

ITEM No ...10.....

REPORT TO: POLICY AND RESOURCES COMMITTEE - 31 OCTOBER 2016

REPORT ON: REGULATION OF INVESTIGATORY POWERS (SCOTLAND) ACT 2000 - OFFICE OF SURVEILLANCE COMMISSIONERS REPORT 2016

REPORT BY: EXECUTIVE DIRECTOR OF CORPORATE SERVICES

REPORT NO: 350-2016

1.0 PURPOSE OF REPORT

- 1.1 To advise the Committee of the outcome of an inspection by the Office of Surveillance Commissioners carried out in June and the recommendations in the report dated 8th July, 2016.

2.0 RECOMMENDATIONS

The Committee is recommended to agree:-

- 2.1 To comply with all six recommendations of the Surveillance Commissioners Inspection Report as outlined at paragraph 4.10 of this report.
- 2.2 To review the practice within the Council of the use of Facebook and other social media sites to ensure their compliance with the Human Rights Act 1998.

3.0 FINANCIAL IMPLICATIONS

None.

4.0 BACKGROUND

- 4.1 Since 2nd October, 2000, the Human Rights Act 1998 has made it unlawful for the Council to act in any way which is incompatible with the Convention Rights found in the European Convention on Human Rights. One of these rights is the right set out in Article 8.1 of the Convention which is "respect for private and family life, home and correspondence".
- 4.2 A number of services within the Council occasionally require to carry out covert surveillance (i.e. persons are placed under observation without them being aware of it). These activities occur for example within the Trading Standards service, Benefit Fraud service and, in particular, in the Council's Anti-Social Behaviour Team. The details of the Council's use of covert surveillance are contained within Report No 210-2016, (Policy and Resources Committee of 13th June 2016 Article III refers).
- 4.3 Surveillance can, by its very nature, impact on the right to privacy of those being observed. In carrying out surveillance the Council therefore needs to satisfy tests found in Article 8 under which it is legitimate to interfere with privacy rights. The first test is that the interference must be explicitly authorised by law.
- 4.4 The Regulation of Investigatory Powers (Scotland) Act 2000 (RIPSA) created a legal framework for the conduct of surveillance and related use of "covert human intelligence sources" (i.e. undercover agents or informants). The Council has, however, never used covert human intelligence sources and the Council's practice is to use directed surveillance which is a much less intrusive activity.

- 4.5 The powers to conduct directed surveillance and use covert human intelligence sources contained in the Regulation of Investigatory Powers (Scotland) Act 2000 have been utilised by a number of Council services in order to assist and help, in particular those suffering from anti-social behaviour.
- 4.6 Whenever considering directed surveillance, the Council has to balance whether the action is both necessary and proportionate. The possible interference in someone's private life has to be necessary in order to obtain the benefit of the supply of information. If there are other means of obtaining the information without directed surveillance then it would not be appropriate to carry out directed surveillance. Similarly the Council has to balance as to whether the action (in terms of the risk of interfering in someone's privacy) is proportionate to the benefit that is achieved by obtaining the information through directed surveillance. In every case, a Senior Officer of the Council considers these issues and authorises the directed surveillance.
- 4.7 The Council undergoes regular inspections from the Office of Surveillance Commissioners. The most recent inspection took place in June of this year.
- 4.8 That inspection report detailed that the Council was a "prolific" user of its powers to authorise directed surveillance. However, the report also indicated that the use of RIPSAs by the Council was "all entirely appropriate". However, the report did have six recommendations to ensure in the report author's view, strong adherence to the Human Rights Act, with particular reference to what is known as the "five W's". The five W's are what, when, why, who and how of any surveillance proposal. They are meant to be a guide to Authorising Officers as to them ensuring that surveillance is considered in detail and recorded accurately in order that an uninformed inspector can see clearly the Authorising Officer's logic in deciding to allow the directed surveillance. This has benefits when it comes to inspections but would also have benefits if the material was ever required to be used within a court case or if the use of directed surveillance was ever legally challenged.
- 4.9 The protection of its tenants and its population from anti-social behaviour is an important function and indeed an obligation of the Council and it is almost always for that function that these RIPSAs activities are taking place.
- 4.10 The recommendations were as follows :-

Recommendation 1

That Dundee City Council reconsider the recent decision of the appointment of its RIPSAs Senior Responsible Officer.

Comment: The inspection which took place was by an Assistant Commissioner of the Surveillance Commissioners office based in London. The term "Senior Responsible Officer" is not strictly speaking statutorily required by virtue of the Regulation of Investigatory Powers (Scotland) Act (although it is required by the English equivalent Act, the Regulation of Investigatory Powers Act 2000 (RIPA)). Nonetheless, in the recent Code of Practice it was stated that it was considered good practice that a Senior Responsible Officer should be appointed by local authorities in Scotland. As a result, the Legal Manager, who has been responsible for the operation of RIPSAs for the last four years, was formally appointed the Senior Responsible Officer. However, the Inspector has stated that the Senior Responsible Officer should be part of the Council's Corporate Leadership Team. That being the case, the recommendation is to substitute the Head of Democratic and Legal Services for the Legal Manager in compliance with recommendation 1. The Legal Manager will deputise for the Head of Democratic and Legal Services in his absence.

Recommendation 2

That a list of designated Authorising Officers be published and annexed to the RIPSAs Guidance Note.

Comment: This will be put in place shortly.

Recommendation 3

That the guidance will be further revised.

Comment: The guidance note was largely commended by the Inspector and the updates will be carried out. Re social networking, once discussions have taken place the guidance note will be extended.

Recommendation 4

That in any future authorisations improved forms of authorisation and cancellation are used to fully comply with OSC procedure and guidance.

Comment: This relates to the use by the Council of a Scottish Government inspired form whereas the Surveillance Commissioners prefer the Home Office forms as they emphasise more the five W's. This will be implemented

Recommendation 5

That Dundee City Council reconsider the issue of RIPSA authorisations in noise nuisance investigations.

Comment: There has been a meeting with the Neighbourhood Services and it has been agreed that the use of noise equipment shall be the subject of warning letters and shall thereafter no longer be considered a covert operation but an overt operation in most cases. As a result, the number of authorisations should decrease. Consideration should also be given as to whether, in the case of cameras, operations can be moved from covert to overt operations. Finally, in the case of test purchasing, consideration should also be given as to whether this is carried out in an overt manner rather than a covert manner, although it should be noted that the Inspector's Report commended our present practice in this area.

Recommendation 6

That steps be taken to raise RIPSA awareness in Social Services Departments so as to reduce the risk of unauthorised covert surveillance taking place there.

Comment: The guidance will be reviewed as stated previously and issued to all Services regarding the accessing of Facebook and other equivalent so called "public facing" social media.

5.0 POLICY IMPLICATIONS

5.1 This report has been screened for any policy implications in respect of sustainable development, strategic environmental assessment, anti-poverty, equality impact assessment and risk management. There are no major issues.

6.0 CONSULTATION

6.1 The Chief Executive and the Head of Democratic and Legal Services have been consulted in the preparation of this report.

7.0 BACKGROUND PAPERS

7.1 Office of Surveillance Commissioners Inspection Report dated 29th June, 2016.

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20th October 2016