



4 December 2018

## Inspection Report – The Moray Council

### 1. Date of inspection

20<sup>th</sup> November 2018

### 2. Inspector

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### 3. Introduction

- 3.1 The county of Moray lies in the north east of Scotland and serves a population of around 90,000. This is a rural area, the main town being Elgin where its HQ is located. There are a number of other sizeable towns in the county, e.g. Forres, Buckie and Lossiemouth. Agriculture plays a major role in the economy of the region which also produces about 50% of Scotch whisky.
- 3.2 The Chief Executive is Mr Roddy Burns and the address for written correspondence is The Moray Council, High Street, Elgin, Moray, IV30 1BX.
- 3.3 A copy of this report should be provided by email to:  
██████████ [@moray.gov.uk](mailto:██████████@moray.gov.uk)
- 3.4 This inspection has been conducted to assess the level of compliance with the Regulation of Investigatory Powers (Scotland) Act 2000, the Regulation of Investigatory Powers Act 2000 (RIPA) and all associated Codes of Practice in respect of the Council's use of covert surveillance, covert human intelligence sources (CHIS) and requests for communications data (CD).
- 3.5 Since the last period of inspection, the Council has significantly reduced the number of authorisations made under RIP(S)A. Since the last inspection five authorisations have been granted for directed surveillance and eight for the use and conduct of CHIS. For comparison, in the previous period of inspection there were 25 DS and 23 CHIS.
- 3.6 This was a striking reduction but was consistently explained by officers at all levels as the result of the decision to adopt a different approach to trading standards investigations, with greater use of overt deterrence and disruption, and reserving the use of investigatory powers for the more persistent offenders who had not responded to overt tactics. No officer felt that the reduction was a consequence of difficulties meeting the standards required under the codes of practice or obtaining an authorisation when it was deemed necessary. No officer felt that there had been a diminishment in the council's ability to deliver its services and to help protect the public.

#### 4. Review of progress on recommendations

4.1 The Council was last inspected on 5 November 2015 and four recommendations were made:

1. *The council should review its policy and guidance document to ensure that the matters discussed in this report are addressed to ensure that officers are aware of the processes to be followed when making applications.*
2. *There should be an immediate review of authorising officers and their responsibilities to ensure that whenever authorisation is granted for directed surveillance or CHIS, the authorising officer is sufficiently detached from the operation as discussed in the Statutory Code of Practice.*
3. *The arrangements for the management of CHIS should be reviewed immediately to ensure that:*
  - a. *CHIS are properly supervised as set out in the legislation and Code of Practice and*
  - b. *That the records relating to the use of the CHIS are properly maintained as required by SSI 2002 No. 205.*
4. *Whenever the urgency provisions are used, proper records should be made and kept by both the applicant and the authorising officer as required by the legislation and Statutory Codes of Practice.*

4.2 The council has addressed all the issues raised, with the partial exception of the second recommendation (independence of authorising officers), and the recommendations are discharged. The question of the independence of authorising officers will be considered in more detail below.

#### 5. Policies and procedures

5.1 Moray Council has a single policy governing the use of Directed Surveillance and CHIS which was provided prior to the inspection. The policy is well presented and gives clear direction to those council officers who may require to use the investigatory powers. It has been reviewed and updated since the last inspection and more recently following the issuing of the new RIP(S)A codes of practice by the Scottish Government in December 2017. The policy is readily available to council officers and the public as it has been published on the council's website. It is also available via the council's internal electronic document management system.

5.2 The council continues to maintain a RIP(S)A forum. This meets every 6 months and is chaired by the Senior Responsible Officer (SRO) and is an effective method of bringing key stakeholders together to note changes in legislation, policy and discuss any issues relating to the use of investigatory powers. The agenda, minutes and action register of the previous two meetings (January and June 2018) were inspected and demonstrate that it is an effective forum. The forum is an excellent initiative and should be maintained. The SRO and the Legal Services team have done well to maintain wider stakeholder engagement, with departments and services who have not made any applications in the last 3 years attending.

- 5.3 A senior solicitor in the Litigation and Licencing team conducts a retrospective review of all RIP(S)A authorisations every 6 months and prepares an assurance report. This is scheduled to report to the RIP(S)A forum and provides an important additional level of independent assurance to the SRO. This process flagged concerns relating to the independence of the authorising officer, which will be discussed in more detail in 7.17-7.20 below.
- 5.4 There are a number of minor observations in relation to the policy:
- At some points, both directed surveillance and CHIS are grouped together under the general heading 'surveillance' (e.g. section 6 of the policy). As this section also considers the use of CHIS, it would be more accurate to title this section 'Investigatory Powers' or similar as this is how the powers are referred to collectively in the legislation. Any change should be made consistently through the policy.
  - The policy does not have specific sections dealing with the on-line use of powers (on-line surveillance, on-line CHIS). As this is the area upon which council officers are most likely to need guidance, or inadvertently engage in unauthorised activity, it may be wise to address it explicitly in policy. It should be noted however that the council had circulated an excellent two-page guidance note to all its staff via its internal newsletter on the use of social media in the course of council investigations. Well written, with precisely the right level of detail and practical guidance for officers, it would be a simple matter to include this guidance as an annex to the policy, include it in induction packs and re-circulate to all staff on an annual basis.
  - As with any policy, it would make sense to include version control and revision information at some point within the document, so it is more readily apparent when it came into force and when significant revisions have been made.
  - It may be helpful to provide hyperlinks to the relevant codes of practice in the digital version of the policy.

## 6. Related training

- 6.1 All Authorising Officers receive annual RIP(S)A training. Organised by Moray Council this has been attended by officers from neighbouring local authorities also. The training has been delivered by very experienced solicitors from the Scottish Crown Office as well as serving members of Police Scotland from their covert authorities bureau. Copies of training materials were inspected and found to be completely satisfactory.
- 6.2 A training register of officers who have completed RIP(S)A training is maintained by the Legal Services department within the council. Recently this has fallen into abeyance, with simply a record of those attending the training from Moray Council kept. It is intended that the register will be instituted again. It is **recommended** that this should be done, as being able to demonstrate clearly who has received what training, at what time and by which provider is an important part of the assurance process and would be one of the first items to be called for in the event of a reported error or legal proceedings of any kind in relation to any alleged mis-use or mis-application of the investigatory powers (be these RIP(S)A, RIPA or IPA). Furthermore, this register should include *any* training received by council officers relevant

to not just the authorisation but also the use of investigatory powers, e.g. CHIS handler training, surveillance officer training.

**7. Inspection Findings**

*Errors*

7.1 No errors have been reported and none were identified during the inspection.

*Confidential Information*

7.2 There has been no case where confidential information has been obtained.

*Journalistic Material*

7.3 No journalistic material was sought or obtained.

*Legally Privileged Material*

7.4 No Legally Privileged Material was sought or obtained.

*Informing Elected Representatives*

7.5 The council discharges its obligations to inform elected representatives by presenting an annual report (covering the financial year) to a committee of councillors. The report is examined in committee and the Chief Executive confirmed that it is given due scrutiny, with councillors typically asking why the activity is necessary and proportionate. The codes of practice also indicate that public authorities should consider internal updates at least quarterly on the use of RIP(S)A powers to elected representatives, but this was not being undertaken. This is understandable given the low number of authorisations sought and granted, but should be kept under consideration if the use of powers returns to the levels seen during the previous inspection period.

*Central Register of Authorisations*

7.6 A central register of authorisations is maintained for authorisations made under RIP(S)A. This is on the Council's Sharepoint application, an electronic documents and records management system (EDRMS). A paper copy is also maintained, which contains all original authorisations and applications. Both the digital and paper versions of the register were clear, straightforward and effective, with review dates, cancellation dates and times etc. readily apparent, as well as when the authorisation had been self-authorised.

*Directed Surveillance*

7.7 Five authorisations for directed surveillance were granted since the last inspection. All were granted in relation to investigations by the council's trading standards department and were for a variety of offences, [REDACTED]

[REDACTED]

7.8 Three of these applications and authorisations were examined in detail. All were to a high-standard, with the operational rationale, necessity and proportionality clearly set out, both in general terms and why in each specific case the use of surveillance was necessary. The applications avoided extraneous detail and it was easy to get to the nub of the issue. Authorisations clearly set out the parameters of what surveillance activity was permitted. It is council policy to conduct reviews by the authorising officer monthly. One authorisation inspected had been through such a review and the reasons why it was necessary to continue the surveillance clearly set out as well as the product from the activity so far. In all cases cancellations were promptly made, with the intelligence benefit of the activity detailed.

7.9 [REDACTED]

*Directed Surveillance – CCTV*

7.10 Moray Council owns the equipment and infrastructure for CCTV equipment deployed across the Moray region. There are some 35-36 cameras. All are controlled from a CCTV control room located in Elgin Police station and operated by Police Scotland civilian staff, meaning it is under the operational control of Police Scotland. The council does not employ the CCTV equipment for directed surveillance of any kind, does not make or seek authorisations, and it was clear the distinction between activity that should be authorised and that which should not, such as the retrospective examination of recordings, was clearly understood by the SRO and other relevant officers.

*Covert Human Intelligence Sources (CHIS)*

7.11 Since the last inspection eight authorisations for the use and conduct of a CHIS have been granted. [REDACTED]

7.12 [REDACTED]

7.13 All of the applications were to a good standard, with the background, necessity and proportionality clearly established. The risk assessments included in the application were sufficiently detailed, with due diligence undertaken to research the potential risk posed [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

7.16 Each CHIS had a source record modelled on the requirements set out in SSI 2002 No. 205. These were adequate, if basic, records, although as all the CHIS were council officers, there was less need for fuller records. If a non-council officer were ever to be authorised as a CHIS then the records would need to be correspondingly more comprehensive, including particularly a record of all contacts (face-to-face to remote) with the CHIS.

7.17 No CHIS was used to obtain information about a member of a relevant legislature.

*Direct Involvement (Self-authorisation)*

7.18 The central register of authorisations indicated that most of the thirteen CHIS and DS applications were authorised by a person with direct involvement in the operation. This was raised in the last inspection and remains a point of concern. The Code of Practice recognises that the Authorising Officer may be involved in the operational direction of the planned activity (e.g. the Controller in the case of CHIS) in small public authorities where it is not practicable to achieve the desirable separation. This point has been discussed and accepted and the fact of self-authorisation clearly recorded. However, in the

two most recent CHIS authorisations, the authorising officer and controller was also the SRO. This is far from desirable. Internal review had already identified this as an issue and the council already has an action-plan in place to appoint and train a new Authorising Officer by early 2019. It is envisaged that this new AO (currently the Environmental Health Manager) will also assume management responsibility for the trading standards department in a new merged structure following the retirement by the previous Trading Standards Manager in May 2018 and a decision by the council not to maintain this post.

- 7.19 This will, however, not fully resolve the issue of self-authorisation as this new AO will still have direct management responsibility for the use of investigatory powers activity they are authorising. But it is certainly preferable to the SRO acting in all three roles. Once this new AO is trained, Moray will have access to five AOs. One of these is the Chief Executive, and another the SRO, amongst three remaining, it should be possible to ensure that an AO other than the SRO is used. It is **recommended** that this is made a matter of policy for the council. Lack of prior practical experience in performing the role should not be a barrier – if only the experienced AO is used then no other AO will gain experience. This will also allow the SRO to focus on their wider oversight responsibilities as set out in the codes of practice.
- 7.20 In discussion, senior Council officers did indicate that partnership arrangement with neighbouring local authorities was under consideration. This is certainly a model that has been used elsewhere, for example small neighbouring police forces in England may send their applications to an AO in the neighbouring force and vice-versa. A similar arrangement may be well worth exploring, notwithstanding the larger size of the neighbouring local authorities.
- 7.21 All AOs should be able to consult with the persons knowledgeable of investigatory powers within Legal Services without compromising either the independence of the AO, or the internal oversight function performed by Legal. Indeed, in cases of greater sensitivity, such as with a juvenile CHIS, or involving journalistic material, seeking legal advice during the authorisation process is strongly advised. Policy should be amended to reflect this.

*Communications Data (CD)*

- 7.22 The council retains the ability to obtain communications data under the provisions of Part 2 of RIPA. In the period under inspection, no applications were made and no communications data obtained. Nevertheless, the council has a comprehensive and effective CD policy in place in the form of a 'Manual of Standards for Accessing Communications Data'. Since 2013, the Council has no SPoCs as this role is performed by the National Anti-Fraud Network. The council currently has four trained Designated Persons (DP) who are the Environmental Health Manager, Benefits Manager, Head of Development Services and Head of Finance. The Trading Standards Manager post was also a DP, however as previously noted this post has been vacant since the retirement of the previous holder and is due to be merged with the Environmental Health Manager role. The council plans to undertake a review of the DP roles early in 2019. This is timely as Part 3 of the Investigatory Powers Act will commence in the spring 2019 and will replace the RIPA provisions for CD. DPs for example will become 'Designated Senior Officers'. The council should take the opportunity of the review to update and refresh policy, designation of roles and training as necessary.

*R v Sutherland considerations*

- 7.23 As a matter of policy, the AO will always hold a face to face meeting with the applicant and discuss what has been authorised. Applicants and operational staff have access to the authorisation. This is best practice and should be maintained.

**8. Conclusion**

- 8.1 This was a very positive inspection which demonstrated that Moray Council is maintaining a good standard of compliance with the legislation and procedures governing the use of covert investigation tactics and had responded effectively to the recommendations given in the previous inspection. Despite the insular geographical nature of Moray and the small size of the council, it makes effective and proportionate use of investigatory powers, maintaining a high standard of policy, training and adherence to the RIP(S)A and RIPA codes of practice. The question of direct involvement will always be a challenge for such a small authority and although a point of concern, it was reassuring to see that the council recognised the issue and had action plans in place to address it.
- 8.2 With the reduction in authorisations, skill fade amongst practitioners and authorising officers is an inevitable risk. Maintaining training standards remains important. Pooling expertise, both internally and with neighbouring authorities, remains a valuable mitigation.

**9. Recommendations**

- 9.1 The council should maintain a training register of all officers who have received relevant training in the use and authorisation of any of the investigatory powers under RIP(S)A, RIPA or the IPA. (6.2)
- 9.2 The Council should amend its policy and procedures to ensure that the Authorising Officer is not the same person as the Senior Responsible Officer except in circumstances where no other AO is available, as with an urgent oral application for example. (7.19)

  
*Inspector*