

IPCO

Investigatory Powers
Commissioner's Office

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Mr Mark Radford
Chief Executive
Swale Borough Council
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2 June 2020

Dear Mr Radford,

Inspection of Swale Borough Council

Please be aware that IPCO is not a "public authority" for the purpose of the Freedom of Information Act (FOIA) and therefore falls outside the reach of the FOIA. It is appreciated that local authorities are subject to the FOIA and that they may receive requests for disclosure of our reports. In the first instance the SRO should bring the matter to the attention of the IPCO Data Protection Officer (at: info@ipco.org.uk), before making any disclosure. This is also the case if you wish to make the content of this letter publicly available.


Your Council was recently the subject of a telephone and desktop-based inspection by one of my Inspectors, Gráinne Athorn. This has been facilitated through your RIPA Co-ordinator Mr Gary Rowland, who was interviewed over the telephone and provided extensive supporting documentation to the Inspector.

The information provided has demonstrated a level of compliance that removes, for the present, the requirement for a physical inspection.

Our last inspection of Swale Borough Council took place during April 2017. The inspection found that the policy and processes utilised by the Council were suitable and consequently no recommendations were made for further action. I understand that since the last inspection Swale Borough Council has used powers to authorise directed surveillance on one occasion during 2018 and copies of all relevant documentation were copied to Mrs Athorn to review.

When assessing the documentation relating to the authorised directed surveillance, Mrs Athorn is mindful that the application as it was presented to her was lawfully authorised following the processes set out by the Protection of Freedoms Act 2012 and she does not wish to undermine this decision, however it is suggested that by utilising the following feedback improvements may be made to any future applications:

- The application for directed surveillance related to the systematic destruction of a protected woodland resulting in the imposition of a High Court Injunction intended to prevent further damage. Mrs Athorn notes that the injunction cites two relevant persons both resident on a nearby Travellers site, however only one of these persons is listed as a subject of the intended surveillance. It is not clear from the

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explanation provided how these individuals came to be identified, what supporting information had been established to evidence their continued involvement in the destruction, and nor was it explained why only one was to be the subject of intended surveillance. A much fuller explanation of the context of the investigation so far would have assisted greatly in 'setting the scene' for the independent reader.

- Within the necessity criteria neither the applicant nor the Authorising Officer (AO) set out the likely penalty for disobeying a High Court injunction and how this reached the crime threshold that councils must satisfy in order to secure authorisation. It may be that the knowledge of the person granting approval was assumed, however in general terms when setting out the necessity of the proposed activity, the relevant offences under investigation and the likely penalty upon conviction as a first offence should be explained.
- When considering proportionality, the applicant did not address the criteria set out within the Covert Surveillance and Property Interference Code of Practice¹. The Code of Practice explains that an account must be provided to show how the proposed activity is justified within the circumstances of the operation and is not excessive; what other less invasive means of investigation have been considered or tried (for example in this case the use of an overt camera(s) as a deterrent); and how the proposed surveillance would cause the least intrusion to the subject(s) of the operation. The Authorising Officer's statement concerning proportionality was equally brief and gave little detail of how he had balanced the rights of the subject of the operation against the need to obtain evidence, and why this evidence was required rather than using the tactic as a deterrent.
- The application provided very little detail as to the type of equipment that was to be used other than to refer to it as 'digital recording equipment' and reference to its placement well away from residential premises. It is important that when authorising surveillance an AO understands the capability and limitations of the equipment to be used, so that an accurate assessment of success and the extent of collateral intrusion can be completed. In most cases there would be an expectation that a suitable feasibility assessment would be carried out prior to consideration by an AO to avoid an unnecessary authorisation.
- The application states that collateral intrusion was unlikely to occur because the land in question did not contain access routes or byways, however the omission of general details of the destruction of the woodland and the suspected perpetrators meant that it was not possible to assess if any other party was involved and what the consequential impact of surveillance would be on them. Community sensitivities or tensions relating to local Traveller residents were not articulated or addressed.
- Finally, the date of authorisation was the 14th May 2018 meaning the expiry date was in August, not July as stated². Any extant surveillance authorisation must be cancelled as soon as it is identified as no longer necessary. The cancellation of this authorisation was completed, without any surveillance taking place, three days before the (incorrect) expiry date. This suggests the need to review the activity at an appropriate point after authorisation had been neglected, as the unsuitability of the tactic in practice might otherwise have led to an earlier cancellation.

During her telephone call with Mr Rowland, Mrs Athorn summarised the above findings. Her conclusion is that the quality of the surveillance application and overall administration of the process would have been much improved by the involvement of a third party such as the RIPA Co-ordinator. It may also be the case that these problems were exacerbated by the decision to allow the Head of Planning to authorise an application from a staff member within his own department. It is therefore suggested that should a similar scenario arise in the future, a nominated Authorising Officer from a different department be asked to consider approving the application prior to it being taken to a court for consideration. The use of an Authorising Officer who is unfamiliar with the case is likely to prompt the greater detail envisaged as part of an improved application.

¹ The Home Office Code was updated in August 2018 after the time of the authorisation, but the earlier version was no less applicable.

² An authorisation begins at the time of the magistrate's approval and will be due to expire three months thereafter.

As well as reviewing the surveillance authorisation, Mrs Athorn also undertook a review of the current RIPA policy which covers both surveillance and CHIS as well as the acquisition of communications data. She found the document to be readable and a comprehensive guide which covered topics such as the use of information derived from social media during investigations. It is understood that your Council is registered with the National Anti-Fraud Network for the purposes of obtaining communications data, albeit as an infrequent user.

The monitoring of social media and the internet can offer initial investigative leads and assist with a council's enforcement or other investigative responsibilities, but it is important that any such activity is undertaken in a controlled and auditable manner. I understand that a suitable firewall is used by Swale Borough Council to prevent unauthorised internet access from Council approved devices. In his discussion with the Inspector, Mr Rowland set out an intention to review the overall use of overt social media profiles which can only help to strengthen your oversight of internet usage for both overt and covert purposes.

Furthermore, in accordance with section 4.47 of the 2018 Home Office Covert Surveillance and Property Interference Code of Practice, Mr Rowland confirmed that you provide Elected Members with an annual report sufficient to enable them to determine that the Council's policy remains fit for purpose, together with regular reports on RIPA activity (or inactivity).

During the inspection Mrs Athorn asked Mr Rowland about the Council's stance on the review and destruction of documentation. It is understood that this is governed by a suitable corporate policy with a standard six-year policy. Consequently, the above directed surveillance authorisation is the only entry on the central record of authorisations with all earlier entries having been deleted. Mrs Athorn did highlight that despite reference to the use of urgency provisions having been removed from the central record (removed from use by Local Authorities by the Protection of Freedoms Act 2012), a brief mention is still made of them within the RIPA Policy. Mr Rowland has agreed to remove this section of the policy.

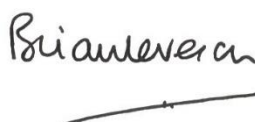
In conclusion, despite what may feel like a critical assessment of your use of RIPA powers, it appears that Swale Borough Council is well prepared to utilise surveillance in the future. The RIPA policy and processes are well established and Mr Rowland is both knowledgeable and helpful. The regular provision of training by an external provider (most recently in 2018) helps to reinforce corporate knowledge of RIPA, particularly as it is not in daily use. I understand that further training is planned, and I encourage you to invite again as many people to attend this as you think will benefit.

I am assured as to the integrity of your Council's processes and governance procedures and that these will be maintained by you in your capacity as SRO to ensure that high standards of compliance with the Act and relevant codes of practice are achieved. Mrs Athorn was impressed by the knowledge and approach of Mr Rowland, who will undoubtedly be a great support to you in your oversight role, and to whom thanks are due for his engagement at a time of unprecedented demands on local authorities.

I hope that this telephone-based inspection has proved to be a worthwhile exercise. My Office is available to you should you have any queries following the recent inspection, or at any point in the future. Contact details are provided at the foot of this letter.

I shall be grateful if you would acknowledge receipt of this letter within two months.

Yours sincerely,



The Rt. Hon. Sir Brian Leveson
The Investigatory Powers Commissioner