Appendix 1

ORKNEY
ISLANDS COUNCIL

Policy on Use of Covert Human Intelligence Sources

Contents

1. Introduction

1.1.

In some circumstances, it may be necessary for Orkney Islands Council employees where evidence cannot be obtained in any other way, 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").

1.2.

The Regulation of Investigatory Powers Act (2000) [RIPA], the Regulation of Investigatory Powers (Scotland) Act (2000) [RIP(S)A] and the Investigatory Powers Act 2016 ("the Acts") together provide a legal framework for use of Covert Human Intelligence Sources by public authorities and an independent inspection regime to monitor these activities.

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1.3.

The Investigatory Powers Act 2016 establishes an Investigatory Powers Commission whose remit includes providing comprehensive oversight of the use of powers to which this Policy applies.

1.4.

The Investigatory Powers Tribunal, established in terms of RIPA, has jurisdiction to investigate and determine complaints against public authority use of investigatory powers.

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The Chief Executive is the RIPSA Senior Responsible Officer, who has oversight and scrutiny in relation to the RIPSA function and ensures the integrity of the processes in place and acts as the main point of contact with the Investigatory Powers Commission. In the Chief Executive's absence the Executive Director of Corporate Services will deputise.

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A detailed procedure has been developed for Covert Human Intelligence Sources ("the Procedure").

2. Objective

The objective of this Policy is to ensure that all use or conduct of a source by council employees is carried out effectively, while remaining in accordance with the law. It should be read in conjunction with the Scottish Government's Code of Practice on Use of Covert Human Intelligence Sources ("the Code of Practice").

3. Scope of the Policy

3.1.

This Policy applies in all cases where the use of an undercover officer or source is being planned or carried out. All Officers involved should be suitably trained and experienced.

3.2.

This Policy does not apply to covert test purchase transactions under existing statutory powers where the officers involved do not establish a personal or other relationship for the purposes stated. 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/she buys suspected fakes, when he/she takes delivery etc. then authorisation should be sought beforehand; or 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).

3.3.

In terms of Section 1(7) of RIP(S) Act a person is a covert human intelligence source if the person:

(a) establishes or maintains a personal or other relationship with another person for the covert purpose of facilitating the doing of anything falling within paragraph (b) or (c) below.

(b) covertly uses such a relationship to obtain information or to provide access to any information to another person.

(c) covertly discloses information obtained by the use of such a relationship or as a consequence of the existence of such a relationship.

4. Principles of the Use and Conduct of a Source

4.1.

In planning and carrying out the use of a covert human intelligence sources, council employees shall comply with the following principles.

4.1.1.

Lawful purposes – the use and conduct of a source shall only be carried out where necessary to achieve one or more of the permitted purposes (as defined in the Acts); i.e. it must be:

a for the purpose of preventing or detecting crime or the prevention of disorder.

b in the interest of public safety.

c for the purpose of protecting public health.

Employees carrying out source work or using sources must be aware that a source has no licence to commit crime.

4.1.2.

Necessity – An authorisation for the use of a Covert Human Intelligence source is necessary on grounds falling within section 7 (3) of RIP(S)A if it is necessary-(a) for the purpose of preventing or detecting crime or of preventing disorder; (b) in the interests of public safety; or (c) for the purpose of protecting public health.

4.1.3.

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

4.1.4.

Proportionality – the use and extent of a source shall be as defined in section 6(2) of the RIP(S) Act – that the authorised use and conduct of a source is proportionate to what is sought to be achieved by carrying it out.

4.2.

Obtaining an authorisation under the RIP(S) Act will only ensure that the authorised use or conduct of a source is a justifiable interference with an individual's Article 8 rights it if is necessary and proportionate for the source to be used. The RIP(S) Act first requires that the person granting an authorisation is satisfied that the authorisation is necessary in the circumstances of the particular case for one or more of the statutory grounds in section 7(3) of the RIP(S) Act.

4.3.

If the use of the source is necessary, the person granting the authorisation must be satisfied that the use of a source is proportionate to what is sought to be achieved by the conduct and use of that source. This involves balancing the intrusiveness of the use of the source on the target and others who might be affected by it against the need for the source to be used in operational terms. The use of a source will not be proportionate if it is excessive in the circumstances of the case or if the information which is sought could reasonably be obtained by other less intrusive means. The use of a source should be carefully managed to meet the objective in question and sources must not be used in an arbitrary or unfair way.

4.4.

Collateral intrusion – reasonable steps shall be taken to minimise the acquisition of information that is not directly necessary for the purposes of the investigation or operation being carried out.

4.5.

Before authorising the use or conduct of a source, the authorising officer should take into account the risk of intrusion into the privacy of persons other than those who are directly the subjects of the operation or investigation (collateral intrusion). Measures

should be taken, wherever practicable, to avoid unnecessary intrusion into the lives of those not directly connected with the operation or investigation.

4.6.

Authorisation – all use and conduct of covert human intelligence sources shall be authorised in accordance with the Procedure. Additionally the authorising officer must make an assessment of any risk to a source in carrying out the conduct in the proposed authorisation and satisfactory arrangements exist for the management of the source.

5. The Authorisation Process

5.1.

Applications for use of a Covert Human Intelligence Source will be authorised by an Executive Director (other than the Executive Director of Corporate Services who has a role of deputising for the Senior Responsible Officer) or in their absence the Head of Legal Services.

5.2.

An Executive Director should be a designated officer to give the necessary written authorisation for the use or conduct of a Covert Human Intelligence Source or in their absence the Head of Legal Services. In urgent or exceptional circumstances written or oral authorisation might be given by an officer of Chief Officer grade which should as soon as practicable be followed up by a written authorisation from the relevant official.

5.3.

In terms of the Scottish Government's Code of Practice a written authorisation granted by an authorising officer will cease to have effect (unless renewed) at the end of a period of twelve months beginning with the day on which it took effect. Urgent oral authorisations granted by a person who is entitled to act only in urgent cases will unless renewed, cease to have effect after seventy two hours, beginning with the time when the authorisation was granted or renewed. Further details are contained in the Procedure. Particular special rules apply to the use of vulnerable individuals or juvenile sources. Additional guidance is contained in Chapter 5 of the Code of Practice.

6. Documents

6.1.

The Procedure in implementation of this Policy uses the following documents:

a Use or conduct of a covert human intelligence source – Written Authorisation

This should be completed by the applicant in all cases not covered by oral authorisation (below). It is effective from the time that approval is given.

b Use or conduct of a covert human intelligence source – Oral Authorisation

This is a record of an oral authorisation, which should be completed by the applicant. It should be used only in cases where the urgency of the situation makes the submission of a written application impractical. The authorising officer should write out a separate authorisation as soon as practical.

c Use or conduct of a covert human intelligence source – Renewal of Authorisation

This should be completed by the applicant in all cases where surveillance is required beyond the previously authorised period (including previous renewals) and thereafter signed by the authorising officer.

d Use or conduct of a covert human intelligence source – Cancellation

This should be completed by both the applicant and the authorising officer when the authorisation ceases to be either necessary or appropriate.

7. Security and Retention of Documents

7.1.

Documents created under this procedure are highly confidential and shall be treated as such. Services must ensure that arrangements are in place for the handling, storage and destruction of material obtained through the use of a covert human intelligence source. Authorising officers must ensure compliance with the appropriate data protection requirements and any relevant codes of practice produced by Orkney Islands Council relating to the handling and storage of material.

7.2.

The Head of Legal Services shall maintain a register of current and past authorisations. Applicant officers shall ensure that sufficient information is provided to keep this up to date.

8. Central Record of all Authorisations

8.1.

A centrally retrievable record of all authorisations should be held by the Head of Legal Services and regularly updated whenever an authorisation is granted, renewed or cancelled. The record should be made available to the relevant Inspector from the Investigatory Powers Commission, upon request. These records should be retained for a period of at least five years from the ending of the authorisation and should contain the following information:

- The type of authorisation.
- The date the authorisation was given.
- Name and rank/grade of the authorising officer.
- The unique reference number (URN) of the investigation or operation.
- The title of the investigation or operation, including a brief description and names of subjects, if known.
- Whether the urgency provisions were used, and if so why.

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- If the authorisation is renewed, when it was renewed and who authorised the renewal, including the name and rank/grade of the authorising officer.
- Whether the investigation or operations is likely to result in obtaining confidential information as defined in this code of practice.
- The date the authorisation was cancelled.

8.2.

In all cases, Services should maintain the following documentation which need not form part of the centrally retrievable record:

- A copy of the application and a copy of the authorisation together with any supplementary documentation and notification of the approval given by the authorising officer.
- A record of the period over which the activities of the source has taken place.
- A record of the result of each review of the authorisation; the results of which should be recorded in the central record.
- A copy of any renewal of an authorisation, together with the supporting documentation submitted when the renewal was requested.
- The date and time when any instruction was given by the authorising officer.