

**ITEM No ...4.....**

**REPORT TO:** COMMUNITY SAFETY AND PUBLIC PROTECTION COMMITTEE -  
22ND APRIL, 2019

**REPORT ON:** USE OF REGULATION OF INVESTIGATORY POWERS (SCOTLAND) ACT  
2000 AND REGULATION OF INVESTIGATORY POWERS ACT 2000

**REPORT BY:** EXECUTIVE DIRECTOR OF CORPORATE SERVICES

**REPORT NO:** 161-2019

**1.0 PURPOSE OF REPORT**

- 1.1 To advise the Committee of the use made by the Council of the powers under the Regulation of Investigatory Powers (Scotland) Act 2000 and the Regulation of Investigatory Powers Act 2000 from 1st April, 2018 to 31st March, 2019.
- 1.2 To report on the Investigatory Powers Commissioner's Office Inspection Report on Dundee City Council and to make recommendations on an action plan to address the recommendations in the Report.

**2.0 RECOMMENDATIONS**

- 2.1 The Committee is asked to note the use which the Council has made of powers contained in the Regulation of Investigatory Powers (Scotland) Act 2000 and in related powers contained in the Regulation of Investigatory Powers Act 2000 between 1st April, 2018 and 31st March, 2019.
- 2.2 To approve the Council's continued proportionate use of the powers, where necessary, in the areas of crime prevention and detection or preventing disorder, in the interests of public safety and for the purpose of protecting public health. In particular, the Council is asked to agree to continue to use the powers to prevent and detect anti-social behaviour.
- 2.3 To note the Investigatory Power Commissioner's Office Inspection Report on Dundee City Council (Appendix 2) and to agree the proposed action plan to address the recommendations in the Report.

**3.0 FINANCIAL IMPLICATIONS**

- 3.1 None.

**4.0 BACKGROUND**

- 4.1 Since 2 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 to "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 where persons are placed under observation without them being aware of it. These activities occur, in particular in the Council's Anti-Social Behaviour Team. A summary of the Council's directed surveillance activities are appended to this report for information. (Appendix 1)
- 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 the 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", that is 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 Council also has limited powers under similar UK legislation - the Regulation of Investigatory Powers Act 2000 - to access certain telecommunications data. These powers have been very rarely used by the Council and have not been used at all in the past year.
- 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 whether the action in terms of the risk of interfering in someone's privacy is proportionate with the benefit that is achieved with 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 receives regular inspections from Investigatory Powers Commissioner's Office (formerly the Office of the Surveillance Commissioner) and was most recently inspected on 29th January, 2019.
- 4.8 A copy of the Report is appended (Appendix 2).
- 4.9 The Recommendations can be found on Pages 3 and 4 and the Observations on Pages 4 and 5. The Head of Democratic and Legal Services as Senior Responsible Officer (SRO) has discussed those with relevant Officers and the proposed Action Plan is as follows:-

<u>Number</u>	<u>Recommendation</u>	<u>Action</u>
R1	It is recommended that the council comply with the requirement to ensure that elected representatives have the opportunity to review the council's use of RIP(S)A and set policy at least once a year and to provide suitable awareness training to elected members.	SRO to report in April of each year to enable DCC to review the use of RIPSAs and set policy. The proposed policy is appended (Appendix 3)  SRO to offer awareness training to Elected Members prior to annual Report being considered.
R2	The SRO must ensure that both applicants and authorising officers properly describe why the conduct to be authorised is both necessary and proportionate in a manner that will ensure compliance with the legislation and codes of practice	All applicants and authorising officers will be reminded by the SRO of the importance of and how to comply with the legislation and codes of practice and the SRO will provide a named contact in the event that legal advice is required in this regard.
R3	The council should cease granting directed surveillance authorisations for nuisance noise-monitoring operations where the equipment has been properly calibrated to only record excessive noise levels.	The Executive Director of Neighbourhood Services has been advised accordingly.
R4	The Chief Executive must understand when they must act as an authorising officer and must be competent to do so.	The Chief Executive has confirmed that he is aware of when he must act as an authorising officer and that he is competent to do so. The SRO will advise the Chief Executive on an ongoing basis of any changes to the legislation or codes of practice of which he should be aware.

R5	The council should consider further dedicated training for authorising officers focusing in particular how they should record their considerations of necessity and proportionality.	The SRO will continue to offer training on an annual basis (or more frequently if required) for applicants and authorising officers focussing on these issues.
O1	The council should bear in mind the whole range of statutory grounds available when determining the necessity of directed surveillance.	The SRO will remind applicants and authorising officers of this.
O2	The Council should consider what policy and procedural arrangements may be necessary in relation to RIP(S)A and the CCTV systems operated from its new Safety and Alarm Response Centre, particularly in relation to third-party access and use by Police Scotland.	The SRO will liaise with the Executive Director of Neighbourhood Services on such policies and procedural arrangements as necessary when the Safety and Alarm Response Centre becomes operational.
O3	The review of authorisations by legal officers is good practice and commendable. Consideration should also be given to legal review of applications before their submission to the authorising officer.	All applicants will be advised by the SRO that he will be happy to arrange for this to be done on request at any time and he will provide a named contact for this purpose.
O4	The council should consider instituting a RIP(S)A forum.	All applicants and authorising officers will be encouraged when emailing queries etc to the named RIPSAs contact in Legal Services to copy all other applicants and authorising officers in (without disclosing personal data) so that an online RIPSAs forum is created.

## 5.0 POLICY IMPLICATIONS

This report has been subject to an assessment of any impacts on Equality and Diversity, Fairness and Poverty, Environment and Corporate Risk. There are no major issues.

## 6.0 CONSULTATIONS

The Council Management Team have been consulted in the preparation of this report.

## 7.0 BACKGROUND PAPERS

None.

Gregory Colgan  
Executive Director of Corporate Services

DATE: 3rd April, 2019



**AUTHORISATIONS FOR DIRECTED SURVEILLANCE FROM 1ST APRIL, 2018 TO 31ST MARCH, 2019**

Excessive Noise	8
Vandalism/Harassment/Verbal Abuse	4
Alleged Drug Dealing	4
Test Purchase of Cigarettes	3
<b>TOTAL</b>	<b>19</b>



OFFICIAL - SENSITIVE

# IPCO

Investigatory Powers  
Commissioner's Office

PO Box 29105, London  
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Mr David Martin  
Chief Executive  
Dundee City Council  
City Chambers  
21 City Square  
Dundee  
DD1 3BY

15 February 2019

## Inspection of Dundee City Council

Dear Mr Martin,

On 29<sup>th</sup> January 2019 one of my Inspectors, Brendan Hughes, examined the arrangements made by Dundee City Council to secure compliance with the legislative provisions which govern the council's use of powers under the Investigatory Powers Act (2016), the Regulation of Investigatory Powers Act (2000) and the Regulation of Investigatory Powers (Scotland) Act (2000). I have attached the report that he compiled following the inspection, which I endorse.

As described by my inspector in his conclusion, this has been an "adequate" inspection that demonstrates that although Dundee City Council has made good progress since the last inspection, there are areas of concern that must be addressed if full compliance is to be ensured. Of particular importance is the decision by authorising officers on the fundamental questions of necessity and proportionality and their written record of how they approached these issues. Weaknesses in this context undermine the integrity of the entire authorisation process.

Mr Hughes makes five recommendations in his report. I would be grateful if you could acknowledge these and respond to me within two months of the receipt of this letter with details of an action plan to address these. He has also advanced a number of observations that I am confident will assist you to improve further, to which I am sure you will give careful consideration.

I trust that this Report will not discourage your staff from utilising these highly important investigatory powers and I hope that you found the inspection process to be helpful and constructive. I look forward to receiving your response to the inspection findings.

In the meantime, please do not hesitate to contact my office should you require any further assistance.

Yours sincerely,



**The Rt Hon. Lord Justice Fulford**  
The Investigatory Powers Commissioner

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## Inspection Report – Dundee City Council

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## 1 Introduction

- 1.1 This inspection has been conducted to assess Dundee City Council's (DCC) level of compliance with the Regulation of Investigatory Powers (Scotland) Act 2000 (RIP(S)A), the Regulation of Investigatory Powers Act 2000 (RIPA) and all associated Codes of Practice in respect of the Council's use of covert surveillance, covert human intelligence sources (CHIS) and requests for communications data (CD).
- 1.2 DCC is one of 32 unitary local authorities in Scotland. It became a single-tier council area in 1996 following the Local Government etc. (Scotland) Act 1994. Dundee is the fourth largest city in Scotland, although the council area is ranked 14<sup>th</sup> by population and is the smallest of the Scottish council areas by geographical size. At the time of the inspection the council was led by a joint SNP-Independent administration with no one party in overall control. The city has seen significant investment in regeneration of its waterfront in recent years but continues to experience notable issues of drug abuse and anti-social behaviour.
- 1.3 The inspection took place on 29<sup>h</sup> January 2019 and examined the period from the last inspection by the OSC, which was conducted on the 29<sup>th</sup> of June 2016. The inspection was conducted by IPCO Inspector Brendan Hughes.
- 1.4 This report should be addressed to:

Mr. David Martin,  
Chief Executive,  
Dundee City Council,  
City Chambers,  
21 City Square, Dundee,  
DD1 3BY

## 2 Inspection methodology

- 2.1 Prior to the inspection, key policy documents were made available. During the inspection interviews were held with a small number of staff including the Senior Responsible Officer (SRO – Roger Mennie, Head of Legal and Risk and the council Monitoring Officer), the RIP(S)A Co-ordinator (Mary Morrissey), and a single Authorising Officer (AO - David Simpson, Head of Housing and Communities). The Chief Executive was unavailable due to other commitments. Regrettably, no operational level staff were available for interview.
- 2.2 Statistics relating to what was viewed at this inspection are captured in Table 1 below. Please see Section 7 for a full list of which records were viewed during the inspection.

Inspection period: 10/6/16-10/11/19						
Dundee City Council	Total authorisations in current inspection period	Total authorisations in previous inspection period	Total records viewed at Inspection	Of this total, number of urgent oral records viewed	Of this total, number of major modifications viewed	Of this total, number of minor modifications viewed
Directed Surveillance	51	116	11	N/A	N/A	N/A

CHIS (crime)	0	0	N/A	N/A	N/A	N/A
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Table 1. Key Statistics

### 3 Key findings

#### 3.1 Recommendations

3.1.1 The findings of this inspection were adequate, with one critical area where compliance must be improved. Five recommendations have been made.

3.1.2 The key recommendations arising from the inspection are listed in Table 2 below.

Number	Reference	In relation to	Recommendation	Recommendation type
R1	5.9	Policy	It is recommended that the council comply with the requirement to ensure that elected representatives have the opportunity to review the council's use of RIP(S)A and set policy at least once a year and to provide suitable awareness training to elected members.	Core recommendation - improvements must be made
R2	5.23	Directed Surveillance	The SRO must ensure that both applicants and authorising officers properly describe why the conduct to be authorised is both necessary and proportionate in a manner that will ensure compliance with the legislation and codes of practice.	Critical recommendation - affects compliance status if not addressed
R3	5.26	Directed Surveillance – noise monitoring	The council should cease granting directed surveillance authorisations for nuisance noise-monitoring operations where the equipment has been properly calibrated to only record excessive noise levels.	Core recommendation - improvements must be made

<b>R4</b>	<b>5.38</b>	<b>Policy and Procedure</b>	The Chief Executive must understand when they must act as an authorising officer and must be competent to do so.	Recommendation - observed potential for improvements
<b>R5</b>	<b>5.41</b>	<b>Related Training</b>	The council should consider further dedicated training for authorising officers focusing in particular how they should record their considerations of necessity and proportionality.	Recommendation - observed potential for improvements

**Table 2. Key recommendations resulting from inspection**

### 3.2 Observations

3.2.1 The key observations arising from the inspection are listed in Table 3 below.

<b>Number</b>	<b>Reference</b>	<b>In relation to</b>	<b>Recommendation</b>	<b>Observation type</b>
<b>O1</b>	<b>5.15</b>	<b>Directed Surveillance</b>	The council should bear in mind the whole range of statutory grounds available when determining the necessity of directed surveillance.	Comment – observation where practice could be improved
<b>O2</b>	<b>5.29</b>	<b>Directed Surveillance - CCTV</b>	The council should consider what policy and procedural arrangements may be necessary in relation to RIP(S)A and the CCTV systems operated from its new Safety and Alarm Response Centre, particularly in relation to third-party access and use by Police Scotland.	Comment – observation where practice could be improved
<b>O3</b>	<b>5.36</b>	<b>Policy and Procedure</b>	The review of authorisations by legal officers is good practice and commendable. Consideration should also be given to legal review of applications before their submission to the authorising officer.	Comment – observation where practice could be improved

O4	5.43	<b>Related Training</b>	The council should consider instituting a RIP(S)A forum.	Comment – observation where practice could be improved
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**Table 3. Key observations resulting from inspection**

## 4 Previous recommendations

4.1 The following progress was noted on recommendations made during the previous inspection:

4.2 *Recommendation 1 - That DCC reconsider the recent designation of its RIP(S)A Senior Responsible Officer.*

4.3 **Discharged.** After the last inspection, DCC reviewed its appointment of the SRO and changed it to Mr Roger Mennie, who is part of the Council's executive leadership team.

4.4 *Recommendation 2 - That the list of designated AOs be published and annexed to the RIP(S)A Guidance Note.*

4.5 **Discharged.** A list of designated authorising officers has been added to the RIP(S)A Guidance Note.

4.6 *Recommendation 3 - That the Guidance Note be further revised [to:*

*– Amend an incorrect statement that prior approval of a Surveillance Commissioner be sought in relation to confidential material;*

*– Amend guidance on the use of noise monitoring equipment;*

*– Provide clearer guidance about who is a CHIS;*

*– Include guidance on digital investigation using social media.]*

4.7 **Discharged.** The recommended changes to the Guidance Note had been made. However, a further new recommendation is made in relation to the Dundee City Council RIP(S)A policy. This is discussed in the 'Policy and Procedure' section below.

4.8 *Recommendation 4 - That in any future authorisations, improved forms of authorisation and cancellation are used so as to comply fully with OSC Procedures & Guidance.*

**Discharged.** New and improved forms had been designed and introduced. Although discharged, it appeared to take an unsatisfactorily long time to do so - the first evidence of these forms actually being used by applicants and AOs was not until late November 2018. This was after notification had been given to DCC by IPCO of this inspection and inevitably created the impression that the recommendation was only properly implemented with a fresh inspection pending. When asked, the SRO indicated that the forms had been introduced in the early part of 2018, but there was no real explanation

given why they were then not in use until late 2018 and indeed why the change had not been made in 2016. If the forms had been changed promptly after the last inspection then it is likely that the most serious compliance issue noted in this inspection, which is subject to a new recommendation, may have been avoided.

- 4.9 *Recommendation 5 - That DCC reconsider the issue of RIP(S)A authorisation in noise nuisance investigation.*
- 4.10 **Extant.** Aspects of this recommendation had been acted on, with DCC no longer seeking RIP(S)A authorisation for all deployments of noise monitoring cases, but that they were still doing so in cases where the target of the surveillance was not given prior notice that they were to be the subject of noise monitoring where Directed Surveillance Authorisations (DSAs) were still be granted. This is contrary to the advice set out in 3.37 of the Scottish Government's Code of Practice on Directed Surveillance and Property Interference. This is discussed in more detail in sections 5.24-5.26 below and a new recommendation is made.
- 4.11 *Recommendation 6 - That steps be taken to raise RIP(S)A awareness in Social Services Departments so as to reduce the risk of unauthorised covert surveillance taking place there.*
- 4.12 **Discharged.** DCC has entered into a shared arrangement towards social care with the local health board through a social health and care partnership. The result of this is that DCC's social work is focused on child social services. This has effectively reduced the number of DCC staff who may ever need to consider applying for or using RIP(S)A powers. These members of the Social Services Department had attended the most recent RIP(S)A awareness/training session given to a cross section of DCC staff involved in the RIP(S)A process. Furthermore, internal one-on-one training was given to the manager of the social work department.

## 5 Inspection findings

### ***Errors***

- 5.1 No errors have been reported during the period under inspection and none were found during the inspection.

### ***Confidential Information***

- 5.2 There has been no case where confidential information has been obtained.

### ***Journalistic Material***

- 5.3 No journalistic material was sought or obtained.

### ***Legally Privileged Material***

- 5.4 No Legally Privileged Material was sought or obtained.

### ***Informing Elected Representatives***

- 5.5 The Council has not complied with the requirement to allow elected members to set RIP(S)A policy. Section 4.43 of the RIP(S)A Surveillance and Property Interference Code of Practice sets out the requirement:

*“In addition, elected members of a local authority should review the authority’s use of RIP(S)A and set the policy at least once a year. They should also consider internal reports on use of RIP(S)A on at least a quarterly basis to ensure that it is being used consistently with the local authority’s policy and that the policy remains fit for purpose. They should not, however, be involved in making decisions on specific authorisations. In regard to the matters mentioned in this paragraph, local authorities may wish to consider ensuring that their elected members have undergone sufficient training in order to fulfil these requirements.”*

- 5.6 As a consistent user of RIP(S)A powers, the Council should give at least an annual report to the relevant committee of the council, with the number of authorisations sought and granted and a description as to what statutory function each proposed use of the power related to, the duration of any authorisation and if the conduct authorised met its aims. Operational details (names, places, etc) should not be provided. This could easily be synchronised with the annual statistical return DCC is required to make to IPCO. IPCO asks for these statistical returns on the basis of calendar-years, which suggests a report to committee should fall in January or February. The Code of Practice does suggest these reports should be at least quarterly. In most cases this is unnecessary and impracticable, but given the number of authorisations DCC grants, the requirement is more relevant and it may wish to provide a more frequent update on usage to elected members.
- 5.7 Allowing elected members to set policy faces a more structural challenge – the present RIP(S)A Guidance Note, which is in effect the Council’s policy document on RIP(S)A, is an internal document and not public facing. To comply, it will be necessary for DCC



to develop a suitable public-facing RIP(S)A policy document that can be endorsed by elected members. This could be based on the Guidance Note, but does not necessarily need to set out internal operational processes in detail.

- 5.8 DCC should also consider giving awareness training to elected members similar, but in perhaps less operational detail, to that given to council officers.

- 5.9 **Recommendation 1 (R1). It is recommended that the council comply with the requirement to ensure that elected representatives have the opportunity to review the council's use of RIP(S)A and set policy at least once a year and to provide suitable awareness training to elected members.**

### ***Centrally Retrievable Register of Authorisations***

- 5.10 An extract of the Centrally Retrievable Register of Authorisations was examined and met the required standard. Unusually, the register is maintained in the form of an Access database. To obtain an overview of authorisations, a report from the database must be produced (which was done during the inspection). Whilst there is nothing to say that the register should not be maintained as a database, it is a more complex method than that adopted by most Scottish local authorities who usually simply have the register as an Excel spreadsheet, which (if structured and maintained correctly) provides a ready overview of what authorisations have been made and when reviews, renewals or cancellations are due or were made. This can help mitigate the risk of unauthorised activity carrying on after an authorisation has expired and can generally help the SRO centrally manage the caseload of authorisations. That said, there was no evidence of reviews having been missed and cancellations were being made promptly, suggesting that the current method of maintaining the register is effective.
- 5.11 As already noted, improved versions of the standard Scottish Government RIP(S)A forms had been introduced and provided clearer direction as to what considerations authorising officers should be making. It would be helpful if the Scottish Government could provide better forms for standard use which would help avoid public authorities having to apply local fixes in a piecemeal manner.

### ***Directed Surveillance***

- 5.12 51 applications for Directed Surveillance had been made, with 49 granted and two rejected during the period under inspection. Eleven authorisations were inspected and were found to relate to a range of conduct including the deployment of covert CCTV cameras to monitor anti-social behaviour including drug-dealing in common areas (corridors, stairwells) of council owned blocks of flats (this was the most common type of authorisation); the covert deployment of noise monitoring equipment; and tobacco test purchasing operations by council trading standards officers.
- 5.13 This is a significant reduction from the previous period of inspection, which was largely accounted for by the Council no longer granting DSAs for 'overt' noise monitoring operations. Even with this reduction however, the number of DSAs is possibly the highest by a local authority in Scotland at this time. It was emphasised in the inspection that there is no right or wrong number of authorisations and that 'league table' comparisons were meaningless as each authorisation had to be considered entirely on its own merits and circumstances. What mattered was that the Council had access

to the powers when necessary and could use them in a compliant manner. It should be recognised though that higher numbers of authorisations places greater demands on the authorising officers and maintaining the overall integrity of the Council's RIP(S)A processes and safeguards.

- 5.14 One thing that the number and types of DSA does serve to underscore is that the use of the powers is always particular to the local circumstances: Dundee has a high percentage of council-owned social housing. Dealing with persistent serious anti-social behaviour in this environment requires particular tactics, which Dundee has been able to effectively refine over the years. Much of this relates to drug-dealing and use activity, which, as previous OSC inspectors have noted, would often be a matter for police investigation, yet it does fall within the scope of the core functions of the council. One point that the SRO and AOs should consider is that there may be more than one statutory basis for deeming the authorisation 'necessary'. Many of the applications examined spoke in detail about the presence of large numbers of discarded needles and other materials that would present a threat to public health as a result of the activity under investigation. This could also form the basis of a valid authorisation – more than one statutory basis can be cited.

**5.15 Observation 1 (O1): The council should bear in mind the full range of statutory grounds available when determining the necessity of a directed surveillance.**

- 5.16 In general, the applications were well constructed, although one common issue was that when setting out the necessity, there was no description of the actual offence in question which the Council had a statutory responsibility to investigate. This makes it hard for the authorising officer to determine the potential gravity of the offence – a key component of their proportionality considerations.
- 5.17 In one application (URN 892), the applicant was careful to make clear that the planned conduct involved the use of a CCTV camera with an audio capability also. It was a well-stated application with a good description of what collateral intrusion may occur and how the applicant proposed to mitigate it.
- 5.18 The authorisations were less well constructed and often did not fully meet the standard required to comply with the legislation. Of particular concern was the lack of detailed discussion as to why the conduct authorised was considered proportionate; and as with the applications, there was often no discussion of what specific offence or core function of the Council was relevant when determining necessity. Few of the authorisations could be shown to meet the necessity test in sufficient detail – it is not adequate to simply state that the conduct is necessary for the prevention and detection of crime – there must also be a discussion of what crime and the gravity of the offences and why this makes the intrusion proportionate. Many of the entries were perfunctory and followed fairly standard wording. This made it hard to see how the AO had engaged with the substance of the application or to demonstrate that it was indeed necessary and proportionate.
- 5.19 One exception to this was an authorisation for a tobacco test purchase operation (URN 935). Here the gravity of the offence was well set out in the necessity discussion. However, it did have a weakness in the proportionality discussion, as the applicant did not explain fully what the intelligence case was for determining the selection of the businesses targeted in the operation. It was clarified during the inspection that there had indeed been an earlier test purchase under 'Challenge 25' and that those premises who failed this test were then selected for test purchasing. This detail should have been set out by the applicant as it shows both that the surveillance is targeted (and not

random) and contributes an important point to the discussion as to why it would be proportionate.

- 5.20 The key issue of AOs insufficiently recording their consideration of necessity and proportionality was discussed with the SRO and RIP(S)A co-ordinator who noted that the issue arose in relation to one AO in particular (a point broadly confirmed by the inspection) and that they had already registered their concern with the AO following internal review. This is a key compliance matter which the SRO should keep under review and determine whether further training is required for any individual Authorising Officer, or whether others are better situated to fulfil the role.
- 5.21 Also, on the basis of the selection of authorisations inspected, the issue was not restricted to a single AO's authorisations and in general the standard was not that which was required. It is critical that the SRO ensure that AOs understand that they must properly state why the authorisation is necessary and proportionate and that they cannot simply rely on what has been said by the applicant – if needs be, they must restate the same points made by the applicant, amending them where necessary. It is not always an easy task, and there is certainly a balance to be struck between clearly setting out necessity and proportionality in their own words and covering the detailed points perhaps already made by the applicant. The re-designed forms will help with this by prompting the AO to consider the 'five W's'. It is unfortunate that they were not available to AOs at an earlier point.
- 5.22 To be clear, it is not that any of the directed surveillance authorisations were unjustified or would have failed to meet an authorisation threshold given the facts of the matter, it is that the records do not properly reflect all these facts. This is unfortunate, given the clear knowledge of the one authorising officer who was interviewed during the inspection. They displayed a good level of knowledge and understanding of the role, RIP(S)A requirements and clearly took its responsibilities seriously.

- 5.23 **Recommendation 2 (R2): The SRO must ensure that both applicants and authorising officers properly describe why the conduct to be authorised is both necessary and proportionate in a manner that will ensure compliance with the legislation and codes of practice.**

### ***Directed Surveillance - Noise Monitoring***

- 5.24 It was a recommendation of the previous inspection that the Council follow the guidance set out in the Codes of Practice in relation to noise monitoring. The Council had followed what it thought was the correct approach and ceased to obtain DSAs for 'overt' deployments, where the target had received a warning letter, but to continue to obtain DSAs for 'covert' deployments where for whatever reason (usually related to the risk of threats to the complainants) no warning was given. However, a DSA is not required even for 'covert' deployments as Section 3.37 of the RIP(S)A Surveillance Code of Practice makes clear:

*"The covert recording of suspected noise nuisance where the intention is only to record excessive noise levels from adjoining premises and the recording device is calibrated to record only excessive noise levels. In such circumstances the perpetrator would normally be regarded as having forfeited any claim to privacy and an authorisation may not be available."*

- 5.25 It can be seen from this that even where the subject is unaware, so long as the equipment is properly calibrated, no DSA is necessary. This does not mean such operations should not be subject to careful control and oversight, not least the means for demonstrating that the equipment has been properly calibrated – a mistake here could easily result in unauthorised intrusive surveillance which would be a serious breach of the Codes of Practice and legislation.

- 5.26 **Recommendation 3 (R3): The council should cease granting directed surveillance authorisations for nuisance noise-monitoring operations where the equipment has been properly calibrated to only record excessive noise levels.**

### ***Directed Surveillance – CCTV***

- 5.27 Dundee City Council does not own or operate a public space CCTV system in the city, rather the system is operated by Police Scotland and therefore no inspection of CCTV was conducted. However, the Council will shortly bring into operation a new Safety and Alarm Response Centre, which centralises a variety of monitoring functions of council owned property, such as schools and blocks of flats. There may be value in a visit to this facility at the time of the next inspection.
- 5.28 The Council should be aware that there is still a requirement to obtain a DSA for any use of a CCTV system for pre-planned or targeted surveillance against an individual/s. This includes requests from Police Scotland who may wish to take greater advantage of the ease of access to areas of CCTV coverage not on their system presented by the Response Centre. There is nothing to prevent this, subject to there being a DSA in place and that if this is a Police Scotland DSA, that the council officers operating the CCTV equipment are shown a suitably redacted version of the DSA. If this eventuality is at all likely (and it may well be), then it would be prudent for this to be covered by a mutually agreed protocol or policy (e.g. as part of an information sharing agreement or CCTV Code of Practice).

- 5.29 **Observation 2 (O2). The council should consider what policy and procedural arrangements may be necessary in relation to RIP(S)A and the CCTV systems operated from its new Safety and Alarm Response Centre, particularly in relation to third-party access and use by Police Scotland.**

### ***Covert Human Intelligence Sources (CHIS)***

- 5.30 Since the last inspection there have been no authorisations for the use and conduct of a CHIS. This reflects the widespread practice common amongst Scottish local authorities of never or rarely authorising CHIS.

### ***Direct Involvement (Self-authorisation)***

- 5.31 There were no instances of self-authorisations. Although as Dundee Council has a relatively large pool of AOs (there are eight, not including the Chief Executive) to call upon, it would be preferable that AOs outside the management structure of the applicant be used, or a greater division of consideration of applications amongst the cadre of AOs. This has the benefit of providing greater independence and more widely sharing the experience of acting as an AO.

### ***Communications Data (CD)***

- 5.32 The Council retained the ability to obtain communications data under the provisions of Part 2 of RIPA during the period under inspection (now IPA Part 3), however no applications were made and no communications data obtained. The Council does not maintain a CD policy. Although applications for CD are dealt with by the National anti-Fraud Network (NaFN) Single Point of Contact (SPoC), applications still need to be initiated and the subsequent product dealt with lawfully if the need should ever arise, and there is still a requirement for the Council to have a Designated Person (DP) under the terms of this legislation.

### ***R. v Sutherland considerations***

- 5.33 It was clear that authorised conduct was fully discussed with applicants following the granting of authorisations. It is worth emphasising to AOs, applicants and operational staff that they should always see a copy of the authorisation once granted so they are in no doubt as to what the authorisation permits. It is also good practice to make a record or note that they have done so.

### ***Policy and Procedure***

- 5.34 The Council has a single internal 'Guidance Note' which is in effect the policy document setting out how it manages RIP(S)A requirements for both CHIS and Directed Surveillance. The Guidance Note is concise and well drafted and readily available to all DCC staff through the internal intranet. As noted above, it is an internal document only and as such has not been placed in front of elected representatives for their endorsement. Action must be taken to do so, or to prepare a separate policy document/s for that purpose – this point is already covered in the first recommendation.
- 5.35 One procedure that has been adopted by the Council is for the RIP(S)A Co-ordinator to undertake a retrospective review of authorisations. It was this review process that identified weaknesses with directed surveillance authorisations highlighted above. This is an example of good practice and is to be commended. A good practice also adopted by some other Scottish local authorities is for a legal input/check to be made between an application being completed and it being submitted to the authorising officer. Of the two practices, this is preferable as it introduces an extra safeguard before an authorisation is made. If there is a choice to be made, the prevention of errors in authorisations is always preferable to their detection.

- 5.36 **Observation 3 (O3). The review of authorisations by legal officers is good practice and commendable. Consideration should also be given to legal review of applications before their submission to the authorising officer.**

- 5.37 The Guidance Note correctly identified the fact that in some circumstances the Chief Executive would have to act as the authorising officer, both for a CHIS and for directed surveillance. However, the SRO confirmed that the Chief Executive was in all likelihood unaware of this requirement and has received no specific training to prepare them in the unlikely eventuality that they would be required to act as the AO. This needs to be rectified with appropriate briefing and if necessary training. Guidance from the SRO or other legal advisors to the Chief Executive would be advisable in such circumstances.

- 5.38 **Recommendation 4 (R4): The Chief Executive must understand when they must act as an authorising officer and must be competent to do so.**

### ***Related Training***

- 5.39 A copy of the most recent training material was provided as well as a register of those staff who had attended. This training took the form of a presentation prepared and delivered by the RIP(S)A Co-ordinator. The content was excellent, covering not only the core aspects of RIP(S)A, but also more recent changes in case law. Such real-life examples are often far more engaging for those receiving the training and are very useful for stimulating discussion.
- 5.40 Given the second recommendation made above about the quality of Authorising Officers' considerations of proportionality and necessity, the Council may wish to consider providing further dedicated training to AOs on these core aspects of the authorisation, with examples of 'what good looks like' and practical scenarios to cement knowledge gained in practice. As was commented during the inspection, AOs perhaps often feel more what they should be saying. A useful rule of thumb is that an authorisation should contain sufficient detail to make sense to a reader without relying on detail in the application. It should always be in the AO's own words, although necessarily there is likely to be some repetition of detail present in the application. AOs should receive such training whenever appointed to the role with refresher training on a periodic basis as required. As Dundee makes many authorisations this should be no more than once every 2 - 3 years and more frequently if resources permit.

5.41 **Recommendation 5 (R5): The council should consider further dedicated training for authorising officers focusing in particular on how they should record their considerations of necessity and proportionality.**

- 5.42 One other way in which the SRO can maintain the integrity of the RIP(S)A processes and maintain the skills of AOs and applicants is to host a 'RIP(S)A forum' to bring the SRO, applicants, AOs and legal staff together to review activity and identify issues or risks. Such a forum should meet at least annually, but preferably more frequently.

5.43 **Observation 4 (O4): The council should consider instituting a RIP(S)A forum.**

## **6 Conclusion**

- 6.1 The findings from this inspection were adequate. The Council had made a good effort to discharge the recommendations from the last inspection and in many areas is compliant with the legislation. It is unfortunate that the quality of the written authorisations examined did not reflect the level of knowledge and understanding shown by the one AO interviewed and the excellent in-house training delivered by the RIP(S)A Co-ordinator. This is a critical issue of compliance and it is vital that authorisations meet the necessary standard, particularly as Dundee is such an active user of directed surveillance tactics. It is the core function of the SRO to ensure that this happens promptly. The other recommendations are less critical but nevertheless important towards achieving fuller compliance.



## 7 List of records reviewed

- 7.1 For completeness, a full list of all records viewed during the inspection is captured below in Table 4.
- 7.2 Records listed here may have been viewed fully or only in part depending on the inspection methodology and approach taken.

Total records viewed at Inspection per power	Operation URN	Operation name
<b>Directed Surveillance (11)</b>	891	N/A
	892	N/A
	898	N/A
	902	N/A
	906	N/A
	910	N/A
	911	N/A
	935	N/A
	936	N/A
	938	N/A
	939	N/A

**Table 4. List of records viewed**

**Brendan Hughes**  
**IPCO Inspector**





**DUNDEE CITY COUNCIL**  
**REGULATION OF INVESTIGATORY POWERS (SCOTLAND) ACT 2000**  
**POLICY ON COVERT SURVEILLANCE**

**INTRODUCTION**

1. In some circumstances it may be necessary for Council employees, or agents appointed by the Council, to make observations on a person in a covert manner. By their nature, actions of this sort are potentially breaches of the right to respect for private and family life (Art 8 of the ECHR). The Convention allows for impingement on such rights where it is necessary, proportionate, and authorised by law.
2. The Regulation of Investigatory Powers (Scotland) Act 2000 (RIPSA) set out the legal framework in which such activity can be lawfully carried out by public bodies. It provides for an internal authorisation system, and inspection by an independent body, the Investigatory Powers Commissioners Office.
3. The Head of Democratic and Legal Services is the Senior Responsible Officer (SRO), responsible for monitoring compliance with the Act, and keeping the Central Record of Authorisations, which is a record of all the authorisations granted within the Council.
4. The Investigatory Powers Tribunal has jurisdiction to investigate and determine complaints against public authorities regarding surveillance activities. Any person having such a complaint can contact the Tribunal through the website [www.ipt-uk.com](http://www.ipt-uk.com) or at the following address;

**The Investigatory Powers Tribunal****PO Box 33220****London****SW1H 9ZQ**

## **OBJECTIVE**

The objective of this policy is to set the terms under which covert surveillance and use of covert human intelligence sources will be carried out by the Council, ensure that it is lawful, in accordance with Scottish Government and IPCO guidance and recommendations, and is best practice.

## **SCOPE**

1. This policy applies to all covert surveillance carried out by or on behalf of the Council. The two types of surveillance defined by the Act are “Directed Surveillance” and use of “Covert Human Intelligence Sources” or “CHIS”. The Council is not permitted to carry out covert surveillance in respect of anything taking place in a private dwelling house or a private vehicle (where the person carrying out the surveillance, or any device is within the dwelling house or vehicle), a place used for legal consultations, prison or police detention cells, solicitors office or place used for legal consultations, all of which are deemed to be “intrusive surveillance”.
2. “Directed surveillance” is defined as covert (carried out in such a way that the subject is unaware of it), carried out for the purpose of a specific investigation or a specific operation, and is likely to result in the obtaining of private information, and is done other than an immediate response to events.
3. Use of a CHIS is defined as a situation where either a person establishes or maintains a personal or other relationship with another person for a covert purpose of obtaining information, or covertly discloses information obtained as a consequence of the existence of such a relationship. It should be noted that the Council has never made use of a CHIS.
4. The Council will discourage the use of CHIS. If there are exceptional circumstances which might justify the use of a CHIS, staff will seek the advice of the SRO before application for authorisation is made. It should be noted that there are particular procedural safeguards which require to be undertaken to ensure the safety of the CHIS.

## **PRINCIPLES OF SURVEILLANCE**

Covert surveillance may only be authorised carried out on certain legal grounds. There are as follows:

- (a) for the purpose of preventing or detecting crime or preventing disorder;
- (b) in the interests of public safety; or
- (c) for the purpose of protecting public health.

Most of the surveillance carried out by the Council has been for the purpose stated in a) above, particularly in relation to antisocial behaviour.

Covert surveillance may only be carried out where it is necessary and proportionate. These words have a legal meaning which can be summarised as follows;

“Necessary” means that it is undertaken for one of the purposes stated in the Act, and that there is no other practical and effective way of obtaining the information which does not involve covert intrusion into anyone’s private and family life.

“Proportionate” means that the degree of intrusion into someone’s private life is proportionate to the harm that the Council is seeking to prevent. In essence, “Do the means justify the ends?” The potential for collateral intrusion also will affect whether the surveillance can be considered proportionate or not.

“Collateral intrusion” is where private information is inadvertently gathered in respect of people who are not the targets of the surveillance. Applicants and authorising officers will require to assess the probability of acquiring information about other people, and any steps that could be taken to reduce the likelihood of this happening.

## **AUTHORISATION PROCEDURES**

The Act establishes an internal authorisation system to verify that surveillance has been carried out in accordance with the Act. Selected, trained officers from the middle management of the Council (at head of service or equivalent level) within each department are designated Authorising officers (AOs). Where it is desired to carry out surveillance, an application is made in a written form to an authorising officer within the service. The AO is required to consider whether the proposed activity falls within the scope of the Act, and meets the tests of necessity and proportionality. The AO also requires to consider the likelihood of obtaining collateral information, and any steps that can be taken to minimise such intrusion.

The AO has power to grant or refuse the application. The original of every application, review, or cancellation must be sent to the SRO, who will and keep it securely for inspection by IPCO for a period of not less than five years.

The AO requires to set review dates to monitor the use made of the authorisation, and ensure that the authorisation is cancelled when no longer necessary and proportionate. At cancellation, the AO will require to determine what should be done with any material gathered in the course of the surveillance.

The SRO will;

1. ensure that AOs are trained and kept up to date on changes in law and official guidance.
2. “quality test” authorisations to ensure that they meet the required standards.
3. provide advice and support to AOs and other staff involved in surveillance activity as required.
4. prepare and make available to staff detailed procedures and guidance, and update this from time to time to reflect changes in law and policy as may be necessary. The guidance has been uploaded to the intranet and is available to all Council staff. Council staff will have regard to the guidance.

## **INTERNET INVESTIGATIONS**

A single viewing of someone’s open source social media page (such as Facebook or Twitter) is not directed surveillance and does not require to be authorised. Repeated viewings, or a systemic examination of someone’s online activity and persons associated with them, however, is directed and so will require to be authorised even if the individual’s social media is public facing and privacy settings have not been applied.

Forming a relationship by “friending” someone, or “following” them in order to gain privileged access, or systemically making use of information gained from an existing relationship, where the subject is unaware of the use being made of the relationship, is likely to require a “CHIS” authorisation. Such activity is to be discouraged.

Staff should not use personal social media accounts in connection with work activities. Departments who may require to view social media and carry out surveillance should establish their own social media page. Access to the page should be controlled and records should be kept of the use made of it. Authorisations will be sought where directed surveillance is required.

**URGENT APPLICATIONS**

In cases of urgency, an oral authorisation may be given. This provision cannot be used where the urgency is due to the fact that a written authorisation could have been obtained in time, but was not. The oral authorisation will expire in 72 hours, and must be documented. In practice, the Council has never required to make use of the urgency provisions.

It is worth mentioning again that an immediate response to events (such as officers who happen upon a crime taking place covertly observing what is taking place) is not directed surveillance.

**CONFIDENTIAL INFORMATION**

Confidential information is

1. Communications subject to legal privilege (such as solicitor / client communications)
2. Communications involving confidential personal information – such as medical or spiritual information, which is held in confidence by a medical professional or priest;
3. Communications involving journalistic material – material held or acquired for the purposes of journalism and held subject to an express or implied undertaking to hold it in confidence;

Where it is possible or likely that directed surveillance is likely to result in obtaining confidential information, it is unlikely that the surveillance would pass the test of proportionality. The severity of the harm that the surveillance is intended to prevent is unlikely to be sufficient to balance the degree of intrusion into someone's private life.

Surveillance that is likely to result in the recovery of confidential information can only be authorised by the Chief Executive.

