

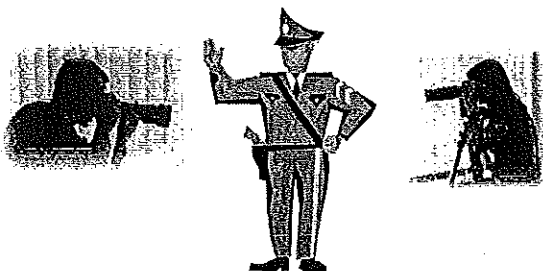
APPENDIX 1

Covert Surveillance and RIPA

Ibrahim Hasan
Act Now Training



RIPA 2000



What is RIPA?

1. Interception of Communications
2. Acquisition of Communications Data
3. Surveillance & Covert Human Intelligence Sources (CHIS)
4. Disclosure of Encrypted Data
5. Scrutiny

Background



- Interception of Communications Act 1985
- Halford v United Kingdom
- Human Rights Act 1998
- Permissive Legislation (S.80)



Need to be
 Human Rights compliant
 Fair trial
 Privacy

Section 80

Nothing in any of the provisions of this Act by virtue of which conduct of any description is or may be authorised by any warrant, authorisation or notice, or by virtue of which information may be obtained in any manner, shall be construed-

- (a) as making it unlawful to engage in any conduct of that description which is not otherwise unlawful under this Act and would not be unlawful apart from this Act;
- (b) as otherwise requiring-
 - (i) the issue, grant or giving of such a warrant, authorisation or notice, or
 - (ii) the taking of any step for or towards obtaining the authority of such a warrant, authorisation or notice,
 before any such conduct of that description is engaged in; or
- (c) as prejudicing any power to obtain information by any means not involving conduct that may be authorised under this Act.

with RIPA
 Failure to comply is not unlawful
 per se, but may be surveillance
 lawful

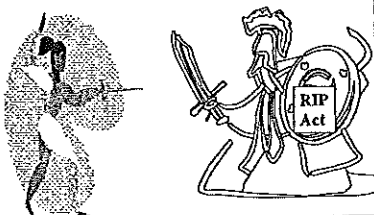
Case No: IPT/03/32/H

- 14th November 2006

"Although RIPA provides a framework for obtaining internal authorisations of directed surveillance (and other forms of surveillance), there is no general prohibition in RIPA against conducting directed surveillance without RIPA authorisation. RIPA does not require prior authorisation to be obtained by a public authority in order to carry out surveillance. Lack of authorisation under RIPA does not necessarily mean that the carrying out of directed surveillance is unlawful."

The RIPA Shield


- Judicial Review
- Article 8
- Article 6
- PACE



Evidence can be excluded under PACE


The RIPA Shield

Section 27 (a) "lawful for all purposes."
(b) no civil liability re: incidental conduct



Human Rights Act 1998

2nd October 2000



The Convention Rights

- Art 1 - duty to secure rights & freedoms
- Art 2 - right to life
- Art 3 - prohibition on torture
- Art 4 - prohibition on slavery
- Art 5 - right to liberty and security
- Art 6 - right to a fair trial
- Art 7 - protection from retroactive criminal offences

The Convention Rights

- Art 8 - right to privacy
- Art 9 - freedom of religion
- Art 10 - freedom of expression
- Art 11 - freedom of assembly
- Art 12 - right to marry
- Art 13 - right to an effective remedy
- Art 14 - freedom from discrimination

The Act & Local Authorities

Section 6

“It is unlawful for a Public Authority to act or fail to act (whether deliberately or not) in a way which is incompatible with Convention Rights...”

Article 8 - Privacy

“Everyone has the right to respect for his private and family life his home and his correspondence.

There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the rights and freedoms of others.”

Caselaw

Privacy

- Douglas & Zeta-Jones v Hello! Ltd (2000)
- David and Victoria Beckham v MGN Ltd (2001)
- Naomi Campbell v Mirror Group Newspapers (2002)
- David Murray v Big Pictures UK (2008)
- Von Hannover v Germany (2005)

Disclosure of Information

- Leander v Sweden (1987)
- MS v Sweden (1999)

CCTV

- Peck v United Kingdom (2001)

Public place right to privacy.
but weaker than in home, - Campbell

balancing exercise, public interest

CCTV public safety: street lighting ok
shd have ~~for~~ deleted his face before
disclosing CCTV footage of attempted suicide
in street.

Key Human Rights Concepts

- Necessity
- Proportionality
- Collateral Intrusion

Key Human Rights Concepts

- Necessity
- Proportionality
- Collateral Intrusion

Best evidence

Key Human Rights Concepts

- Necessity
- Proportionality
- Collateral Intrusion

reduce number of cameras?
do cameras need to be operating
all the time?
Warning before surveillance?
TIC searches of office

Covert Surveillance Code (Para 2.5)

"This involves balancing the intrusiveness of the activity on the target and others who might be affected by it against the need for the activity in operational terms. The activity 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. All such activity should be carefully managed to meet the objective in question and must not be arbitrary or unfair."

DCA HR Guide (Pg 55)

“ When taking decisions that may affect any of the qualified rights, a public authority must interfere with the right as little as possible only going as far as is necessary to achieve the desired aim.”

- See R v. Secretary of State for the Home Department ex p Daly (2001)

MB

Is it Proportionate?

- Is the surveillance excessive in the circumstances?
- Is it arbitrary or unfair?
- Can you get information using less intrusive means/ overt methods? (//)
- What other means have you tried? (//)
- Factors to set out :
 - Amount of data to be gathered
 - Impact on subject of surveillance
 - Timing of surveillance
 - Effect on others (Collateral Intrusion) (//)

- What you are seeking to achieve?
- Seriousness of the offence
- Impact of the offence on :
 - the victims
 - others/wider community
 - on the public purse

Wearing make surveillance laws
more strict.

Key Human Rights Concepts

- Necessity
- Proportionality
- Collateral Intrusion

Covert Surveillance Code

2.7 An application for an authorisation should include an assessment of the risk of any collateral intrusion. The authorising officer should take this into account, when considering the proportionality of the surveillance.

2.8 Those carrying out the surveillance should inform the authorising officer if the investigation or operation unexpectedly interferes with the privacy of individuals who are not covered by the authorisation. When the original authorisation may not be sufficient, consideration should be given to whether the authorisation needs to be amended and reauthorised or a new authorisation is required.

2.9 Any person granting or applying for an authorisation or warrant will also need to be aware of particular sensitivities in the local community where the surveillance is taking place and of similar activities being undertaken by other public authorities which could impact on the deployment of surveillance.

Collateral Intrusion Considerations

What is the impact on third parties?
How have you tried to minimise it?

Consider :

- Timing of surveillance
- Amount of surveillance
- Method of surveillance
- Sensitivities of local community
- Operations by other public authorities

reduce impact on Nth

people who are not targets

A surveillance

Key Human Rights Concepts

- Necessity
- Proportionality
- Collateral Intrusion

Conclusion

- Be aware - human rights angle/overlap
- Prepare justification/records
- Legal Aid - £50m

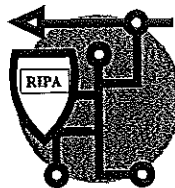
The RIPA Shield

- Judicial Review
- Investigatory Powers Tribunal
- Article 8
- Article 6
- PACE
- Ombudsman



The RIPA Shield

Section 27 (a) "lawful for all purposes."
(b) no civil liability re: incidental conduct



Surveillance of People and Places



RIPA Part 2 :

1. Directed Surveillance
2. Intrusive Surveillance
3. Covert Human Intelligence Sources (CHIS)

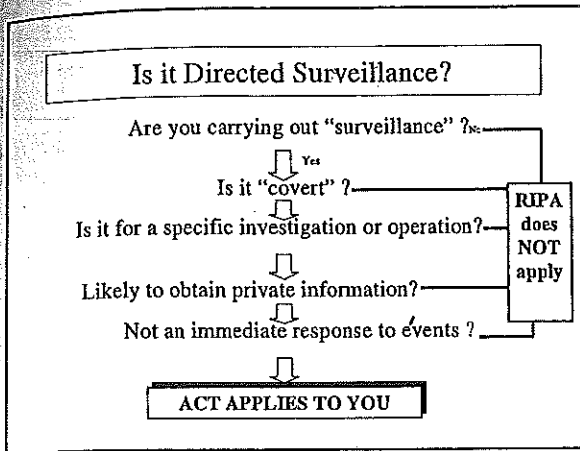
can't be authorised by LA's

Directed Surveillance Examples

- Fly tipping
- Benefit fraud
- Anti social behaviour
- Employee surveillance?
- Planning enforcement?

Directed Surveillance S. 26 (2)

1. Any covert surveillance that is not intrusive
2. Carried out for the purposes of a specific investigation or operation
3. Likely to result in the obtaining of private information about a person
4. Not an immediate response to events or circumstances where it would not be practical to seek authorisation

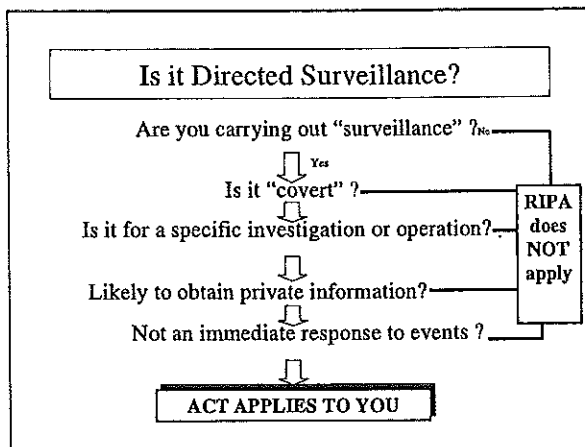


Are You Carrying Out "Surveillance" ?

"Surveillance" includes:

- Monitoring, observing or listening to persons, their movements, their conversations or their other activities or communication
- Recording anything monitored, observed or listened to in the course of surveillance; and
- Surveillance by or with the assistance of a surveillance device

very wide



Is the Surveillance "Covert" ?

Section 26 (9)

• Surveillance is covert if, and only if, it is carried out in a manner that is calculated to ensure that persons who are subject to surveillance are unaware that it is or may be taking place

- Dog patrol
- Refuse collection
- Litter enforcement



NA open: no prior warning
 hiding what you are doing.
 he planned targeted covert surveillance
 expectation of privacy quite

Is it Directed Surveillance?

Are you carrying out "surveillance"? *Yes*

Is it "covert" ?

Is it for a specific investigation or operation?

Likely to obtain private information?

Not an immediate response to events ?

RIPA does NOT apply

ACT APPLIES TO YOU

not CCTV or not
 + NA for specific investigation

Specific Investigation

Investigatory Powers Tribunal

Case No: IPT/03/32/H - 14th November 2006

C v. The Police and Secretary of State for the Home Department

Complaints to IPT
 can avoid damages.
 Some investigations must be related to a core regulatory function of LA/police
 e.g. surveillance of employees
 not core or regulatory function.
 no RIPA authorization obtainable

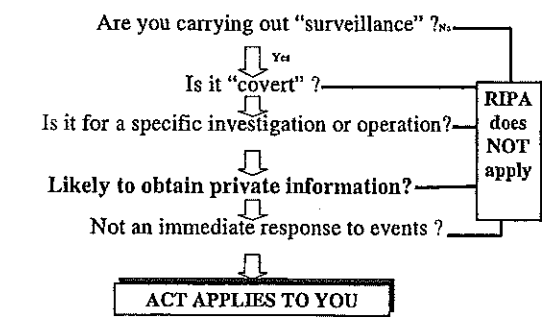
Purpose of Directed Surveillance

"Directed surveillance under RIPA is carried out by public authorities which are responsible for the discharge of the specific public functions and are equipped with investigatory powers for the performance of those functions.
 Directed surveillance by specified public authorities can only be authorised on specified grounds. Those grounds are linked to the specific public functions of the public authority and vary according to the functions of the particular public authority."

"Core Functions"

"The specific core functions and the regulatory powers which go with them are identifiable as distinct from the ordinary functions of public authorities shared by all authorities, such as the employment of staff and the making of contracts.
 There is no real reason why the performance of the ordinary functions of a public authority should fall within the RIPA regime, which is concerned with the regulation of certain investigatory powers, not with the regulation of employees or of suppliers and service providers."

Is it Directed Surveillance?



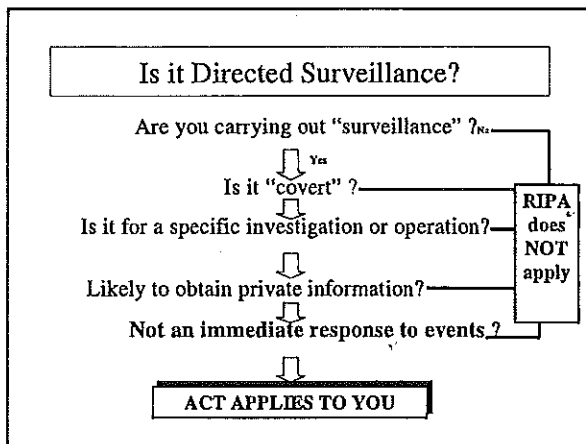
Private Information S.26(2)

Undertaken in such a manner as is likely to result in the obtaining of private information about a person (whether or not one specifically identified for the purposes of the investigation or operation)

Private Information

- 26 (10) - any information relating to a persons private or family life
- Amann v Switzerland (2000) - right to establish and develop relationships with other human beings; incl. professional/business activities
- "Likely" not calculated
- Any person

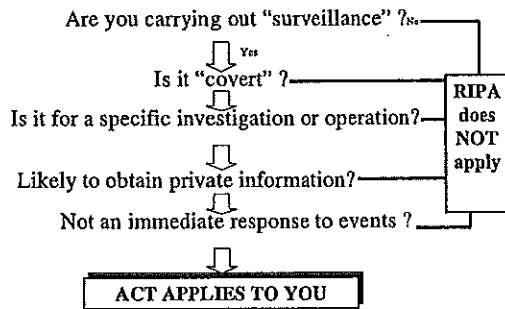
NB



Immediate Response

“otherwise than by way of an immediate response to events or circumstances the nature of which is such that it would not be reasonably practicable for an authorisation ... to be sought ...”

Is it Directed Surveillance?



Surveillance & Covert Sources



1. Directed Surveillance
2. Intrusive Surveillance
3. Covert Human Intelligence Sources (CHIS)

Intrusive Surveillance s.26(3)

Covert Surveillance that-

(a) is carried out in relation to anything taking place on any residential premises or in any private vehicle; and

(b) involves the presence of an individual on the premises or in the vehicle or is carried out by means of a surveillance device

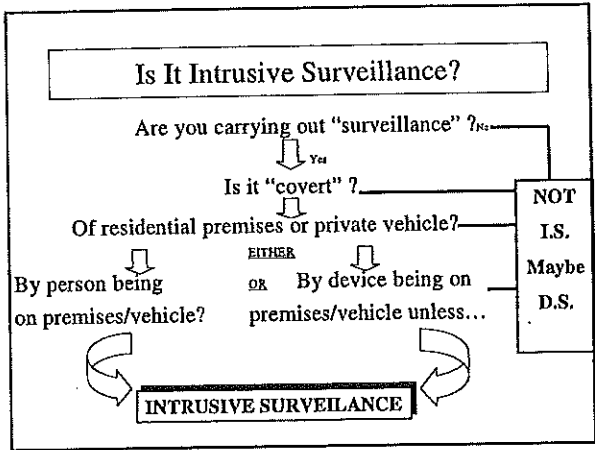
private vehicle not a ^{LA} ~~LA~~ commercial vehicle

device on

outside the premises not

intrusive

unless device gives quality & detail as if on the premises e.g. zoom camera



Surveillance Device

- Though surveillance device not present on the premises or in the vehicle,
- The device consistently provides information of the same quality and detail as from a device actually present on the premises or in the vehicle.

NB

Property Interference

- Part 3 Police Act 1997
- Vehicle Tracking Devices (VTD's)
- Councils have no statutory powers to undertake property interference

Intrusive Surveillance

- Check Definition/Flowchart
- Local Authority has no power to carry out intrusive surveillance
- Powers Reserved for Police, HM Customs and Security Services
- Maybe Reviewed

Surveillance & Covert Sources



1. Directed Surveillance
2. Intrusive Surveillance
3. Covert Human Intelligence Sources (CHIS)

CHIS - S.26(8)

A person who

- A. Establishes or maintains a personal or other relationship with a person for the covert purpose of facilitating b or c below
- B. Covertly using such relationship to obtain information or provide access to information
- C. Covertly disclosing information obtained by the use of such a relationship

professional witness
informant
relationship necessary with a person
e.g. confidential or private
single purpose? definition is wide
no intention of being a witness
∴ evidence would not be admitted
see 2 & 3 above

What needs to be authorised?

- Inducing, Asking, Assisting
- Examples:
 - Professional witnesses
 - Test purchases
 - Police informants

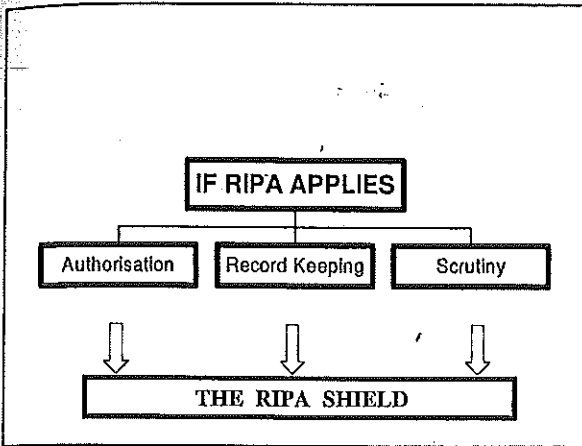


Volunteers

“The provisions of the 2000 Act are not intended to apply in circumstances where members of the public volunteer information to the police or other authorities, as part of their normal civic duties, or to contact numbers set up to receive information....”

- Crimestoppers

no arrangement to use the data for
to act covertly



Authorisations

- Who can give it?
 - » "Assistant chief officer or service manager or equivalent or any more senior officer..."
- What criteria / considerations apply?

level of authorisation may be increased in future or (considerations taken place)

Confidential Information

- Confidential Personal/Journalistic Material or Legally Privileged information
- Inform OSC
- Higher Level of Authorisation
 - » "The Head of Paid Service or in his absence a chief officer."

Authorisation Considerations
(Directed Surveillance) S.28 (2)

1. Necessary on one of grounds s.28 (3)
2. Proportionate to what is sought to be achieved
3. Collateral Intrusion
4. Confidential Information
5. Review Date

Authorisation Grounds
S.28 (3) & S.29(3)

Must be necessary in the interests of :

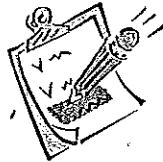
- [1. National security]*
- 2. Prevention or detection of crime/disorder**
- [3. Economic wellbeing of UK]*
- [4. Public safety]*
- [5. Protecting public health]*
- [6. Assessing/collecting tax,duty,levy etc.]*
- [7. Specified by regulations] 5th Jan 2004*

Authorisation Considerations
(CHIS) S.29 (2)

1. Necessary on one of grounds s.29 (3)
2. Proportionate to what is sought to be achieved
3. Special duties S.29 (5)

Special Duties S.29 (5)

1. Day to day responsibility for source's security and welfare
2. General oversight of source
3. Record of use
4. Security of source records



Authorisations

- Oral grants
- Written grants - forms
- Renewal - statutory review (CHIS)
- Cancellation

*must cancel authorisations
before 3 months if Section comes
to end before then.*

Central Record

- 3 years – inspection by OSC
- Regulation of Investigatory Powers (Source Records) Regulations 2000, SI No 2725 of 2000
- Confidentiality must be maintained
- Designated person to maintain records
- See codes (paras 2.13/2.14)

*central record = info cleared
from forms.*

Central Record Contents

- 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/operation;
- the title of the investigation or operation, including a brief description and names of subjects, if known;

Central Record Contents (2)

- whether the urgency provisions were used, and if so why.
- 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 operation is likely to result in obtaining confidential information as defined in this code of practice;
- the date the authorisation was cancelled.

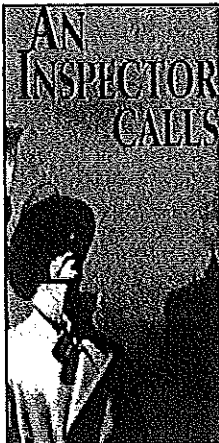
Documents to be Retained

- 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 surveillance has taken place;
- the frequency of reviews prescribed by the authorising officer;
- a record of the result of each review of the authorisation;
- 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.

Scrutiny :

- Independent Oversight
- 4 Commissioners
 - Interception
 - Intelligence Service
 - Investigatory Powers Commissioner for NI
 - Chief Surveillance Commissioner
- Independent Tribunal





Common OSC Criticisms

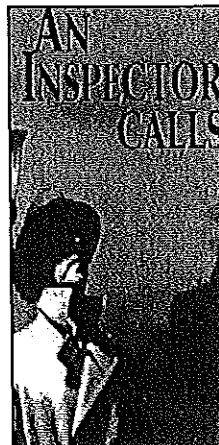
- Use of out of date forms
- Use of cut and paste
- Repetitive narrative and rubber stamping
- Necessity, proportionality and collateral intrusion not fully considered
- Likelihood of obtaining Confidential Information not fully considered
- Central records not compliant with Code e.g URN's etc.
- Inadequate corporate policy/guidance documents
- No CCTV protocol/procedure

also under in central record.

Home Office web site

MPs

NS



Common OSC Criticisms (2)

- Confusion re: review and renewals
- Lack of understanding of when CHIS
- Monitoring, recording and audit of surveillance equipment
- Handling and storage of surveillance product/evidence
- Confusion about interference with property powers under Police Act 1997
- More robust management and quality assurance
- Lack of regular training/refresher trainer

review send after period expired

The RIPA Shield

- Judicial Review
- Article 8
- Article 6
- PACE



More Information

- Codes of Practice
- www.homeoffice.gov.uk/ripa/ripact.htm
- www.lacors.com.uk
- www.lga.gov.uk



consultation doc

RIPA Cases

- Amman v Switzerland (16/2/00) ECHR 27798/95
- R v Button and Tannahill (2005) All ER 75
- Gilchrist v HM Advocate (Scotland) Appeal (2004) SCCR595
- R v E (2004) EWCA Crim 1243
- R v Terry and others (8/8/2001) HH Judge Broderick

technical breaches

A.R. PA not lead to

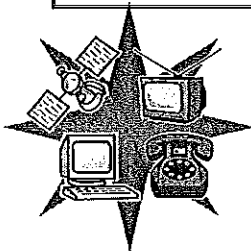
exclusion of evidence

but under Art. 6, courts are possible

More RIPA Cases

- PG and JH v UK (25/12/01) ECHR 44787/98
- McGowan v Scottish Water (2005) IRLR 167
- Jones v Warwick University (2003) 3 All ER 760
- Martin v McGuinness (2/4/03) (2003) ScotCS 96
- Grant v R (4/5/2005) CA Case no: 2003/04573

Data Protection: Employment Code Part 3



Employment Code Part 3

Surveillance

- Point of sales terminals
- CCTV
- E mails
- Auto checking software
- Website logs/Telephone logs
- Vehicle tracking

Key Recommendations

- Managing data protection
- The general approach to monitoring: monitoring is intrusive and employees are entitled to keep their private lives private.
- Monitoring should take place for a clear, justified purpose, and employees should be aware that it is taking place.

Key Recommendations

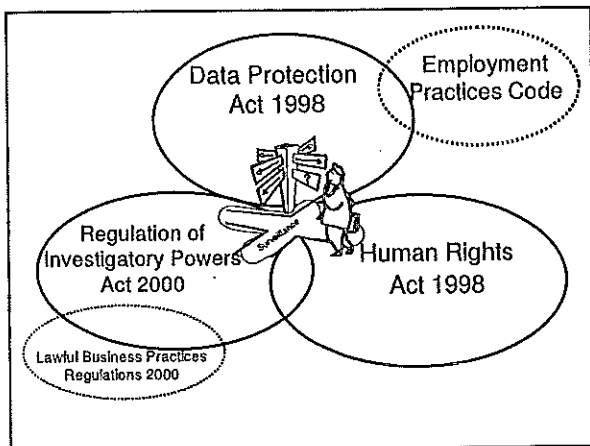
- Video and audio monitoring: tell employees
- Covert monitoring: authorisation
- In-vehicle monitoring: develop a policy
- Electronic communications: policy

Impact Assessment

- The purposes behind the monitoring;
- Any likely adverse impact on the employee(s) or others
- Alternatives to monitoring, or to the type of monitoring
- The legal obligations that will arise; and
- Whether the monitoring is justified

Adverse Impact

- Likely intrusion into employees' private lives
- Extent to which the employee will be aware
- Who will see the information
- Impact on the employment relationship
- The impact on other professionals – e.g. solicitors – who may have confidentiality issues
- How the monitoring will be perceived – e.g. will it be seen as "oppressive" or "demeaning"?



Practical Steps

- Brief management
- Assign responsibility
- Train staff
- Assess documentation
- See the big picture



APPENDIX 2

Practical RIPA and Covert Surveillance

Suggested Course Outline

We can discuss your precise requirements, make amendments and tailor the contents to suit your needs.

A full day course (10am to 4pm) on Part 2 of the Regulation of Investigatory Powers Act 2000 with an emphasis on practical guidance, form filling and discussion.

Suitability: Officers who need an in depth knowledge of the RIPA process and how to complete the authorisation forms. This course is also useful for those who advise in this area.

10 am

- Introduction, background and quiz
- The Human Rights Act 1998 – Privacy (art 8) its implications on surveillance
- Human Rights Concepts of Necessity, Proportionality and Collateral Intrusion full explained
- How to address human rights issues within the RIPA application forms

11. 15 Coffee (15 mins)

- Directed Surveillance – What it is and is not
- Covert Human Intelligence Sources – What exactly are they?
- Protecting sources
- Possible uses of above
- Authorisation criteria for Directed Surveillance and CHIS

12.45 Lunch (one hour)

- How to complete RIPA forms
- Mistakes to avoid
- Practical form filling/reviewing exercise
- Preparing for OSC inspections

3pm Tea (15 mins)

- Case Studies, group work and practical examples
- Latest RIPA News
- Feedback and open forum
- Practical Steps & Action Plan

4pm Formal Close