

SANDWELL METROPOLITAN BOROUGH COUNCIL

REGULATION OF INVESTIGATORY POWERS ACT 2000 AND INVESTIGATORY POWERS ACT 2016

DIRECTED SURVEILLANCE

COVERT HUMAN INTELLIGENCE SOURCES

CORPORATE POLICY

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1. INTRODUCTION

- 1.1** Some of the Council's activities may involve covert (secret) surveillance of individuals and organisations. Service areas likely to engage in covert surveillance include those dealing with Counter Fraud, Trading Standards, Environmental Health and Licensing.
- 1.2** The Human Rights Act 1998 protects the rights and freedoms of the individual, particularly the rights to privacy and private life. These rights are not unqualified. They can be breached in appropriate circumstances.
- 1.3** The Regulation of Investigatory Powers Act 2000 and the Investigatory Powers Act 2016 were enacted in order to give a statutory framework for the lawful use of investigative and surveillance techniques in order to comply with the Human Rights Act 1998. Of particular relevance to Local Authorities are the authorisation of, and use of, Directed Surveillance, Covert Human Intelligence Sources and the Interception of Communications Data. The latter can only be carried out in exceptional circumstances by Local Authorities and is the subject of a separate policy document called 'Interception of Communications Data'.
- 1.4** The aim of this policy is to ensure a consistent simple and effective system of authorising Directed Surveillance and using Covert Human Intelligence Sources (CHIS) throughout the Council.
- 1.5** Councils enforce and prosecute serious offences and some less serious offences. Surveillance intrudes into private life. For the use of Directed Surveillance or Covert Human Intelligence Sources (CHIS) to be lawful, the investigation must be into a "serious" offence as defined by the legislation.
- 1.6** The definition is an offence that is punishable by at least a maximum penalty of 6 months imprisonment or suspected sale of alcohol or tobacco to under-age persons (ie persons under the age of 18). -See sections 146, 147 or 147a of the Licensing Act 2003 or Section 91 or 92 of the Families Act 2014 respectively. Many offences prosecuted

by Local Authorities are punishable by fine only. However even an unlimited fine is less serious than 6 months imprisonment. An offence so punishable cannot be investigated by Directed Surveillance or the use of a Covert Human Intelligence Source. Nor can activity that is not of itself criminal, for example activity that may lead to the service of a statutory notice but not (at that stage) prosecution.

- 1.7 It follows that a good many of the criminal offences the Council is charged with enforcing cannot be investigated with the use of Covert Directed Surveillance or by using a Covert Human Intelligence Source (CHIS). **The Council would not purposefully act outside of its statutory powers to conduct such surveillance on a person within Sandwell Borough.**
- 1.8 Even if this seriousness threshold is met the proposed method of investigation **still** has to be deemed necessary and proportionate by an authorising officer. That judgment **has to be confirmed by a Magistrates Court who must authorise an application made by the Council to carry out Directed Surveillance or use a CHIS.** The Court has the power to grant or refuse such an application. The Council cannot legally do either without a written authorisation from the Magistrates Court.
- 1.9 The Local Authority also may use these processes to investigate `Disorder`.

2. BACKGROUND

- 2.1 A person's right to privacy can only be lawfully `invaded` when serious circumstances require surveillance and appropriate authorisations are obtained. The Human Rights Act 1998 protects a person's private life including information about an individual such as official records, photographs, letters, diaries and medical information kept private and confidential. **Public Bodies should not collect information such as this without good reason.** The term `private life` is to be interpreted quite widely to include the right to establish and develop relationships in the wider sense and can include business activities.

2.2 The Regulation of Investigatory Powers Act 2000 and the Investigatory Powers Act 2016 apply to other public bodies aside from Local Government. More intrusive surveillance such as surveillance within residential premises (Intrusive Surveillance) **cannot be carried out lawfully by Local Authorities at all. The legislation does not permit it.** Powers such as this and intercepting very private communications are generally given to organisations such as the Police and the Serious Crime Agency though the Council has limited powers as regards Communications contained in a separate “sister” policy concerning Communications Data.

2.3 Sandwell Metropolitan Borough Council is committed to respecting the right to privacy of its citizens. It will only seek to conduct surveillance or seek to intercept communications data when it is 1) lawful and 2) it is necessary and proportionate to do so and 3) properly authorised internally and by the Courts

3. DIRECTED SURVEILLANCE

3.1 ‘Surveillance’ is defined in the Regulation of Investigatory Powers Act 2000 as

- Monitoring, observing, and/or listening to persons, their movements, conversations other activities or communications and/or
- Recording anything monitored, observed or listened to in the course of surveillance
- Surveillance can be directed or intrusive. **Sandwell Metropolitan Borough Council is not authorised to carry out Intrusive Surveillance (see above).**

3.2 Directed Surveillance is

- Covert Surveillance if and only if it is carried out in a **manner calculated to ensure that person (s) subject to the surveillance are unaware that it is taking place**
- **Is not intrusive.** Surveillance is intrusive only if it is covert and is -
 - Carried out in relation to anything taking place on residential premises or in a private vehicle, and
 - Involves the presence of an individual on the premises or vehicle or is carried out by a surveillance device -See the Code of Practice - Covert Surveillance and Property Interference Code of Practice 2018 **The Council cannot lawfully engage in intrusive surveillance.**
- Is undertaken for the purpose of a specific investigation or operation in a way likely to obtain private information about a person whether or not that person is specifically targeted for the purpose of an investigation UNLESS
- It is an immediate response to events which would otherwise make seeking an authorisation under the Regulation of Investigatory Powers Act 2000 unreasonable (for example spotting something suspicious in a manner that was unplanned and continuing to observe it [see the 2018 Code of Practice])

4. COVERT HUMAN INTELLIGENCE SOURCE (CHIS)

4.1 A person is a CHIS (Covert Human Intelligence Source) if he or she establishes or maintains a personal or other relationship with a person for the covert purpose of facilitating the doing of anything that

- Covertly uses such a relationship to obtain information or to provide access to information to another person: or
- Covertly discloses information obtained by the use of such a relationship, or as a consequence of the existence, of such a relationship

- The authorising officer must be satisfied that the “use” of a CHIS is proportionate to the objectives and that arrangements are in place to ensure levels of management and oversight of the CHIS, and that those records are available on a “need to know” basis

4.2 “Use” is defined actions inducing, asking or assisting a person to act as a CHIS in the 2022 CHIS Code of Practice

5. GENERAL

5.1 The use of Directed Surveillance and CHIS may be authorised by authorising officers (see Annex A for more detail on authorised officers).

5.2 All applications for Directed Surveillance and CHIS must engage the proportionality test, that is to say, is it reasonably necessary in order to achieve the Surveillance Objective? The degree of intrusion into the privacy of the surveillance target and any collateral intrusion (incidental intrusion affecting other persons) needs to be balanced against the need for the surveillance activity.

5.3 If legal due process is observed in all respects **including judicial authorisation being obtained from the Magistrates Court** any interference with privacy and family life will be lawful for all purposes.

5.4 The carrying out of Directed Surveillance will often require the use of technical surveillance equipment. The precise piece or pieces of, equipment used shall be identified in writing on the authorisation form by the investigating officer and approved by signature by the authorising officer

6. RESPONSIBILITY AND ACCOUNTABILITY

- 6.1** The Covert Surveillance and Property Interference Code of Practice provides that it is considered good practice that a Senior Responsible Officer should be responsible for the process of the Regulation of Investigatory Powers Act 2000.
- 6.2** The Senior Responsible Officer for all aspects of the Regulation of Investigatory Powers Act 2000 and the Investigatory Powers Act 2016 is the Director of Law and Governance (Monitoring Officer).
- 6.3** The process is regulated by the Investigatory Powers Commissioners Office (IPCO).
- 6.4** There will be regular training for Council staff in dealing with this legislation.
- 6.5** The Council's compliance with this legislation (and associated secondary legislation through Regulation and Codes of Practice) is monitored by the Investigatory Powers Commissioners Office (IPCO). Inspections are undertaken every 3-4 years. IPCO also publishes procedure and guidance which will be provided to the affected Council Officers.

7. AUTHORISATIONS

DIRECTED SURVEILLANCE

- 7.1** Authorisations can only be granted for the purposes outlined in this policy.
- 7.2** The use of overt CCTV cameras by public authorities does not normally require authorisation under the Regulation of Investigatory Powers Act 2000 or the Investigation of Powers Act 2016 relating to Directed Surveillance. The Council has a list of authorised accredited CCTV Cameras and a Drone. Provided this equipment is labelled as providing overt ie "Street Scene" or Buildings assessing type of surveillance this is overt not covert

surveillance and therefore not Directed Surveillance. (See 2018 Code of Practice-Covert Surveillance and Property Interference).

- 7.3** Similarly a letter sent to an intended subject of surveillance informing them activity will be subject to surveillance for a period of three months overt, not covert, surveillance.
- 7.4** The use of the Internet and drones are a feature of modern society and are dealt with specifically in the 2018 Code of Practice-Covert Surveillance and Property Interference. Paragraph 3.10 of the Code states that the use of the internet prior to an investigation should not usually engage privacy considerations. However should the study of an individuals on line presence become persistent, or where any material obtained is to become extracted or recorded and may engage private considerations, a RIPA Authorisation may need to be considered by the Council.
- 7.5** Paragraph 3.11 of the Code of Practice states that where online monitoring or investigation is conducted covertly for a specific investigation and is likely to result in the obtaining of private information about a person or a group an authorisation should be considered. Where there is proposed active engagement with others without the true identity of the officer or true purpose for gathering the information being revealed an authorisation for a CHIS (Covert Human Intelligence Source) may be required and should be considered by the Council.
- 7.6** An external individual or non-governmental organisation may act on behalf of the Council as authorised agent. Any activities undertaken by them that fall within the definition of Directed Surveillance or the use of a Covert Human Intelligence Source (CHIS) will be considered for authorisation by the Council. This is confirmed as recommended practice in the 2018 Code of Practice -Directed Surveillance and Property Interference.
- 7.7** When the Council acts in partnership with another public sector agency (for example the Police) consideration will be given as to who the lead public body for the purpose of seeking a Directed Surveillance or CHIS (Covert Human Intelligence Source)

authorisation is going to be. Relevant factors include who is the lead investigator, who owns the surveillance equipment, and who has the more extensive powers (if appropriate to use) under the Regulation of Investigatory Powers Act 2000 and/or the Investigation of Powers Act 2016.

- 7.8** A centrally retrievable record of all authorisations will be held by the Council. This will be regularly updated when an authorisation is granted, renewed or cancelled. The record will be made available to the Investigatory Powers Commissioners Office (IPCO) upon request. This will be kept in accordance with the Council's Retention Schedule (link).
- 7.9** The Regulation of Investigatory Powers Act 2000 and the Investigation of Powers Act 2016 do not prevent material obtained from properly authorised surveillance or interception of data from being used in other investigations aside from the investigation referenced on the application form. Service areas ensure arrangements are in place for the handling, storage and destruction of material obtained through the use of covert surveillance/covert human intelligence sources (CHIS) or interception of data in accordance with Data Protection requirements, currently in accordance with the Data Protection Act 2018 which enacts the "GDPR" -The General Data Protection Regulations 2018.
- 7.10** RIPA does not provide special protection for confidential Information but care will be taken by the Council where information consists of legally privileged information confidential personal information or confidential journalistic material relating to issues of security, local or national. In these circumstances (anticipated to be very rare) the Head of Paid Service (Chief Executive) or Assistant /Deputy Chief Executive will give the necessary authorisations.

8. PROCESS

RIPA AUTHORISATIONS

- 8.1** RIPA authorisations must be authorised by those with power to authorise in the Councils scheme of delegation contained in Annex A of this policy. **Once made the internal authorisation has to be judicially approved by a Magistrates Court.**
- 8.2** A written authorisation lasts for 3 months from the date Judicial authorisation (Magistrates Court approval) is given.
- 8.3** One authorised internally, the Council will apply to the Magistrates Court to seek judicial authorisation. **Only once that is given will the Council be able to carry out Directed Surveillance or use a Covert Human Intelligence Source (CHIS). Procedures for the Interception of Communications Data are dealt with in a separate policy.**
- 8.4** Reviews of the authorisation will take place regularly between investigating and authorising officers to determine:
- (1) Whether Directed Surveillance should continue and if so whether the authority should be renewed after 3 months and
 - (2) The identity of individuals the subject of the surveillance and the risk of collateral intrusion shall be reviewed.
- 8.5** A renewal takes effect at the time at which the authorisation would have ceased to have effect but for the renewal. An application for renewal should not be made until shortly before the authorisation period is coming to the end. Authorisations can be renewed more than once, provided they continue to meet the criterion for authorisation.
- 8.6** A renewal should assess broadly the value of the surveillance, the reasons for continuing with it and the benefit of the surveillance so far.
- 8.7** All authorisations both internal and approved by the Magistrates Court must be in writing.
- 8.8** If the decision is taken that the directed surveillance should be discontinued and is no longer justified, the authorising officer

should cancel the authorisation by instructing those involved in the Directed Surveillance to cease the operation.

- 8.9** Authorisation forms under the legislation are not public documents.

COVERT HUMAN INTELLIGENCE SOURCES

- 8.10** A Covert Human Intelligence Source (CHIS) is defined in paragraph 3.3 above.

- 8.11** In practice, the use of a CHIS by the Council is likely be very limited.

- 8.12** The requirements of necessity, proportionality and collateral intrusion are the same as for directed surveillance as is the authorisation process including that of seeking judicial approval. Similar authorisation forms are to be used as for Directed Surveillance too but will be designated to apply to Covert Human Intelligence Sources.

- 8.13** A CHIS authorisation lasts for 12 months not 3 months, unlike a Directed Surveillance authorisation.

- 8.14** The receipt of a complaint, or complaint log/petition from a member of the public is not considered to be using a Covert Human Intelligence Source. Provided the Council have not asked for that person to strike up a relationship with a suspect in order to collect evidence then no CHIS relationship should be in existence.

- 8.15** Should a CHIS be employed the Investigatory Powers (Source Records) Regulations 2000 require the Council to maintain detailed records to protect the source which it would do.

- 8.16** From October 2021 the Regulation of Investigatory Powers Act 2000 has been amended to allow a Covert Human Intelligence Source to engage in criminal conduct to covertly gather information/evidence to assist a criminal investigation .However

these powers, whilst available to some other enforcement agencies on authorisation being granted, are **NOT under this amendment to the Act, available to local authorities** .Accordingly Sandwell MBC cannot and would not, seek to use these powers.

- 8.17** Any manipulation of a personal relationship by a public authority is likely to engage Article 8 of the Human Rights Act 1998 (which includes the right to establish and develop human relationships) **whether or not private information is intended to be gathered.**
- 8.18** An authorisation can be renewed provided there is good reason to renew after it has been reviewed by the authorising officer after reading a renewal application form submitted by the investigating officer before the existing authorisation has expired. Similarly if there is no good reason to continue with Directed Surveillance or the use of a Covert Human Intelligence Source the authorisation may be cancelled.
- 8.19** All authorities for Directed Surveillance and the use of Covert Human Intelligence Sources **must be** given in writing not verbally by Sandwell MBC.
- 8.20** All authorities granted by the officer process internally **must be** affirmed externally in writing by the Magistrates Court following an application by officers of the Council for approval. The decision maker will be a lay bench of Magistrates or a District Judge who also have the power to quash an authorisation made internally if they are not satisfied with it.
- 8.21** As a matter of law referred to in the Regulation of Investigatory Powers Act 2000 a subject of Directed Surveillance or of a Covert Human Intelligence Source will **NOT** be notified of the surveillance activity or application to authorise it as that would defeat the object of carrying out covert surveillance

AUTHORISING PROCESS – ANNEX A

The following Directorates within the authority may be affected by the Regulation of Investigatory Powers Act 2000 and the Investigation of Powers Act 2016 in terms of investigating serious offences which are also listed (but are examples only-they are not exhaustive) together with Officer Level and other circumstances relevant to level of authorisation.-

The Officers posts listed have power to authorise under the Officer Scheme of Delegation introduced in October 2022

Chief Executive and Deputy Chief Executive in their absence.

Authorisations concerning confidential or privileged Information or vulnerable persons being used as Covert Human Intelligence Sources, and any other authorisations if required to do so.

Director of Finance

Power to authorise also delegated by the Director of Finance to the **Audit Services Manager and Counter Fraud Manager** by virtue of the Officers Sub-Delegation Scheme /Agreed Policies referred to in the Scheme of Delegation above.

Power to investigate delegated by the Director of Finance to **Team Counter Fraud Investigators and Accredited Financial Investigator (if in post)**

For Investigation of offences under eg the **Fraud Act 2006, Theft Act 1968, Proceeds of Crime Act 2002**

Director of Law and Governance/Monitoring Officer

Authorisations concerning confidential or privileged information or vulnerable persons being used as Covert Human Intelligence Sources, and any other authorisations if required to do so.

Director of Borough Economy

Power to **authorise** also delegated by the Director of Borough Economy by the Officer Sub-Delegation Scheme/Agreed policies to **Regulated Services and Transformation -Borough Economy-Service Manager, Citizens and Consumer Protection Business and Consumer Manager ,Citizens and Consumer Protection Team Manager (Trading Standards) and Citizens and Consumer Protection Team Manager (Environmental Health) ,Operations Manager Citizen and Consumer Protection -Private Sector Housing Team**

Power to **Investigate** delegated by the Director of Borough Economy by the Officer Sub-Delegation Scheme/Agreed Policies to **Senior Trading Standards Officer /Inspector of Weights and Measures (Citizen and Consumer Protection),Trading Standards Officer (Citizen and Consumer Protection) Senior Environmental Health Officer (Citizen and Consumer Protection),Environmental Health Officer (Citizen and Consumer Protection) Enforcement Officer, Private Sector Housing Team**

For Investigation of offences under eg **The Fraud Act 2006, The Trade Marks Act 1994, The Tobacco Packaging Regulations 2015 and 2016, The Consumer Protection from Unfair Trading Regulations 2008 and the Consumer Protection Act 1987, Anti -Social Behaviour Act 2003 Section 54 in relation to aerosol paints, Licensing Act 2003 Sections 145-154 in relation to alcohol and Section 141A of the Criminal Justice Act 1988 in relation to Knives and the Children and Young Persons Act 1933 in relation to tobacco (“Under Age Sales” related offences)**

The Environmental Protection Act 1990 Sections 33 and 34 (“Fly-tipping”)

Director of Regeneration and Planning

Power to **authorise** also delegated by the Director of Regeneration and Planning by the Officer Sub-Delegation Scheme /agreed policies to **Service Manager -Development Planning and Building Consultancy**

Power to **Investigate** delegated by the Director of Regeneration and Planning by the Officer Sub-Delegation Scheme/agreed policies to **Senior Enforcement Co-ordinator and Planning Enforcement Officers.**

Most offences in the sphere of Planning and Building Control are offences that carry a maximum penalty of a **fine only**. The Council cannot therefore authorise covert surveillance or the use of a Covert Human Intelligence Source .The Town and Country Planning Act 1990 and the Building Safety Act 2022 contain some more serious offences based on the supply of false information that carry sentences above the minimum threshold, ie more than 6 months imprisonment.

USEFUL CONTACT POINTS

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