when doing covert surveillance of employees:

- Prior to the investigation, clear rules must be set up limiting the disclosure and access to information obtained.
- The number of people involved in a covert monitoring exercise should be limited.
- The surveillance must be strictly targeted at obtaining evidence within a set time frame and it should not continue after the investigation is complete.
- If using audio or video equipment, this should not normally be used in places such as toilets or private offices.
- Information obtained through covert monitoring should only be used for the prevention or detection of criminal activity or serious malpractice.

- Other information collected in the course of monitoring should be disregarded and, where feasible, deleted unless it reveals information that no employer could reasonably be expected to ignore.

Non – RIPA Surveillance Form

In both the above cases it is important to have a proper audit trail through written records. In his annual report (2011/2012) the Chief Surveillance Commissioner (at paragraph 5.22) emphasises this:

“I occasionally encourage the use of similar authorisation mechanisms for activity which cannot be protected by the Acts (for example where covert techniques are used to identify a missing person when no crime is suspected). In these circumstances statutory definitions are met but none of the grounds specified in RIPA section 28(3) or RIP(S)A section 6(3), yet the human rights of the subject of surveillance must be considered. The authorisation process provides a useful audit of decisions and actions.”

Non-RIPA surveillance will only be carried out if it is authorised by Council officers who are of sufficient seniority i.e. Service Managers (or equivalent) and above, and who have been appropriately trained. The Non-RIPA Authorisation form at the end of this appendix will be used for such authorisation. As an added quality assurance check, the completed Non-RIPA Authorisation form must be provided to, and approved by the RIPA Coordinator, before any such surveillance takes place. This will ensure both consistency of approach and compliance with the relevant law and guidance so that this type of surveillance is only carried out where it is appropriate, necessary and proportionate to do so. The surveillance should cease as soon as the surveillance is no longer necessary and a Non-RIPA Cancellation form should be completed.

If the Council authorises a non-employee (e.g. an enquiry agent) to conduct covert surveillance then that person/company is acting as an agent for the Council. The Authorising Officer must ensure that the person/company is competent and they have provided a written acknowledgment that they are an agent of the Council and will comply with the authorisation

As with Directed Surveillance and CHIS, Non-RIPA authorisation and cancellation forms should be provided to the RIPA Coordinator who will maintain a central record of such authorisations/cancellations.

Flowchart - Authorising Non RIPA Surveillance

