

## **The Protection of Freedoms Act 2012: Judicial Approval for Local Authority Surveillance**

**By Ibrahim Hasan**

The Protection of Freedoms Act 2012 was passed on 1<sup>st</sup> May 2012. From 1<sup>st</sup> November 2012, all local authority surveillance authorised under the Regulation of Investigatory Powers Act 2000 (RIPA) will have to be approved by a Magistrate.

### **Background**

On 26th January 2011 the [Home Office Review](#) into counter-terrorism and security powers was published. Before the 2010 General Election, both coalition partners promised to overhaul RIPA which regulates, amongst others, local authorities when conducting covert surveillance and accessing communications data. They argued that such surveillance was often used to investigate minor offences and in a disproportionate manner (see also the latest [Big Brother Watch Report](#)).

### **Magistrates' Role**

Chapter 2 of Part 2 of the 2012 Act (sections 37 and 38) amends RIPA so as to require local authorities to obtain the approval of a Magistrate for the use of any one of the three covert investigatory techniques available to them under RIPA namely Directed Surveillance, the deployment of a Covert Human Intelligence Source (CHIS) and accessing communications data. An approval is also required if an authorisation to use such techniques is being renewed. In each case, the role of the Magistrate is to ensure that the correct procedures have been followed and the relevant factors have been taken account of. The new provisions allow the Magistrate, on refusing an approval of an authorisation, to quash that authorisation.

### **Directed Surveillance and CHIS**

Section 38 of the 2012 Act makes provision for Magistrate approval of local authority authorisations for the use of Directed Surveillance and the deployment of a CHIS. It does this by adding a new section 32A to Part 2 of RIPA.

Directed Surveillance is often conducted by local authorities to, amongst other things, investigate a benefit fraud or to collect evidence of anti-social behaviour. Typical methods include covertly following people, covertly taking photographs of them and using hidden cameras to record their movements. A typical example of a CHIS, in a local authority context, is an informant using his relationship with his employer to regularly disclose information about benefit fraudsters working in a factory.

From 1<sup>st</sup> November 2012, the internal authorisation for such surveillance methods is not to take effect until such time (if any) as a Magistrate has made an order approving it (section 32A(2)). Approval can only be given if the Magistrate is satisfied that:

- a) There were reasonable grounds for the authorising officer approving the application to believe that the Directed Surveillance or deployment of a CHIS was necessary and proportionate and that there remain reasonable grounds for believing so.
- b) The authorising officer was of the correct seniority within the organisation i.e. a Director, Head of Service, Service Manager or equivalent as per the Regulation of Investigatory

Powers (Directed Surveillance and Covert Human Intelligence Sources) Order 2010 (SI 2010/521) (“the 2010 Order”).

- c) The granting of the authorisation was for the prescribed purpose, as set out in the 2010 Order i.e. preventing or detecting crime (*and satisfies the Serious Offence Test for Directed Surveillance (see below)*)
- d) Any other conditions set out in any order under Part 2 of RIPA are satisfied (none at present).

In addition to the above, where the authorisation is for the deployment of a CHIS, the Magistrate must be satisfied that:

- e) The provisions of section 29(5) have been complied with. This requires the local authority to ensure that there are officers in place to carry out roles relating to the handling and management of the CHIS as well as the keeping of records (as per the Regulation of Investigatory Powers (Source Records) Regulations 2000 (SI 2000/2725)).
- f) Where the CHIS is under 16 or 18 years of age, the requirements of the Regulation of Investigatory Powers (Juveniles) Order 2000 (SI 2000/2793) have been satisfied. This sets out rules about parental consent, meetings, risk assessments and the duration of the authorisation. Note that the authorisation of such persons to act as a CHIS must come from the Chief Executive.
- g) Where the application is for the renewal of a CHIS authorisation, a review has been carried out by the local authority and the magistrate has considered the results of the review.

The new provisions make it clear that the authorising officer is not required to apply in person and there is no need to give notice to either the subject of the authorisation or their legal representatives (Section 32B(2)). This reflects the covert nature of the exercise of the investigatory powers under RIPA.

### **Directed Surveillance and the Serious Crime Test**

The Home Office Review also recommended that where local authorities wish to use RIPA to authorise Directed Surveillance, this should be confined to cases where the offence under investigation carries a custodial sentence of six months or more (the Serious Crime Test). This recommendation was put into effect by [The Regulation of Investigatory Powers \(Directed Surveillance and Covert Human Intelligence Sources\) \(Amendment\) Order 2012, SI 2012/1500](#) which also comes into force on 1<sup>st</sup> November 2012. See our [Blog post](#) for more (<http://actnowtraining.wordpress.com>).

### **Communications Data**

Chapter 2 of Part 1 of RIPA allows local authorities, as well as others, to access communications data about an individual from any Communications Service Provider (CSP) (e.g. a telephone or mobile phone service provider).

A new section 23A will be added to Chapter 2 of RIPA (by section 37 of the 2012 Act). Once again, an authorisation or notice to obtain communications data from a CSP shall not take effect until a Magistrate has made an order approving it. The magistrate must be satisfied that:

- a) There were reasonable grounds for the Designated Person (the person authorising the obtaining of the data) within the local authority to believe that obtaining communications

data was necessary and proportionate and that there remain reasonable grounds for believing so.

- b) The Designated Person was of the correct seniority within the local authority in accordance the Regulation of Investigatory Powers (Communications Data) Order 2010 (SI 2010/480) i.e. Director, Head of Service, Service Manager or equivalent.
- c) The granting or renewal of the application was only for the prescribed type of communications data to be acquired for the prescribed purpose as set out in the above Order (i.e. subscriber and service use data (e.g. mobile phone subscriber information and itemized call records) to be acquired only for the purpose of preventing or detecting crime or preventing disorder)
- d) Any other conditions set out in an order made by the Secretary of State under Chapter 2 of Part 1 of RIPA are satisfied (none at present).

Note that the [Draft Communications Data Bill](#) was laid before Parliament on 14<sup>th</sup> June 2012. This provides an updated framework for ensuring the availability of communications data and its obtaining by public authorities. It will replace the communications data provisions within the RIPA as amended by the Protection of Freedoms Act. See our [blog post](#) for more on this (<http://actnowtraining.wordpress.com>).

The new RIPA codes of practice and guidance (yet to be published), which will accompany the changes to the local authority surveillance regime, will spell out precisely how the Magistrate approval process will work. The new procedure will have a profound impact on the work of local authority investigators and auditors. The added scrutiny of authorisation forms by Magistrates increases the importance of staff training and guidance on completing such forms correctly.

Covert Surveillance and RIPA Update	
The latest changes to Part 2 of the Regulatory of Investigatory Powers Act 2000	
<p>This workshop will cover the latest developments in this fast changing area of law incl. the Protection of Freedoms Act changes. It is suitable for those new to RIPA as well as those seeking an update or refresher.</p>	<p><b>Venues and Dates</b></p> <p><b>Birmingham</b> - 11<sup>th</sup> Sep 2012</p> <p><b>London</b> - 2<sup>nd</sup> Oct 2012</p> <p><b>Manchester</b> - 16<sup>th</sup> Oct 2012</p> <p><b>Cardiff</b> - 6<sup>th</sup> Nov 2012</p>

More details - [http://www.actnow.org.uk/courses/RIPA/Surveillance\\_Law](http://www.actnow.org.uk/courses/RIPA/Surveillance_Law)

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