

East Ayrshire Council

Procedure for Authorisation of the Use of the Covert Human Intelligence Source

1. Foreword

- 1.1 The use of human beings to provide information ('informants') is a valuable resource for the protection of the public and the maintenance of law and order. In order that local authorities and law enforcement agencies are able to discharge their responsibilities, use is made of 'undercover' officers and informants. These are referred to as 'covert human intelligence sources' or 'sources' and the area of work of undercover officers and informants to whom this procedure applies will be referred to as 'source work.'
- 1.2 Until October 2000 the use of such sources was not subject to statutory control in the UK. From that date a legal framework ensures that the use, deployment, duration and effectiveness of sources is subject to an authorisation, review and cancellation procedure.

2. Policy Statement

- 2.1 In some circumstances it may be necessary for East Ayrshire Council employees, in the course of their duties, to make use of informants and to conduct 'undercover' operations in a covert manner, i.e. without a person's knowledge. By their nature, actions of this sort may constitute an interference with that person's right to privacy and may give rise to legal challenge as a potential breach of Article 8 of the European Convention on Human Rights and the Human Rights Act 1998 ('the right to respect for private and family life').
- 2.2 The Regulation of Investigatory Powers Act (2000) [RIPA] and the Regulation of Investigatory Powers (Scotland) Act (2000) [RIP (S) A] ('the Acts') together provide for the first time a legal framework for covert surveillance and the use of covert human intelligence sources by public authorities (including local authorities) and an independent oversight regime to monitor these activities.
- 2.3 Whilst the Acts do not impose a requirement for local authorities to seek to obtain an authorisation. East Ayrshire Council employees will be expected to adhere to this authorisation procedure before using a source or allowing or conducting an undercover operation.
- 2.4 Employees of East Ayrshire Council will **not** carry out intrusive surveillance within the meaning of the Regulation of Investigatory Powers (Scotland) Act 2000 nor will they authorise any person for any covert human intelligence source activity as an

opportunity to install any surveillance equipment into residential premises or private vehicle.

3. Objective

3.1 The objective of this procedure is to ensure that all work involving the use or conduct of a source by East Ayrshire Council employees is carried out effectively, while remaining in accordance with the law. It should be read in conjunction with the Regulation of Investigatory Powers (Scotland) Act 2000 and the Scottish Executive's Code of Practice on the Use of Covert human intelligence sources and the code of Practice on Covert Surveillance.

3.2 Definitions

3.2.1 **Covert human intelligence source** means a person who establishes or maintains a personal or other relationship with another person for the covert purpose of facilitating anything that:

- (a) covertly uses such a relationship to obtain information or to provide information or to provide access to information to another person; or
- (b) covertly discloses information obtained by the use of such a relationship or as a consequence of the existence of such a relationship.

A relationship is used covertly if, and only if, it is conducted in a manner calculated to ensure that the person is unaware of its purpose.

3.2.2 **Directed surveillance** is defined in the Interim Code of Practice as surveillance undertaken "for the purposes of a specific investigation or operation" and "in such a manner as is likely to result in the obtaining of private information about a person."

3.2.3 **Authorising officer** is the person who is entitled to give an authorisation for the use or conduct of a source in accordance with section 5 of the Regulation of Investigatory Powers (Scotland) Act 2000.

3.2.4 **Handler** means the person referred to in section 4(6)(a) of the Regulation of Investigatory Powers (Scotland) Act 2000 holding an office or position within the local authority and who will have day to day responsibility for:

- Dealing with the source on behalf of the local authority;
- Directing the day to day activities of the source;
- Recording the information supplied by the source; and
- Monitoring the source's security and welfare

- 3.2.5 **Controller** means the person/the designated managerial officer within the local authority referred to in section 4(6)(b) of the Regulation of Investigatory Powers Scotland Act 2000, responsible for the general oversight of the use of the source.
- 3.2.6 **The conduct** of a source is action of that source, falling within the terms of the Regulation of Investigatory Powers (Scotland) Act 2000, or action incidental to it.
- 3.2.7 **The use** of a source is any action to induce, ask or assist a person to engage in the conduct of a source or to obtain information by means of an action of the source.
- 3.2.8 **Private information** includes information about a person relating to his private or family life.
- 3.2.9 **Residential premises** means any premises occupied or used, however temporarily for residential purposes or otherwise as living accommodation.
- 3.2.10 **Private vehicle** means any vehicle that is used primarily for the private purpose of the person who owns it or of a person otherwise having the right to use it. This does not include a person whose right to use a vehicle derives only from his having paid, or undertaken to pay, for the use of the vehicle and its driver for a particular journey. A vehicle includes any vessel, aircraft or hovercraft.

4. Scope of the Procedure

- 4.1 This procedure applies in all cases where the use of an undercover officer or source is being planned or carried out.
- 4.2 This procedure does not apply to:
- Covert test purchase transaction under existing statutory powers where the officers involved do not establish a personal or other relationship for the purposes stated (see definition of a covert human intelligence source). As an example the purchase of music CD for subsequent expert examination would not require authorisation but where the intention is to ascertain from the seller where he buys suspected fakes, when he takes delivery etc. then authorisation should be sought beforehand.
 - Tasks given to persons (whether that person is an employee of the Council or not) to ascertain purely factual information (for example the location of cigarette vending machines in licensed premises).

4.3 In marginal cases, or other situations where doubt may arise as to the applicability of these procedures, officers should obtain appropriate advice from their line-managers/authorising officers, or from Legal Services. In general, officers should always err on the side of caution, bearing in mind the consequences which can arise from carrying out unauthorised activity, specifically 'evidence' subsequently being ruled inadmissible by the Courts or the Council being sued by an aggrieved person who believes his legal rights have been infringed by the carrying out of such unauthorised activity.

5. Principles of use or conduct of covert human intelligence source

5.1 In planning and carrying out source work, East Ayrshire Council employees shall comply with the following principles.

5.2 Lawful purposes

Source work shall only be carried out where necessary to achieve one or more of the permitted purposes (as defined in the Acts) namely:

- 5.2.1 For the purpose of preventing or detecting crime or the prevention of disorder;
- 5.2.2 In the interests of public safety;
- 5.2.3 For the purpose of protecting public health;
- 5.2.4 For any other purpose prescribed in an order made by the Scottish Ministers.

Employees carrying out source work or using sources must be aware that a source has no licence to commit crime. Any source that acts beyond the acceptable limits of case law in regard to this principle risks prosecution.

5.3 Confidential material

5.3.1 Applications where a significant risk of acquiring confidential material has been identified shall always require the approval of a Director, and should only ever be authorised following consultation with Legal Services.

5.3.2 Confidential material consists of:

- Matters subject to legal privilege (for example between professional legal advisor and client)
- Confidential personal information (for example relating to a person's physical or mental health) or
- Confidential journalistic material.

5.4 Vulnerable individuals

5.4.1 Vulnerable individuals, such as the mentally impaired will only be authorised to act as a source in the most exceptional circumstances. Authorisation of a Director will be required.

5.5 Juvenile sources

5.5.1 The use or conduct of any source under 16 years of age living with their parents cannot be authorised to give information about their parents.

5.5.2 Juvenile sources can give information about other members of their immediate family in exceptional cases. A parent, guardian or other 'appropriate adult' should be present at meetings with the juvenile source under the age of 16 years.

5.5.3 The authorisation should not be granted unless or until.

- The safety and welfare of the juvenile has been fully considered;
- The authorising officer has satisfied himself/herself that any risk has been properly explained and understood by the juvenile.
- A risk assessment has been undertaken as part of the application to deploy a juvenile source, covering the physical dangers and the moral and psychological aspects of his or her deployment.

5.5.4 Deployment of juvenile sources will only be authorised by a Director.

6. The Authorisation Process

6.1 Applications for the use or conduct of a source will be authorised at the level prescribed by the Regulation of Investigatory Powers (Prescription of Offices, Ranks and Positions) (Scotland) Order 2000. For the purposes of East Ayrshire Council the Investigations Manager will be no lower than third tier level. For public authorities there are no substitutes of lower grade prescribed to authorise 'urgent' cases in contrast, for example, to the police. It will be the responsibility of each Director to identify all authorising officers within their Department and to communicate this information to all relevant employees. All lists of authorising officers should be regularly reviewed, at least annually, to ensure they remain current and accurate.

6.2 Authorising officers within the meaning of this procedure should avoid authorising their own activities, although an authorising officer can also act as a controller or handler of a source.

- 6.3 Authorisations should always be in writing. However, in urgent cases a third tier level Manager or Head of Service or above may approve applications orally.
- 6.4 All applications for covert human intelligence source authorisations will be made on form EAC/auth/chis. The applicant in all cases should complete this. In urgent cases an oral authorisation may be given by the authorising officer. A statement that the authorising officer has verbally granted the authorisation should be recorded on the form or, if that is not possible, in the applicant's notebook or diary. This should be done by the person to whom the authorising officer spoke (normally the applicant) but should later be endorsed by the authorising officer.
- 6.5 All applications for covert human intelligence source renewals will be made on form EAC/ren/chis. The applicant in all cases should complete this where the source work requires to continue beyond the previously authorised period (including previous renewals).
- 6.6 Where authorisation ceases to be either necessary or appropriate the authorising officer or appropriate deputy will cancel an authorisation using form EAC/can/chis.
- 6.7 Forms, codes of practice and supplementary material will be available from the Council Intranet and will be maintained by the Trading Standards Service of the Department of Community Services.
- 6.8 Any person giving an authorisation for the use or conduct of a source must be satisfied that:
- Account has been taken of the likely degree of intrusion into the privacy of persons other than those directly implicated in the operation or investigation ('collateral intrusion'). Measures must be taken, wherever practicable, to avoid unnecessary intrusion into the lives of those affected by collateral intrusion.
 - The authorisation is necessary.
 - The authorised use or conduct is proportionate.
 - Satisfactory arrangements exist for the management of the source.
- 6.9 Authorisation for use of a Covert Human Intelligence Source can only be granted if sufficient arrangements are in place for handling the source's case. The arrangements that are considered necessary are that:
- 6.9.1 There will at all times be a person holding the requisite office, rank or position with the relevant investigating authority who will have day to day responsibility for dealing with the source on behalf of that authority and for the source's security and welfare – this should be the source's line manager (the Handler).
- 6.9.2 There will be at all times another person holding the requisite office, rank or position with the relevant investigating authority who will have the

general oversight of the use made of that source – this should be the handlers line manager (the Controller)

6.9.3 There will be at all times a person holding the requisite office, rank or position with the relevant investigating authority who will have responsibility for maintaining a record of the use made of that source – this should be the Authorising Officer.

6.9.4 The record relating to the use of that source are maintained by East Ayrshire Council which will always contain particulars of such matters as may be specified in regulations made by the Scottish Ministers.

6.9.5 The records maintained by East Ayrshire Council that discloses the identity of the source will not be available to persons except to the extent that there is a need for access to them to be made available to those persons.

6.10 **Necessity**

Source work shall only be taken where there is no reasonable and effective alternative way of achieving the desired objective(s).

6.11 **Effectiveness**

Planned undercover operations shall be undertaken only by suitably trained or experienced employees, or under their direct supervision.

6.12 **Proportionality**

The use of covert human intelligence sources shall not be excessive i.e. it shall be in proportion to the significance of the matter being investigated.

6.13 **Authorisation**

All use and conduct of covert human intelligence sources shall be authorised in accordance with this procedure.

6.14 Additionally, the authorising officer must make an assessment of any risk to a source in carrying out the conduct in the proposed authorisation.

6.15 Use of a covert human intelligence source with technical equipment

6.15.1 A covert human intelligence source wearing or carrying a surveillance device and invited into residential premises or a private vehicle does not require special authorisation to record activity taking place inside the premises or vehicle. Authorisation for the use of that covert human intelligence source may be obtained in the usual way.

- 6.15.2 Applicants should apply within their own line management structure unless other arrangements have been agreed or it is unreasonable or impractical in the circumstances.
- 6.15.3 Services wishing to adopt a more developed authorisation process may do so only on the explicit approval of a written policy by the Council; all authorisations must remain within the scope of the Scottish Executive's guidance on authorising grades.

7. Time Periods – Authorisations

- 7.1 Oral applications expire after 72 hours. If required they can be renewed for a further period of 12 months if renewed in writing.
- 7.2 Written authorisations expire 12 months beginning on the day from which they took effect.

8. Time Periods – Renewals

- 8.1 If at any time before an authorisation would expire (including oral authorisations) the authorising officer considers it necessary for the authorisation to continue for the purpose for which it was given, it may be renewed in writing for a further period of 12 months beginning with the day on which the previous authorisation ceases to have effect. Applications should only be made shortly before the authorisation is due to expire.
- 8.2 Any person entitled to authorise may renew authorisations. They may be renewed more than once, provided they continue to meet the criteria for authorisation.
- 8.3 Authorisations for the deployment of a juvenile source are renewable for one further period of 1 month.

9. Review

- 9.1 The Authorising Officer shall review all authorisations at intervals of not more than one month. Details of the review and the decision reached shall be noted on the original application.

10. Cancellation

- 10.1 The Authorising Officer or appropriate deputy must cancel an authorisation if he/she is satisfied that the use or conduct of the source no longer satisfies the criteria for authorisation or that procedures for the management of the source are no longer in

place. Where, possible the source must be informed that the authorisation has been cancelled.

11. Monitoring

- 11.1 Each Service or discrete location within Services must maintain a record of all applications for authorisation (including refusals), renewals, reviews and cancellations. The most senior authoriser in that Service or at that location will maintain the monitoring sheet from EAC/ms/ripsa.

12. Security and Retention of Documents

- 12.1 Documents created under this procedure are highly confidential and shall be treated as such. Services shall make proper arrangements for their retention, security and destruction, in accordance with the requirements of the Data Protection Act 1998 and the Code of Practice.
- 12.2 The Head of Administrative and Legal will maintain the Central Register of Authorisations. Authorising Officers shall notify, and provide copies to, the said officer of the grant, renewal or cancellation of any authorisations and the name of the Applicant Officer within no more than 2 working days to ensure the accuracy of the Central Register.
- 12.3 The Authorising Officer shall retain the original Authorisation and Renewal forms until cancelled. On cancellation, the original Application, Renewal and Cancellation forms shall be forwarded to the Head of Administrative and Legal with the Authorising Officer retaining a copy.
- 12.4 The Authorising Officer shall retain the copy forms for at least one year after cancellation. The Head of Administrative and Legal will retain the original forms for at least five years after cancellation. In both cases these will not be destroyed without the authority of the authorising officer if practicable.
- 12.5 All information recovered through the use of a source which is relevant to the investigation shall be retained for at least five years after the cancellation of the authorisation or the completion of any Court proceedings in which said information was used or referred to. All other information shall be destroyed as soon as the operation is cancelled.

13. Oversight

- 13.1 The Office of Surveillance Commissioners (OSC) provides independent oversight of the use of the powers contained within the Regulation of Investigatory Powers

(Scotland) Act 2000. This oversight includes inspection visits by Inspectors appointed by OSC.

14. Complaints

- 14.1 The Regulation of Investigatory Powers Act 2000 (the 'UK Act) establishes an independent tribunal. This has full powers to investigate and decide any cases within its jurisdiction. A leaflet entitled 'Investigatory Powers Tribunal: Regulation of Investigatory Powers Act 2000' sets out the complaints procedure. This is available from the Council Intranet and includes a form for a person to complain to the Tribunal.

AGENDA