

**SURREY COUNTY COUNCIL****CABINET****DATE: 25 SEPTEMBER 2018****REPORT OF: MRS DENISE TURNER-STEWART, CABINET MEMBER FOR COMMUNITY SERVICES****LEAD OFFICER: JASON RUSSELL, EXECUTIVE DIRECTOR FOR HIGHWAYS, TRANSPORT AND ENVIRONMENT****SUBJECT: REGULATION OF INVESTIGATORY POWERS ACT 2000 – UPDATED CORPORATE POLICY AND PROTOCOL****SUMMARY OF ISSUE:**

The Cabinet is asked to endorse an updated Corporate Policy and Protocol on the use of the Regulation of Investigatory Powers Act 2000 (RIPA) by council services. The proposed update includes a section on social media and the use of online selling platforms and includes a change to the Senior Responsible Officer (SRO) for RIPA. The proposed update also includes a section on how the policy complies with the General Data Protection Regulation and the Data Protection Act 2018.

**RECOMMENDATIONS:**

It is recommended that Cabinet endorse the proposed new Corporate Policy and Protocol on the application of the Regulation of Investigatory Powers Act 2000 to include the added section at paragraph 6 including the use of RIPA regarding social media and online selling platforms and the added section at paragraph 10 including how the policy complies with Data Protection legislation.

**REASONS FOR RECOMMENDATIONS:**

The inclusion of a section within the Corporate Policy and Protocol will provide an updated framework to ensure that the authority continues to comply fully with the requirements of RIPA. In line with the changing market place for goods and services, the way Trading Standards investigates legal compliance has also changed and often now involves the use of social media and online selling platforms.

The Corporate Policy and Protocol on the use of RIPA is a public document and the introduction of new data protection legislation and the requirement to be open and transparent in how we process personal data has led to the requirement to include a section within the Policy.

<b>DETAILS:</b>
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**Background:**

1. Local Authority Trading Standards Services conduct criminal investigations into a wide range of activities, bringing criminals to justice whilst protecting local communities and legitimate businesses.
2. The Human Rights Act (HRA) 1998 came into force in October 2000, enshrining the principle of the rights in respect of private and family life, and that there should be no interference by a public authority except in accordance with the law.
3. During criminal investigations it is sometimes necessary to interfere with an individual's right to privacy, for example, by carrying out surveillance activity covertly or by tracing the subscriber of a telephone number used in connection with a crime. The Regulation of Investigatory Powers Act 2000 (RIPA) allows such activities to continue and properly regulates such investigative activity.
4. The use of RIPA is included within existing Corporate Governance Policies and the Policy Custodian on behalf of the Council is Jason Russell, Executive Director for Highways, Transport and Environment. Jason Russell is the newly appointed SRO.

**What types of activities can be authorised?**

5. Three different types of activity can be authorised known as:
  - **Communication Data Checks** – used to obtain subscriber and billing details. This **does not** include the ability to “bug” or otherwise monitor calls and their content or open emails.
  - **Directed Surveillance** - covert targeted monitoring of an individual. Used in situations such as age restricted test purchase exercises. This **does not** include ‘intrusive surveillance’ i.e. an individual's private residence or vehicle.
  - **Covert Human Intelligence Sources (CHIS)**, using or tasking individuals who establish or maintain a relationship with another person for a covert purpose e.g. using a profile on social media for the purpose of posing as a potential customer to investigate the sale of illicit goods over the internet.
6. In all cases, after less intrusive approaches have been considered, the activity authorised must be necessary and proportionate to the nature of the criminal offence under investigation. The offences under investigation must also either;
  - meet the ‘serious crime threshold’ being offences that attract a maximum custodial sentence of six months (or more) or,
  - be those that relate to underage sales of alcohol or tobacco for directed surveillance only.
7. All applications for authorisations are initially scrutinised by the accredited RIPA Single Point of Contact (SPoC) or in-house Senior Legal Officers, then the

National Anti-Fraud Network (NAFN) in the case of communications data, before being passed to the Assistant Head or Head of Trading Standards to authorise. The authorised application is then presented in private to a Justice of the Peace by a Senior Legal Officer.

8. The Protection of Freedoms Act 2012 came into force on 31 October 2013. This requires RIPA authorisations to undergo judicial review with a magistrate approving a RIPA application only if satisfied that it:
  - Is necessary for the prevention and detection of crime or prevention of disorder.
  - Is proportionate in human rights terms to what it seeks to achieve.
  - Has been authorised by a person in the authority at the level designated in RIPA.
  - Meets any other restriction imposed by order (e.g. serious crime threshold).
  - In the case of a CHIS, sets out that the relevant procedures and supporting officers are in place to protect the welfare and safety of the CHIS.
9. All authorisations must be fully recorded and are subject to regular external oversight by the Investigatory Powers Commissioners Office. The Office looks at how public authorities make use of authorisations in relation to Directed Surveillance, Covert Human Intelligence Sources and Communications Data. It conducts audit visits, requires annual returns and reports the results to Parliament.

#### **What are we trying to achieve:**

10. The proposed policy and protocol (Annex 1) provides information on RIPA and how it must be applied across all relevant services. Adoption of the policy and protocol will:
  - Help ensure that all services are aware of and fully comply with RIPA requirements.
  - Comply with the requirements of the Protection of Freedoms Act 2012.
  - Maintain current reporting and scrutiny proposals which will ensure transparency and help to keep public confidence in the use of RIPA by the local authority.
  - Ensure that everyone involved in making RIPA applications, and all those authorising applications, are appropriately trained and fully competent to do so.
  - Clearly specify those persons / posts that can authorise activity.
11. The amendments ensure that the policy is brought up to date with particular emphasis on the growing use of social media as a sales platform and changes to Data Protection legislation.

12. Any applications made through this policy will still need to be placed before the court and a Justice of the Peace will only grant the applications if they are satisfied that individual applications are legal, necessary and proportionate.

### External Oversight and Record Keeping

13. RIPA requires the local authority to keep a central record of all authorisations. As the primary user of the legislation the central record is maintained and retained by the Trading Standards service. All authorisations are also subject to regular external inspection to ensure compliance with requirements of RIPA.
14. During 2017/18 one RIPA authorisation was granted. For comparison purposes the figures for three previous years are also given. As you can see, the usage of RIPA is relatively low reflecting the Service's move to a genuinely intelligence led service and an adherence to the principles enshrined in the HRA of using RIPA only where absolutely necessary.

	2014/15	2015/16	2016/17	2017/18
<b>Communications Data Authorisations</b>	0	1	3	1
<b>Directed Surveillance Authorisations</b>	3	5	0	0
<b>CHIS Authorisations</b>	0	0	0	0

### Additional Scrutiny

15. The Environment Select Committee (previously the Communities Select Committee) have a role in the oversight and scrutiny of the process and use of authorisations made under RIPA. As previously the draft Policy and Protocol includes a requirement for the Head of Trading Standards, as corporate RIPA monitoring officer, to produce the annual report to the Environment Select Committee on all activities undertaken under the Act. The report also includes the results of any external inspection in the year. The report would also be published, with a view to ensuring openness, transparency and enhancing public confidence in the application of RIPA by the local authority.
16. The proposed changes highlighted within this report were put before the Select Committee on the 7 November 2017 where the changes were endorsed and agreed to be proportionate and necessary.

### Are there choices?

17. There is no statutory requirement to maintain a corporate policy but feedback from the most recent inspections strongly recommends that a corporate policy is in place. However the authority should comply with the requirements of the Protection of Freedoms Act 2012.
18. The updated policy was not brought immediately to Cabinet for endorsement as further legislative guidance had been expected. In practice this has not yet been forthcoming and rather than add further delay, the updated policy has now been brought forward for approval.

## What are the implications of not adopting a corporate policy and protocol.

19. The implications would be:

- Greater possibility of some services failing to be fully aware of their responsibilities under RIPA and consequently an increased risk of legal challenge.
- Increased likelihood that future external inspections would be very critical of the authority for failing to make improvements identified in earlier inspections, which could lead to an increased reputational risk.
- The benefits of the reporting and scrutiny activities introduced by the policy and protocol would not be realised.

## What has changed?

20. Within the existing corporate RIPA policy at section 12, a section has been added to show how Services should be using and considering RIPA in relation to cases involving Social Media and Online Selling platforms to ensure consistency in the use of this legislation across Council services.

21. Within the existing corporate RIPA policy at section 16, a section has been added to show how the policy complies with Data Protection legislation.

### **CONSULTATION:**

22. The RIPA Corporate Policy and Protocol last received approval from Cabinet on 26 September 2013.

23. The proposed changes were put before the Communities Select Committee on 7 November 2017.

### **RISK MANAGEMENT AND IMPLICATIONS:**

24. The adoption and application of this policy and protocol will help ensure that the local authority continues to act correctly when carrying out criminal investigations and reduce the risk of any actions in relation to allegations of breaches of the Human Rights Act. It will also minimise the potential reputational risk from any claims of misuse of investigatory powers.

### **Financial and Value for Money Implications**

25. Application of this policy and protocol will minimise any risk of claims being made against the local authority alleging Human Rights breaches.

26. The revised policy will be administered by Trading Standards within existing resources and budgets. The presentation of each authorisation to the Justice of the Peace will be carried out by existing Trading Standards staff and no fee is payable.

### **Section 151 Officer Commentary**

27. This is an update of an existing policy which clarifies the use of RIPA. The S151 Officer (Chief Finance Officer) confirms that all material, financial and business issues and risks have been considered / addressed.

### **Legal Implications – Monitoring Officer**

28. The legal implications and context to the proposals are as set out in the body of the report. The adoption of a RIPA policy by the Council is discretionary, although it is strongly recommended. The RIPA Policy and Protocol sets out how the Council will ensure compliance with the requirements of the legislation and the protections it affords to individuals against intrusive investigation. The requirements of the policy, if approved, will be brought to the attention of all the Council's services. Cabinet will note that the final decision on the Council's ability to utilise RIPA rests with a justice of the peace (magistrate) in any given matter.

### **Equalities and Diversity**

29. Many rogue traders deliberately target elderly and vulnerable people. The investigative techniques covered by RIPA are often used in these crimes to help identify and locate such criminals. Therefore the Trading Standards Service can continue to effectively protect the most vulnerable people in Surrey's communities.

30. Any decision to use techniques covered by RIPA are made against standard criteria and are not influenced by ethnicity, race or other factors. However, any relevant equalities issues are taken into account on a case by case basis, and the process also requires that consideration be given to any local community influences or sensitivities.

### **WHAT HAPPENS NEXT:**

The new policy and protocol will be introduced and all services made aware of the requirements.

An annual report produced for consideration by the Environment Select Committee.

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#### **Consulted:**

The report on the proposed changes went before the Communities Select Committee in November 2017.

The RIPA Corporate Policy and Protocol last received approval from Cabinet on 23 September 2013.

#### **Annexes:**

Annex 1: Corporate Policy and Protocol on the use of the Regulation of Investigatory Powers Act 2000 (RIPA)

#### **Sources/background papers:**

- The Protection of Freedoms Act 2012
- Regulation of Investigatory Powers Act 2000