POLICY AND PROCEDURE ON THE USE OF POWERS UNDER THE REGULATION OF INVESTIGATORY POWERS ACT

1. INTRODUCTION

1.1 ***"Surveillance plays a necessary part in modern life. It is used not just in the ~ targeting of criminals but as a means of protecting the public from harm and ~ preventing crime.*** "

From the Foreword to the Home Office's Code of Practice on Covert Surveillance

1.2 The use of covert surveillance by public authorities, particularly local authorities has been the subject of much recent debate. The use of covert surveillance is properly a matter of public concern. The purpose of this policy is set out exactly how the Council will use its surveillance powers and comply with best practice.

1.3 The Council uses cover surveillance to supports its enforcement activities. It has been used principally by the Regeneration Department in dealing with anti-social behaviour and trading standards cases. This has resulted in many successful cases being brought which might otherwise not have been possible bringing rogue traders to account and improving the lives of Wirral residents suffering from severe anti-social behaviour. In 2007/8 the Council used directed surveillance on 45 occasions, 35 in anti-social behaviour case and 9 in cases investigated by Trading Standards.

1.4 The Council approved a policy and procedure for the use of covert surveillance in 2004. The Council has been inspected twice by the Office of the Surveillance Commissioner in 2003 and 2007. The use of surveillance was also the subject of a review by the Council's Internal Audit Team in 2008. The need to revise and update the Council's Policy and Procedure was identified as part of that review.

2. RELEVANT LEGISLATION

2.1 **The Human Rights Act 1998 (HRA)**

2.1.2 The HRA gives effect to the rights and freedoms guaranteed under the European Convention on Human Rights and Fundamental Freedoms ("the Convention"). Article 8 of the Convention is relevant in the context of covert surveillance in that everyone has the right to respect for his/her private and

family life, home and correspondence. It is now clear from decided cases that this right extends to activities of a professional or business nature and so includes employees. Article 6 of the Convention is relevant in the context of covert surveillance in that everyone has the right to a fair trial, including internal procedures or hearings, and fairness extends to the way in which evidence is obtained.

2.1.3 Consequently, there is to be no interference with the exercise of these rights by any public authority including a local authority, except where:

Such interference is in accordance with the law and is necessary in a democratic society in the interests of:

- national security
- public safety
- the economic well-being of the country
- for the prevention of disorder or crime
- for the protection of health or morals
- the protection of the rights and freedoms of others.

2.1.4 The HRA can be found at:

www.opsi.gov.uk/ACTS/acts1998/19980042.htm

2.2 **The Regulation of Investigatory Powers Act 2000 ("RIPA")** (and associated Regulations)

2.2.1 RIPA was introduced shortly after the HRA to ensure that the use by public bodies of surveillance was codified. Prior to RIPA there was only limited regulation of the use by public bodies of surveillance. RIPA was passed to ensure a consistency of approach and to set in place safeguards to ensure that the use of surveillance is proportionate. RIPA was passed well before the terrorism attacks on September 11 and was not introduced to deal with terrorism. RIPA and its associated regulations also follow the philosophy of recent legislation in trying to strike a balance between community responsibilities, including effective law enforcement, and individual rights and freedoms.

3.0 COVERT SURVEILLANCE

3.1 The term surveillance includes

- Monitoring, observing or listening to people, their movements, their conversations or their other activity or communication;

- Recording anything monitored, observed or listened to in the course of surveillance;
- Surveillance by or with the assistance of a surveillance device.

3.2 **Covert** surveillance is surveillance that is carried out in a manner calculated to ensure that the persons subject to the surveillance are unaware that it is or may be taking place. This needs to be contrasted with the deployment of **overt** surveillance. The use of such surveillance in places to which the public has access is increasingly commonplace. The Council has employed it in the form of CCTV monitoring of its offices, car parks and the town centres. CCTV monitoring is undertaken in accordance with the Council's Code of Practice for the operation of CCTV. CCTV is usually clearly marked through the use of signage.

3.3 RIPA applies where any covert surveillance of an identifiable or named person is carried out by a public authority carrying out an investigatory function. RIPA includes a local authority within the description of public authority.

3.4 Covert surveillance can be either

(a) **intrusive**, that is, carried out in relation to anything that is taking place on any residential premises or in any private vehicle by an individual or a surveillance device on the premises or in the vehicle; or

(b) **directed**, that is, undertaken for the purposes of a specific investigation or operation and involving the observation of a person or persons in order to gather information about them.

3.5 Local authorities are **not** authorised to conduct **intrusive** surveillance.

3.6 **Directed** covert surveillance that is likely to result in obtaining private information about a person is permitted by RIPA and its associated regulations **if** such surveillance has been authorised in the manner provided by the Act, the Home Office Code of Practice and the prescribed standard forms. Private information is any information relating to a person's private or family life.

3.7 An authorising officer for a public authority may only grant authorisation to carry out directed surveillance if it is necessary in the interests of:

- national security;
- preventing or detecting crime or of preventing disorder;
- public safety;
- protecting public health;

- assessing or collecting any tax, duty, levy or other imposition, contribution or charge payable to a government department; or

- is specified by regulations.

3.8 Local authorities may only authorise use of covert directed surveillance on the ground that it is necessary in the interests of **preventing or detecting crime or of preventing disorder**. The use of surveillance must also be proportionate to what is being sought to achieve.

3.9 Authorisation is not required to record things which are not planned but arise in the course of an investigation. For example if an enforcement officer is attending a property to visit a witness and observes a neighbour causing criminal damage he/she can record what they saw without authorisation.

3.10 Particular care needs to be taken when the surveillance may give rise to the obtaining of **confidential information**. In this context confidential information means:

- Where legal professional privilege applies;
- Confidential personal information; or
- Confidential journalistic material

Legal professional privilege will apply to oral and written communications between a professional legal adviser and his/her client made in connection with the giving of legal advice or in connection with or contemplation of legal proceedings.

Confidential personal information is information held in confidence about a person's physical or mental health or to spiritual counselling or assistance. The information must have been created or acquired in the course of a trade, business or profession or for the purpose of any paid or unpaid office.

Confidential journalistic material includes material acquired or created for the purposes of journalism and held subject to an undertaking to hold it in confidence.

If the purpose of the surveillance is to obtain confidential information then this will need to be approved by the Head of Legal and Member Services and the Chief Executive. If in the course of an operation confidential material is obtained through surveillance this must be notified immediately to the Head of Legal and Member services. It must be retained and provided to the inspector from the Office of the Surveillance Commissioner at the next inspection.

3.11 An applying officer wishing to use directed surveillance must complete **FORM RIPADS1** (all forms are attached to this policy). The applying officer must fully complete all parts of the form. The officer should refer as necessary to the Home Office Code of Practice, available as set out in paragraph 3.18 below.

3.12 The applying officer must consider the proportionality of the use of surveillance. The officer must consider the seriousness of the matter being investigated, the impact that any evidence obtained through the surveillance will have on the investigation and the level of intrusion which will be caused. The officer must take steps to ensure that any intrusion is kept to the minimum level necessary. Any intrusion in to the private life of persons not the subject of the investigation (e.g. family or visitors) should be kept to a minimum.

3.13 The completed form should be referred to an **authorising officer**. All Chief Officers may designate officers within their department as authorising officers for the purposes of RIPA. On receipt of the form the authorising officer will contact the Head of Legal and Member Services to obtain a unique reference number. The authorising officer must be a Head of Service or Service Manager. The authorising officer will place the form on the central register. The register is an electronic folder with access rights limited to authorising officers (for their area only) and the Head of Legal and Member Services or his/her nominated representatives (to all contents). When an authorising officer places a form on the register he/she will also separately notify the Head of Legal and Member Services by e-mail that this has been done. If the authorising officer does not have access to the register he or she will e-mail the form to the Head of Legal and Member Services who will arrange for it to be placed on the register. All forms for authorised applications shall be placed on the register immediately. All applications shall remain on the register for at least 3 years.

3.14 **Urgent Oral Applications**

3.14.1 It is possible to grant urgent oral authorisations. It is envisaged that this will be done very rarely, if ever. No authorisations have been granted in this way in the past 3 years. The Code of Practice states that this should not be done:

unless the time that would elapse before the authorising officer was available to grant the authorisation would, in the judgement of the person giving the authorisation, be likely to endanger life or jeopardise the investigation or operation for which the authorisation was being given. An authorisation is not to be regarded as urgent where the need for an authorisation has been neglected or the urgency is of the authorising officer's own making.

3.14.2 Where an urgent authorisation is granted the authorising officer must record as soon as is practicable the reasons for granting the authorisation urgently. An urgent authorisation will lapse after **seventy two hours**.

3.14 **Review/Cancellation**

3.15.1 Written authorisations will lapse automatically unless they are renewed after **3 months**. However, authorisations should be reviewed on a regular basis and cancelled when they are no longer required for the purpose for which they were granted. In each case the authorising officer within each public authority should determine how often a review should take place. This should be as

frequently as is considered necessary and practicable. On carrying out a review the authorising officer should complete a **Form RIPADS2**. Once completed the form should be placed on the central register immediately either by the authorising officer directly or via the Head of Legal and Member services. If the form is placed directly on the register the authorising officer must notify the Head of Legal and Member Services that this has been done by e-mail.

3.15.2 If upon review the need for directed surveillance no longer exists then the authorisation will be cancelled immediately. On cancellation the authorising officer shall complete **Form RIPADS3**. The completed form shall be placed on the central register either by the authorising officer directly or via the Head of Legal and Member services. If the form is placed directly on the register the authorising officer must notify the Head of Legal and Member Services that this has been done by e-mail.

3.16 **Renewal**

If the authorisation is due to lapse it may be renewed for a period of a further 3 months provided the need for the surveillance continues. If a renewal is required a **Form RIPADS4** shall be completed. If an authorisation is renewed for a further period of 3 months it should be reviewed during that period.

3.17 **Audit Checks**

The Head of Legal and Member Services shall carry out a regular audit of authorisations contained on the central register at least once every 3 months.

3.18 **Code of Practice**

The Home Office Code of Practice on the Use of Covert Surveillance can be viewed at: http://security.homeoffice.gov.uk/ripa/publication-search/ripa-cop/

4.0 COVERT HUMAN INTELLIGENCE SOURCES (CHIS)

4.1 The use of CHISs is also regulated by RIPA. A CHIS is a person who establishes or maintains a relationship with someone in order to obtain information, to provide another person with access to information or to disclose information as a consequence of that relationship. Should an officer consider the use of a CHIS as necessary, they must liaise with the Head of Legal and Member Services. If the use of a CHIS is deemed necessary, special arrangements will be made for their use in accordance with the Home Office Code of Guidance on Covert Human Intelligence Sources (see paragraph 4.5 below). It is not anticipated that CHIss will be used often by the Council. However, if professional witnesses are used they may fall within the definition of CHISs.

4.2 If an investigating officer does believe that the use of a CHIS is necessary in the course of an investigation he/she should complete **FORM RIPACHIS1**. The officer must consider the safety and welfare of a person acting as a

source and must carry out a risk assessment before authorisation is granted. The use must be proportionate to what is intended to be achieved. The authorisation will lapse automatically if not renewed after a period of **12 months**.

4.4 Special considerations apply if the person to be used as a source is **vulnerable** or a **juvenile**. In such circumstances advice should be sought from the Head of Legal and Member Services. Authorisation may only be granted by the Chief Executive, as Head of Paid Service, or in his/her absence a Chief Officer.

4.3 The same procedures outlined above in respect of directed surveillance of:

- Maintenance of a central register
- Confidential information
- Review
- Cancellation
- Renewal; and
- Audit checks

Shall also apply to the use of CHISs. The following forms shall be used **FORM RIPACHIS2** (review), **FORM RIPACHIS3** (cancellation) and **FORM RIPACHIS4** (renewal)

4.4 **Code of Practice**

The Code of Practice relating to the use of CHISs can be found at: http://security.homeoffice.gov.uk/ripa/publication-search/ripa-cop/

5.0 COMMUNICATIONS DATA

5.1 Requests for communications data will be dealt with by **designated persons**. Those persons who are authorising officers for the purposes of directed surveillance and CHIS's shall also be designated persons for the purposes of obtaining communications data. Each local authority must have its own **Single Point of Contact (SPOC)**, to whom applicants can submit their requests for communications data. This is to ensure there is a specific point of accountability in each authority requesting data for reasons connected with RIPA and the HRA etc. The SPOC for Wirral Council is the Trading Standards Manager

5.2 It is important to note that we are not referring here to the interception of communications or the **content** of communications. The Council does not have power to intercept communications or acquire content.

5.3 There are 3 types of communications data;

- traffic data;
- service use data; and

- subscriber data.

5.4 More information on what constitutes these types of communication data is set out in the Home Office Code of Practice (see paragraph 4. 8 below). Advice can also be sought from the Head of Legal and Member Services. Local authorities are only able to seek disclosure under RIPA of service use data and subscriber data **not** of traffic data.

5.5 Applications may be made for service use data e.g. itemised bills or subscriber data e.g. whether a person uses a particular network, who is the user of a particular number. A request for such information can only be made where it is necessary for the purpose of preventing or detecting crime or preventing disorder. The request must be proportionate. The form for completion for disclosure of communications data including guidance on completion is attached as **FORM RIPACD 1**. An authorisation or notice remains valid for **one month**. A valid authorisation or notice may be renewed for a further period of one month.

5.6 An authorisation or notice must be cancelled as soon as it is no longer necessary for the service provider to comply with the notice or the conduct required by the notice is no longer proportionate to what was sought to be achieved.

5.7 The **Senior Responsible Officer** must be responsible for: the integrity of the process in place within the public authority to acquire communications data; compliance with Chapter II of Part I of the Act and with this code; oversight of the reporting of errors to the Interception of Communications Commissioners Office (IOCCO) and the identification of both the cause(s) of errors and the implementation of processes to minimise repetition of errors; engagement with the IOCCO inspectors when they conduct their inspections, and where necessary, oversee the implementation of post-inspection action plans approved by the Commissioner. In Wirral the Senior Responsible Officer is the Head of Legal and Member Services.

5.8 In Wirral there has been very limited use of these powers. In the year 01/01/08 – 31/12/08 there were only 2 requests made for subscriber data by the Council.

5.9 The Home Office Code of Practice on the use of Communications Data can be viewed at: http://security.homeoffice.gov.uk/ripa/publication-search/ripa-cop/acquisition-disclosure-cop.pdf

6.0 REPORTING AND REVIEW

5.1 The Council recognises the public interest in the use by it of these powers. It is essential that it regularly monitors and reviews the use of these powers. Therefore, this policy and procedure shall be subject to a review on at least an annual basis. The Head of Legal and Member Services shall report annually to the Chief Officers Management Team on the use of these powers and the

Director of Law, HR and Asset Management shall report annually to the Cabinet and the Audit and Risk Management Committee.

7.0 COORDINATION AND TRAINING

7.1 All Departments that use or may use the Council's powers under RIPA shall nominate a Departmental Coordinator under this Policy. The Departmental Coordinators shall meet at least once a quarter to review the operation of this policy, share best practice and consider training needs. Those meetings shall be chaired by the Head of Legal and Member Services or his/her nominated representative. Appendix 1 shows the list of Departmental coordinators.

7.2 The Council shall ensure that adequate training is provided to officers in the use of the powers. A training register shall be maintained and all authorising/designated officers will receive training at least every 2 years. A copy of the register is attached as Appendix 2 If an authorising/designated officer has not attended any training for a period of 2 years they shall **automatically cease** to be a responsible/authorised officer.