

Corporate Policy and Strategy Committee

10.00am, Tuesday, 28 February 2017

Regulation of Investigatory Powers (Scotland) Act 2000: Outcome of Inspection by the Office of Chief Surveillance Commissioner

Item number	7.6
Report number	
Executive/routine	
Wards	All

Executive Summary

This report provides members with an annual update on surveillance activity, including the inspection by the Office of Chief Surveillance Commissioners (OSC) which took place in June 2016.

The OSC is a statutory body which oversees use of powers within the Regulation of Investigatory Powers (Scotland) Act 2000 (RIPSA).

The Council uses the powers in the Act on a much reduced basis from previous years. The inspection found that the Council had discharged all the recommendations from previous inspection reports and was complying well with its duties under the Act.

Links

Coalition Pledges	N/A
Council Priorities	N/A
Single Outcome Agreement	N/A

Regulation of Investigatory Powers (Scotland) Act 2000: Outcome of Inspection by the Office of Chief Surveillance Commissioner Examination Centre

Recommendations

- 1.1 It is recommended that the Corporate Policy and Strategy Committee:
 - 1.1.1 notes the positive outcome of the inspection;
 - 1.1.2 notes that a refreshed corporate training plan will be rolled out and that this will include an appropriate briefing for members of CLT.

Background

- 2.1 Local authorities in Scotland are included within the list of public bodies which may utilise the relevant provisions of the Regulation of Investigatory Powers (Scotland) Act 2000 ('RIPSA') ('the Act'). The Act provides a framework for carrying out covert surveillance activity to ensure compliance with the Human Rights Act 1998.
- 2.2 The Council has adopted two policies on the use of surveillance and has appointed a Lead Officer for all activity relevant to use of the Act. The Lead Officer was previously the Head of Housing and Regulatory Services. The Lead Officer is supported by the Regulatory Services Manager, who acts as RIPSA Coordinator and undertakes audit, training and policy work.
- 2.3 Additional responsibility for the Central Register of Authorisations sits with the Head of Legal and Risk. Colleagues within Legal Services discharge the statutory function of keeping the registers, as well as providing feedback on quality/legal issues.
- 2.4 The provisions of the Act are most commonly used in connection with the Council's regulatory functions. Historically three service areas made active use of the Act: Planning and Transport, Housing and Regulatory Services and Safer and Stronger Communities. The levels of activity authorised have continued to decrease year on year. The Council had authorised the use of 'Directed Surveillance' five times in the financial year 2015/16.
- 2.5 The Act provides for oversight of public bodies by the Office of the Chief Surveillance Commissioner (OSC). The OSC previously inspected the Council in June 2013. The latest inspection took place 10 June 2016 and was the sixth

inspection of the Council. The report from this inspection only became available in October 2016.

- 2.6 The Council's transformation programme has affected the use of surveillance. A number of key staff have left the organisation in the last 12 months, including three Authorising Officers. This means that only two Authorising Officers remain, one of whom is currently on maternity leave. There has been further change within the Place Directorate and the current lead officer, the Head of Housing and Regulatory Services, has left the Council. Guidance and good practice means that a chief officer of the Council should be nominated to carry out the lead officer role. The Head of Legal and Risk has assumed this role.

Main report

3.1 Use of Surveillance

Corporate use of the provisions of the Act is low and has decreased since the previous inspection. At its peak the number of authorisations for the Council was 307 during 2005/06, compared with five during 2015/16. Planning and Transport staff are the greatest users of the Act, in relation to investigations of fraudulent use of blue badges. Appendix 1 provides a breakdown on usage and the main purpose of the surveillance activities authorised. Since the last inspection the Council has passed responsibility for benefit fraud investigation to the Department for Work and Pensions, and the small number of authorisations in that area have therefore ceased.

Nationally the use of these powers by local authorities continues to drop. In England and Wales the equivalent statutory provisions are now significantly more onerous on local authorities. As a result surveillance by Councils in England and Wales has, to a large extent, ceased.

3.2 2013 OSC Inspection Findings

The 2013 OSC inspection was undertaken by a former Senior Judge, whose report was overwhelmingly positive and concluded that:

- "Overall the City of Edinburgh Council is a well performing council";
- "The management structure is of the highest standard and involves processes which are rarely seen in other local authorities".

3.3 2016 OSC Inspection Findings

The inspection found that all recommendations from the 2013 inspection had been implemented in full, and therefore discharged. The Inspector noted the significant changes within the Council as a result of the Transformational Change projects. Despite the challenges that this presents the Inspector found that the Council continued to perform well and had a good understanding of the governance required.

- 3.4 The inspection report included the following conclusions;
- “the standards which I encountered as part of this inspection were at an appropriate level and seemed to be consistent with the situation encountered by His Honour Norman Jones when he inspected the council in 2013”;
 - “It was also evident that the members of council staff with whom I met as part of this inspection process, demonstrated an appropriate level of knowledge and understanding as to their responsibilities under RIP(S)A”.
- 3.5 The following recommendations were made in the latest report and steps are underway to implement these and these are expected to be completed within the next six months:
- a minor update to one of the corporate forms to allow instructions about disposal of surveillance product to be recorded. Now completed;
 - minor amendments to CCTV policies including memorandums of understanding with Police Scotland;
 - reviewing training and updating awareness levels of staff, this includes training of CLT members;
 - reviewing the number of Authorising Officers to ensure it is sufficient; and
 - the Council to consider whether a further policy is required to control the use of social media by staff conducting investigations. This will be the subject of a future report to Committee.

3.6 **Internal Audits**

The RIPSA coordinator continues to monitor corporate activity through regular meetings in addition to reviewing issues identified by Legal Services who keep the Central Register.

3.7 **Code of Practice**

The statutory Codes of Practice have been revised since the last report was presented to members. There is now a requirement within the Codes to report to members on an annual basis.

Measures of success

- 4.1 The Council receives a positive inspection report and that its use of these powers complies with the Council’s policies and the Act.

Financial impact

- 5.1 The proposed training programme shall require to be funded and is estimated to be in the range of £5-7K, to be contained within the corporate training budget.

Risk, policy, compliance and governance impact

- 6.1 Failure to comply with the Act and associated guidance presents a legal risk of being sued for breach of the Human Rights Act 1998 and possible damages.
- 6.2 Additionally the Council's regulatory functions could be hampered if evidence is gathered without proper authorisation under RIP(S)A.
- 6.3 There is a significant reputational risk for the Council in the use of these powers and there continues to be a high level of scrutiny from the media and public.

Equalities impact

- 7.1 Use of the policies is directly relevant to the Human Rights Act 1998. Council policies have been written to ensure a high level of consideration of the impact of surveillance of public sector duties.

Sustainability impact

- 8.1 There is no impact arising from the contents of this report.

Consultation and engagement

N/A

Background reading/external references

- 10.1 http://www.edinburgh.gov.uk/download/meetings/id/42341/item_77_-_update_of_council_surveillance_policies

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Links

Coalition Pledges	N/A
Council Priorities	N/A
Single Outcome Agreement	N/A
Appendices	Appendix 1 – Usage and main purpose of surveillance activities authorised Appendix 2 - OSC Report 2016

Appendix 1: RIPSA Authorisations

- 1 For 2015/16 the following activity under the Act took place.
- Five RIPSA applications in total were made (five authorised and none refused).
 - Five applications were for 'Directed Surveillance'¹ (five authorised and none refused).
 - No application was made for use of a Covert Human Intelligence Source.
 - Authorised activity remains low when compared to the peak years.
- 2 At present there are three grounds under one or more of which the Council may authorise surveillance.
1. The prevention and detection of crime or disorder
 2. To protect public safety
 3. To protect public health

The majority of applications authorised were relevant to ground 1, with a minority relevant to grounds 2 or 3.

3 RIPSA authorisations per year

Year	Number of RIPSA authorisations approved
2015/16	5
2014/15	23
2013/14	25

4 Breakdown of surveillance by Council regulatory function for the past three years

Regulatory Function	2015/16	2014/15	2013/14
Antisocial Behaviour legislation	2	6	5
Environmental Health legislation	0	5	15
Trading Standards legislation	0	0	0

¹ Typically this might include covert use of CCTV or staff carrying out covert observations of a suspect or premises.

Benefit Fraud legislation	0	0	0
Parking Fraud legislation	3	12	5

5 The following trends have been identified in respect of use of the Act.

- The use of Directed Surveillance to tackle antisocial behaviour has continued to drop in number and as an overall proportion.

The use of Directed Surveillance in terms of enforcing blue badge fraud has grown significantly, after being identified in 2008 as a regulatory function with activities falling within the scope of the Act.

Appendix 2: OSC Inspection report 2016

Official

File ref: OSC/INSP/074

The Rt. Hon. Lord Igor Judge
Chief Surveillance Commissioner
Office of Surveillance Commissioners
PO Box 29105
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17th June 2016

OSC INSPECTION REPORT – THE CITY OF EDINBURGH COUNCIL

1. Date of inspection

1.1 10th June 2016

2. Inspector

2.1 David Buxton.

3. Chief Executive/Managing Director

3.1 The Chief Executive of The City of Edinburgh Council is Mr Andrew Kerr. The address for correspondence is Waverley Court, 4 East Market Street, Edinburgh EH8 8BG.

4. Introduction

4.1 The City of Edinburgh Council (the council) is a unitary authority with responsibility for the local government administration of Edinburgh, the capital city of Scotland. It administers an area of 102 square miles with a population of about 486,000.

4.2 The Chief Executive of the council is Mr Andrew Kerr who took up his current position in July 2015. The senior leadership team structures changed as recently as February this year and now comprises of two Directors and two interim Directors.

4.3 It was reported that the council continues to undergo a programme of significant internal change so as to meet challenging budget reductions. As a consequence of these changes the council has reduced in size by approximately 2000 staff, and something in the region of 700 staff have left the organisation as recently as December 2015. The Chief Executive has been in post for less than one year and was reported to be the longest serving member of the council senior leadership team. Understandably therefore the council was in the process of establishing stability within its new structures at the time at which this inspection was conducted.

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4.4 The council was last inspected by the Office of Surveillance Commissioners on 10th June 2013. His Honour Norman Jones, Assistant Surveillance Commissioner, conducted the inspection on that particular occasion.

5. Inspection approach

5.1 The purpose of this inspection was twofold; firstly to review and report upon the exercise and performance of the council in relation to the powers provided pursuant of those sections of the Regulation of Investigatory Powers (Scotland) Act 2000 (RIPSA) which fall under the responsibility of the Chief Surveillance Commissioner, and also to review and report upon the performance of those persons upon whom the powers and duties of the legislation are conferred or otherwise imposed.

5.2 The inspection process was agreed with the council in advance and involved meetings with a number of council staff and the examination of policies and procedures. At the conclusion of the inspection I provided feedback as to my initial findings to the Governance Manager and the Chief Solicitor. During the course of my inspection I met with the following members of staff:

- Andrew Mitchell – Regulatory Services (RIPSA Coordinator/Gatekeeper)
- Keith Irwin – Head of Legal and Administrative Services
- Steve Williamson – Head of CCTV
- Clare Devlin – Environmental Enforcement Noise Team
- Michelle Pandit – Community Safety Manager
- Russell Simpson – Environmental Warden
- Phil Morrison – Trading Standards
- Chris Bell – Trading Standards
- Tony Fergus – Mobile CCTV

5.3 The council is a modest user of the legislation (RIPSA). Since the last OSC inspection of this council was conducted in 2013 there have been 53 authorisations granted for directed surveillance and no authorisations granted for CHIS. Of the 53 authorisations granted, 25 authorisations were granted in 2014, 23 were granted in 2015 and 5 were granted in 2016. The council anticipates a continuing reduction in volumes of authorisations due to reduced capability within its functions.

6. Review of Progress against 2013 Recommendations

6.1 The recommendations arising from the previous OSC inspection of this council, and the council's response as to progress in respect of those matters are as follows:

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- 6.2 *Recommendation 1 - Amend the Central Record matrix to be compliant with the Covert Surveillance Code of Practice.*
- 6.3 Completed. The Central Record was examined as part of this inspection process and found to be compliant with the provisions of Section 8 of The Scottish Government's *Covert Surveillance and Property Interference Code of Practice* (The Code).
- 6.4 *Recommendation 2 - Adopt RIPSAs forms more closely based on the current Home Office RIPA forms.*
- 6.5 Completed – The RIPSAs forms had been amended as requested. There was however vulnerability within the cancellation document in that the format used did not provide for the authorising officer to endorse his/her direction as to the management of any surveillance product which had been obtained as a result of authorised surveillance activity having been conducted. Notes 109 to 109.4 inclusive of the OSC Procedures and Guidance document provide relevant guidance in this respect and it is recommended that the cancellation form be amended so as to accommodate this information.
- 6.6 *Recommendation 3 - Address the issues arising from the examination of the RIPA applications/authorisations, reviews, renewals and cancellations and in doing so also fully discharge the recommendations from the previous inspection report.*
- 6.7 Completed – The issues identified have been addressed by the council. The vulnerability within the cancellation form as identified in the preceding paragraph gives rise to a separate recommendation.
- 6.8 *Recommendation 4 - Amend the policy and procedure documents and produce an advisory document for Authorising Officers.*
- 6.9 Completed - The policy and procedures document was examined as part of this inspection process and amendments had been made as identified. A separate advisory document has been produced for authorising officers which provides appropriate guidance.
- 7. Policies, Procedures and Training**
- 7.1 As was the case when inspected previously, the council has a directed surveillance policy document and a CHIS policy, both of which set out the procedures for authorisation. This document is widely available to council staff via the council's intranet facility.
- 7.2 The policy documents are comprehensive and in general, drafted to a good standard.

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- 7.3 The council additionally had a Code of Practice for “*Public Space CCTV*”. This is a comprehensive document which includes within its content, responsibilities under the Data Protection Act. The document makes no mention of RIPSAs or indeed the processes to follow in circumstances whereby the police or other law enforcement agency request the use of the council CCTV in connection with a directed surveillance authorisation granted by an authorising officer within that third party agency. In such cases, the council relies upon an existing agreement document which does set out those processes. The vulnerability within this document is that it is out of date and is an agreement between the council and Lothian and Borders Police, the latter of which no longer exists, having been subsumed within the amalgamation of all Scottish police forces which is Police Scotland. Additionally the language in this document is a little vague as it makes repeated reference to “*a directed view*” when what it is referring to is “*directed surveillance*”. **It is a recommendation of this report that the CCTV Code of Practice be amended to include the relevant RIPSAs considerations inherent in the use of the council CCTV, and that the current agreement which is in use by the council and Police Scotland to accommodate the use of the council CCTV system in connection with directed surveillance authorisations granted by the police, be updated and incorporate relevant terminology.**
- 7.4 In terms of training, the council had invested in an external training provider shortly after the previous OSC inspection was conducted, and RIPSAs training was provided to approximately 300 members of staff. It was acknowledged that this training was provided some years ago (2014) and there had been many changes of personnel in the intervening period. It was reported that it is the intention to conduct a training need analysis for RIPSAs provision once the organisation stabilises and thereafter appropriate training and awareness for relevant personnel will be delivered.
- 7.5 It is important that the council maintains a proportionate programme of staff awareness with regards to RIPSAs considerations so that any covert activity which the council conducts may be conducted on a more informed basis by staff and risks associated with a breach of the legislation are thereby less likely to occur. Such an investment in the knowledge levels of relevant personnel will have the additional benefit in ensuring public confidence by covert activity being conducted legally and ethically by knowledgeable council employees. **This is a recommendation of this report.**
- 7.6 The council complies with its responsibilities arising from paragraph 3.29 of The Codes in that it regularly reports matters of RIPSAs policy to elected members.

8. Issues Highlighted

- 8.1 The Senior Responsible Officer for RIPSAs in the council is Susan Mooney, Head of Housing and Regulatory Services. There are two authorising officers within the council, a reduction from five which were in place when the last inspection was conducted. It was reported that the council has an intention to train one or two more authorising officers in due course once the organisation has stabilised, so as to provide further resilience to the function. It was reported that the current authorising officers have received RIPSAs training.
- 8.2 Mr Andrew Mitchell is the Regulatory Services Manager and is the RIPSAs Coordinator/Gatekeeper and clearly very knowledgeable and experienced in the function. He maintains the Central Record of Authorisations to an appropriate standard, develops policy and guidance documentation and provides the quality assurance function to both the documentation and the authorisations processes.
- 8.3 A sample of RIPSAs documentation was examined; in general the applications and authorisations were completed to an appropriate standard commensurate with the volumes of activity conducted. In the case of one authorisation examined, ref: RIPSAs/DS/1516/005, an authorisation for directed surveillance was granted on 22/02/2016 and at the time at which this inspection was conducted the authorisation had not been reviewed, renewed or cancelled and effectively had been left to simply expire. This particular authorisation had not been managed in accordance with the legislation and I was advised that these circumstances had arisen as a result of the unavailability of an authorising officer. This authorisation should be formally cancelled by an authorising officer without further delay. **It is further a recommendation of this report that the SRO reviews the provision of the authorising officer function within the council to ensure that the legal responsibilities associated with that role may be discharged diligently and expeditiously.**
- 8.4 A vulnerability within the cancellation documentation is reported at paragraph 6.5 above.
- 8.5 It was clear from my discussions with members of the focus group with whom I met, that there was an appropriate level of understanding amongst staff members as to their responsibilities under RIPSAs. Offences such as dog fouling, fly tipping, noise and other anti social behaviour were prominent considerations within the enforcement functions of the council and although directed surveillance was sometimes a tactical consideration amongst teams, the legislation was not frequently used.
- 8.6 It was evident from my discussions that there is the potential for an increased operational requirement amongst enforcement teams to search for and acquire information which amounts to evidence of offences, and which is posted in the public domain on social media sites, such as "*Facebook*". There were instances discussed where such information had been provided to officers by complainants. It was reported that there is currently insufficient

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policy guidance within the council to assist council staff with regards open source research activity and the RIPSAs considerations inherent in such an approach. It was further reported that there is insufficient provision of corporate facilities, processes or audit trails in place to guide staff wishing to conduct basic open research of social media sites in support of enforcement activity.

- 8.7 Unquestionably these are sensitive matters for the council to address. On one hand the communities which the council serves would expect the council to be able to secure evidence of offences which blight their daily lives, where such information is publically posted on the internet, however, on the other hand, activity of this nature is intrusive and can adversely affect public confidence and therefore has to be conducted within a framework of legality, integrity and transparency.
- 8.8 It was acknowledged as part of my discussions that the council had yet to turn its mind to the subject of corporate policy and practice with regards to open source research and investigations, but that these were matters to be considered. Without such corporate direction the potential exists for well meaning staff to unwittingly conduct open source research outside of any corporate controls and risk breaching the legislation.
- 8.9 **It is therefore a recommendation of this report** that the council considers both the strategic and operational user requirement for open source research within its investigative function, and thereafter provides coherent policies, training and processes, so that if such activity becomes necessary it may be conducted lawfully and ethically in a manner which maintains the confidence of the communities which the council serves.

CCTV

- 8.10 The council has 219 cameras located across its area, some of which are located in public spaces. The cameras all have a pan, tilt and zoom capability and the system is monitored around the clock seven days a week, throughout the year. The monitoring activity is conducted from a single location by members of council staff who cover three shifts so as to provide around the clock monitoring.
- 8.11 It was reported that the council monitoring staff have all received some form of RIPSAs awareness provision and processes are in place to address requests by the police for retrospective viewing of CCTV recorded material. I was told that processes were in place which required the police to provide a copy of a directed surveillance authorisation to the CCTV manager, suitably redacted where necessary, and for operatives to see a copy of the authorisation before such time as any surveillance is conducted using the council CCTV system, under the terms of the authorisation. Although this process is acknowledged it is important that the vulnerabilities within the council policy documentation, which are alluded to at paragraph 7.3 above, are addressed.

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8.12 I was impressed by Mr Steve Williamson who appeared to have a very professional and knowledgeable regard for his responsibilities relating to the lawful and ethical use of the council's CCTV system by council members and third party law enforcement agencies.

9. Conclusions

9.1 It was clear that council officials with whom I met took this inspection process, and their responsibilities under RIPSA, seriously. It was also evident that the members of council staff with whom I met as part of this inspection process, demonstrated an appropriate level of knowledge and understanding as to their responsibilities under RIPSA.

9.2 I was very much left with an impression of this council being in the midst of a significant programme of transition, and issues regarding staffing reductions and internal restructuring were common discussion points. Mr Andrew Mitchell is very much the lynch pin for the council RIPSA processes, being very experienced in the requisite subject matter and evidently a veteran of many previous OSC inspections of this council. In the midst of the current programme of organisational change, the maintenance of standards of legislative compliance with regards the council's responsibilities under RIPSA are doubtless challenging, but they amount to legislative responsibilities which are issues of public confidence.

9.3 In this context therefore, it is acknowledged that the current position inspected is very much a "holding position" until such time as the organisation has stabilised. That having been said, the standards which I encountered as part of this inspection were at an appropriate level and seemed to be consistent with the situation encountered by His Honour Norman Jones when he inspected the council in 2013.

9.4 The council is at best a modest user of the legislation. It will of course be some time until the next OSC inspection of the council takes place and given the many challenges which the council faces in settling its change programme, it cannot allow the subject of RIPSA to become a negligible consideration when set alongside its wide portfolio of responsibilities until such time as either a RIPSA application is made, or the next OSC inspection is due. The council must ensure that it guards against such complacency borne out of a lack of use of the legislation and the SRO should ensure that the recommendations which arise from this report are appropriately addressed by the council leadership and not simply left to the RIPSA Gatekeeper to address. In particular, the developing issues around securing social media material and developing the authorising officer function will require active SRO involvement.

9.5 Overall, however, this council is in an appropriate state of health in so far as RIPSA compliance is concerned and the recommendations within this report are intended to assist the council to improve further.

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9.6 I wish to record my thanks to Mr Andrew Mitchell for his endeavours in arranging and facilitating my inspection and also to the members of the council whom I encountered as part of the planning and subsequent inspection discussions.

10 Recommendations

10.1 Recommendation 1 - The cancellations of directed surveillance authorisations by authorising officers should include the information provided by Notes 109 to 109.4 inclusive of the OSC Procedures and Guidance document.

10.2 Recommendation 2 - The council's CCTV Code of Practice should be amended to include the relevant RIPSAs considerations inherent in the use of the council CCTV, and the current agreement which is in use by the council and Police Scotland to accommodate the use of the council CCTV system in connection with directed surveillance authorisations granted by the police, should similarly be updated and incorporate relevant terminology.

10.3 Recommendation 3 - The council should maintain a proportionate programme of staff awareness provision with regards to the responsibilities they have associated with RIPSAs.

10.4 Recommendation 4 - The SRO should review the provision of the authorising officer function within the council to ensure that the legal responsibilities associated with that role may be discharged diligently and expeditiously.

10.5 Recommendation 5 - The council should, in consideration of both the strategic and user requirement for open source research within its investigative function, provide coherent policies, training and processes so that such activity may be conducted where necessary, lawfully and in a manner which maintains the confidence of the communities which the council serves.

David Buxton
Surveillance Inspector

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