East Cambridgeshire District Council

OPERATIONAL POLICY AND GUIDANCE ON THE USE OF DIRECTED SURVEILLANCE UNDER THE REGULATION OF INVESTIGATORY POWERS ACT 2000

OPERATIONAL POLICY AND GUIDANCE ON DIRECTED COVERT SURVEILLANCE AND AUTHORISATION UNDER THE REGULATION OF INVESTIGATORY POWERS ACT 2000, as amended ("RIPA")

1. What is covert surveillance?

RIPA defines surveillance as including

- *monitoring, observing, or listening to persons, their movements, their conversations, or their other activities or communications.*
- *recording anything monitored, observed, or listened to in the course of surveillance; and*
- *surveillance by or with the assistance of a surveillance device.*

Covert surveillance is surveillance, carried out so that the people being observed, or listened to, or monitored, are unaware that it is, or may be, taking place.

2. When might the Council undertake covert surveillance?

The Council is involved in every day functions of law enforcement, which are mainly carried out in an overt manner. However, there will be occasions when Council officers undertake their duties in a covert manner, for example, Trading Standards might covertly observe traders to ensure compliance with legal requirements.

RIPA provides a framework for regulating the use of those investigatory powers ensuring that any covert surveillance activities are consistent with the duties imposed upon public authorities by the Human Rights Act. RIPA provides that covert surveillance will be lawful if an authorisation has been properly issued and a person acts in accordance with that authorisation. This is important because if the Council is involved in any proceedings before a Court the Council will be able to show that it has acted lawfully and that it has gathered evidence properly.

The Council has to be satisfied that:

- *Any surveillance is undertaken in connection with a statutory function with which the Council is charged.*
- *That such interference can be justified legally.*
- *The surveillance is properly authorised in accordance with this policy and consequently provides a basis for justifying any interference with a person's human rights.*

3. What is Directed Surveillance?

Directed Surveillance is covert surveillance undertaken:

- for the purposes of a specific investigation or a specific operation.

- 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); and

- otherwise, then 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 under this Part to be sought for the carrying out of the surveillance

3A. Internet and Social Networking Sites

Although social networking and internet sites are easily accessible, consideration must still be given about whether a RIPA authorisation should be obtained if they are going to be used during the course of an investigation. If the study of an individual's online presence becomes persistent, or where material obtained from any check is to be extracted and recorded and may engage privacy considerations, RIPA authorisations may need to be considered.

Care must be taken to understand how the social media site being used works. Officers must not be tempted to assume that one service provider is the same as another or that the services provided by a single provider are the same.

Depending on the nature of the online platform there may be a reduced expectation of privacy where information relating to a person or group of people is made openly available within the public domain. However, in some circumstances privacy implications still apply. This is because the intention when making such information available was not for it to be used for a covert purpose such as investigative activity. This is regardless of whether a user of a website or social media platform has sought to protect such information by restricting its access by activating privacy settings.

In order to determine whether a directed surveillance authorisation should be sought for accessing information on a website as part of a covert investigation or operation, it is necessary to look at the intended purpose and scope of the online activity it is proposed to undertake. Factors that should be considered in establishing whether a directed surveillance authorisation is required include:

- Whether the investigation or research is directed towards an individual.

- Whether it is likely to result in obtaining private information about a person or group of people.

- Whether it is likely to involve visiting internet sites to build up a picture or profile.

- Whether the information obtained will be recorded and retained.

- Whether the information is likely to provide an observer with a pattern of lifestyle.

- Whether the information is being combined with other sources of information, which amounts to information relating to a person's private life.

- Whether the investigation or research is part of an ongoing piece of work involving repeated viewing of the subject(s).

- Whether it is likely to involve identifying and recording information about third parties, such as friends and family members of the subject of interest, or information posted by third parties, that may include private information and therefore constitute collateral intrusion into the privacy of these third parties.

- Conversely, where the Council has taken reasonable steps to inform the public or particular individuals that the surveillance is or may be taking place, the activity may be regarded as overt, and a directed surveillance authorisation will not normally be available.

Example 1: *An officer undertakes a simple internet search on a name, address, or telephone number to find out whether a subject of interest has an online presence. This is unlikely to need an authorisation. However, if having found an individual's social media profile or identity, it is decided to monitor it or extract information from it for retention in a record because it is relevant to an investigation or operation, authorisation should then be considered.*

Example 2: *The Council undertakes general monitoring of the internet in circumstances where it is not part of a specific, ongoing investigation or operation to identify themes, trends, possible indicators of criminality or other factors that may influence operational strategies or deployments. This activity does not require RIPA authorisation. However, when this activity leads to the discovery of previously unknown subjects of interest, once it is decided to monitor those individuals as part of an ongoing operation or investigation, authorisation should be considered.*

An authorisation for the use and conduct of a CHIS (Covert Human Intelligence Source, see Operational Policy and Guidance on the Use and Conduct of Covert Human Intelligence Sources) may be needed if a relationship is established or maintained by the officer on behalf of the Council without disclosing his or her identity (i.e. the activity will be more than mere reading of the site's content). This could occur if an officer covertly asks to become a 'friend' of someone on a social networking site.

An officer must not set up a false identity for a covert purpose without authorisation.

An officer must not adopt the identity of a person known, or likely to be known, to the subject of interests or users of the site without authorisation, and without the explicit consent of the person whose identity is used, and without considering the protection of that person.

4. When can Council Officers use Directed Surveillance?

Council officers can use directed surveillance to prevent and/or detect crime where the crime under investigation carries a custodial sentence of 6 months or more, and also for the investigation of offences relating to the illegal sale of alcohol or tobacco to minors. Such offences are considered to meet the "crime threshold".

If these conditions are not satisfied the Council cannot conduct surveillance under RIPA.

If the proposed surveillance activity takes place in residential premises or in a private vehicle and involves the presence of a person or surveillance device in the premises or vehicle, such surveillance is then referred to as Intrusive Surveillance. No officer of the Council is authorised to approve an authorisation under RIPA for Intrusive Surveillance.

Likewise, no officer of the Council may authorise entry onto, or interference with, property, for example, a Council officer cannot authorise trespass onto land in order to deploy surveillance equipment. In any case where a trespass is envisaged officers should seek immediate legal advice from the Director Legal & Monitoring Officer and Legal Services.

The fact that covert surveillance may not be authorised under RIPA does not necessarily mean that the actions proposed cannot lawfully be undertaken, and the advice of an authorising officer should be sought before any surveillance is contemplated. *(Reference Case No: IPT/11/129/CH; IPT/11/133/CH & IPT/12/72/CH)*

The changes introduced by SI. 2012:1500 and Sections 37 and 38 of the Protection of Freedoms Act 2012 mean that judicial approval is required before any covert surveillance can be carried out.

Throughout this Policy and Guidance, the term 'authorisation' refers to an Authorisation granted by an Authorising Officer [see Section 6]. Such an

Authorisation once granted requires judicial approval before it becomes effective. In this Policy and Guidance, the term 'approval' refers to that judicial approval.

5. How is an application for an authorisation made?

An application for authorisation for Directed Surveillance must be in writing and use the application form held on the central U drive. It will contain:

- The action to be authorised.
- The identities, where known, of those to be the subject of directed surveillance.
- An account of the investigation or operation.
- An explanation of the covert techniques that will be used, *N.B. the use of CCTV (see section 10 below)*
- Confirmation that the action proposed is intended to prevent or detect crime
- A statement outlining why directed surveillance is considered to be proportionate to what it seeks to achieve.
- An explanation of the information which it is desired to obtain as a result of the authorisation.
- An assessment of the potential for collateral intrusion, that is to say, interference with the privacy of persons other than the subjects of the surveillance, and an assessment of the risk of such intrusion or interference.
- An assessment of the likelihood of acquiring any confidential material and how that will be treated.

6. Authorising the use of Directed Surveillance

RIPA, as amended, identifies Authorising Officers as Director, Head of Service, Service Manager or equivalent. In East Cambridgeshire, this will be construed as a member of the Corporate Management Team, the Chief Executive and Service Leads.

Ideally the Authorising Officer should not be responsible for authorising surveillance within their own direct sphere of activity, i.e., those operations or investigations in which they are directly involved or for which they have direct responsibility.

7. What will the Authorising Officer have to consider in processing an authorisation?

Authorising Officers, and officers authorised to conduct directed surveillance, must be familiar with the requirements of any relevant Codes of Practice issued by the Home Office.

An authorisation can only be considered if the proposed covert activity aims to prevent or detect crime. The proposed activity should relate to a specific purpose that is part of the Council's statutory, or core, function. The concept of statutory or core functions of public authorities is not set out in RIPA, but the decision in *C v The Police and Secretary of State for the Home Office* ***IPT/03/32/H*** provides

guidance. It is not easy to define the concept in general terms or to propound a general test for distinguishing between the core functions and the ordinary functions of public authorities. However, such a distinction is implicitly recognised in RIPA by the nature of the grounds on which the Council may be authorised to conduct directed surveillance under RIPA, i.e., to prevent or detect crime.

To consent to an authorisation, the Authorising Officer must be satisfied that the proposed surveillance is ***necessary*** for the purpose of preventing and detecting crime that meets the crime threshold.

The Authorising Officer must also believe that the proposed surveillance is ***proportionate*** to what it seeks to achieve and that any potential for ***collateral intrusion*** and the likelihood of acquiring any ***confidential material*** is reduced to a minimum. Reference must be made to the statutory code of practice on covert surveillance.

There must be a record of whether authorisation was given or refused, by whom and the time and date (see Central Register). Service areas may use a range of techniques and equipment to undertake covert surveillance. Service areas must ensure that the use of covert equipment is managed appropriately, and the technical capacity of such equipment is made known to the Authorising Officer when it is deployed for covert purposes.

N.B. The safety of the public and Council staff must override all other considerations. Authorising Officers must consider violence at work, fatigue, lone working, etc. Where appropriate the Authorising Officer should call for a risk assessment to be conducted before granting the authorisation.

8. What does the term “necessary” mean?

RIPA provides a framework for ensuring that any surveillance activities do not infringe the human rights of the individual. In considering whether to grant an authorisation, the authorising officer must consider whether the proposed conduct is ***necessary***.

The fact that a crime may have been, or is about to be committed, does not automatically mean that covert surveillance is necessary. There must be a pressing need for a covert operation to be undertaken and there must be a clear reason for the covert activity. Council Officers should not seek to obtain information through covert means that is not needed for an investigation. It might be useful and very interesting to acquire information about a particular individual, but if it is not strictly necessary to have it then officers should not seek to obtain it. Officers need to show necessity in each case.

9. What does the term “proportionate” mean?

Proportionality is a very important concept. At its simplest, proportionality is about balancing the human rights of the individual against the need to undertake covert surveillance to further an investigation. An authority should not be granted upon grounds of the seriousness of the offence alone.

Any interference with a person's rights must be appropriate and justifiable. An Authorising Officer must consider a number of issues in deciding if a proposed course of action is proportionate. Most important is the belief that the Council has relevant and sufficient reason for interfering with an individual's right to respect for family and private life.

If an Authorising Officer decides that the required information needs to be acquired in a covert manner and that it cannot reasonably be acquired by other means that would involve less, or no, invasion of privacy that decision must be carefully documented and show how the Council has:

- Balanced the size and scope of the operation against the gravity and extent of the perceived crime or harm.

- Determined that the methods to be adopted will cause the least possible Intrusion on the target and others.

- Determined that the activity is an appropriate use of the legislation and the only reasonable way of obtaining the necessary result.

- Examined other methods of achieving the requisite information and why they were not used.

Interference will not be justified if the means used to achieve the aim are excessive in all the circumstances. Thus, where surveillance is proposed the covert action must be designed to do no more than meet the objective in question; it must not be unfair or arbitrary; and the impact on the individual or group of people concerned must not be too severe.

Every case must be considered on its merits. What is proportional in some circumstances will not be proportional in others. Authorising Officers need to ensure that an applicant has considered other ways to obtain the required information, or evidence, such as use of third-party information powers and other sources.

10. What does the term "collateral intrusion" mean?

Collateral intrusion occurs when officers obtain information about people unconnected with the investigation. Authorising Officers must consider the likelihood and extent of collateral intrusion when considering any application and ensure that applicants have planned to minimise collateral intrusion. Situations where collateral intrusion can occur include where:

- Observing business premises may result in watching unconnected people come and go.

- During an operation observing or overhearing other conversations that are not relevant to the investigation and impact upon the privacy of others.

It is important to understand that what is done in public does not automatically cease to be private. Members of the public are aware that public authorities use CCTV in an overt manner to prevent crime. Where such systems are used for a specific covert purpose, the covert operation shall not start until the owner/operator of the CCTV system has been shown the Authorisation for the covert action and has been briefed on the parameters of the covert action.

11. What does the term "confidential material" mean?

Confidential material is anything:

- That is subject to legal privilege, for example, communications between a legal adviser and his/her client.

- That is confidential personal information, for example, information about a person's health or spiritual counselling or other assistance given or to be given to him or her.

- That is confidential journalistic material (this includes related communications), that is, material obtained or acquired for the purposes of journalism and subject to an undertaking to hold in confidence.

If there is a likelihood that confidential material will be obtained as a result of covert surveillance, the authorisation can only be considered by the Chief Executive, or in his absence, the Director Legal and Monitoring Officer.

12. Applying for judicial approval

Following the issue of an authorisation by an Authorising Officer, the applicant should contact Legal Services so that a hearing may be arranged at the Magistrates Court. The applicant should be aware of the process for obtaining prompt or out-of-hours judicial approval if required. All relevant paperwork should be available for the Court to examine and officers should complete the judicial approval form on the central U drive. A magistrate will make one of the following decisions:

- **Approve the application**

  If the application is approved, the magistrate will make an order and the Council is now able to use the covert technique for that particular case.

- **Refuse to approve the application**

  The RIPA authorisation or notice will not take effect and the Council cannot use the technique in that case.

If an application has been refused the Council may wish to consider the reasons for that refusal, for example, a technical error in the form may be remedied without going through the internal authorisation process again. The Council may then wish to reapply for judicial approval once those steps have been taken.

- **Refuse to approve the grant and quash the authorisation**
  This applies where a magistrates' court refuses to approve the grant and decides to quash the original authorisation or notice. The court must not exercise its power to quash that authorisation unless the applicant has had at least 2 business days from the date of the refusal in which to make representations.

13. How long will an Authorisation last?

The written Authorisation will normally cease to have effect (unless renewed) at the end of a period of 3 months beginning with the date on which it took effect.

14. Allocation of tasks following the grant and approval of an Authorisation

Officers tasked with carrying out duties associated with directed surveillance must see a copy of the Authorisation and any comments by the Authorising Officer. However, for directed surveillance not involving the installation of devices, it is sufficient for the officer in charge of the surveillance team to see the documents and then to brief the team accordingly while taking care to precisely repeat the form of words used by the Authorising Officer. There should be an acknowledgement in writing (with date and time) that the Authorisation has been seen.

15. Reviewing authorisations/approvals

It is the duty of Authorised Officers to review periodically all the circumstances relating to an application. Such reviews should take place, at least, on a monthly basis. Any notes relating to the review must be recorded on the Review form held on the central U drive. Reviews should be more frequent where there may be collateral surveillance on persons other than those who are the subject of surveillance. Reviews must be recorded using the relevant review form on the central U drive.

If a decision is taken to cease surveillance, an instruction must be given to those involved in the operation to stop listening, watching, or recording the activities of the subject. The date on which that instruction is given should also be recorded.

N.B. Magistrates **do not** consider internal reviews

16. Renewing Authorisations

If an applicant wishes to continue a covert surveillance exercise for the same purpose for which it was given, then he/she may apply to renew it in writing for a

further period beginning with the day when the authorisation would have expired but for the renewal.

Any request for a renewal of an authorisation should be recorded using the Renewal form on the central U drive outlining the following:

- Whether this is the first renewal, or on how many occasions it has been renewed.
- The same information as outlined for an original application.
- Details of any significant difference in the information given in the previous authorisation.
- The reasons why it is necessary to continue with the surveillance.
- The content and value to the investigation or operation of the information so far obtained by the surveillance.
- An estimate of the length of time the surveillance will continue to be necessary.

Any renewal application will follow a similar process through the Magistrates.

17. Cancelling an authorisation

The Authorising Officer who granted or last reviewed/renewed the authorisation must cancel it if he/she is satisfied that the Directed Surveillance no longer meets the criteria for authorisation. If that Authorising Officer is unavailable, another Authorising Officer must undertake that role and ensure that surveillance ceases. Cancellation must be recorded using the relevant cancellation form on the central U drive.

N.B. Magistrates **do not** consider cancellations

18. What records must be kept?

The following records must be kept. Original documentation will be forwarded to the Senior Responsible Officer for filing with the Central Record. Practitioners should work from copies.

- The application for authorisation.
- The authorisation.
- The judicial application
- The judicial approval
- A record of the period over which the surveillance is taking or has taken place (including any significant suspensions of coverage).
- A record of the result of periodic reviews of the authorisation.
- Any renewal of authorisation, together with the supporting documentation when the renewal was requested.
- The cancellation of the authorisation

19. Who keeps the record?

The Director Legal and Monitoring Officer will maintain a central register of records. The Central Register is held electronically, and access is restricted. Authorising Officers are responsible for ensuring that they provide timely information to enable the Central Register to reflect all current activities and to avoid duplication of resources.

20. Who is responsible for overseeing compliance with RIPA?

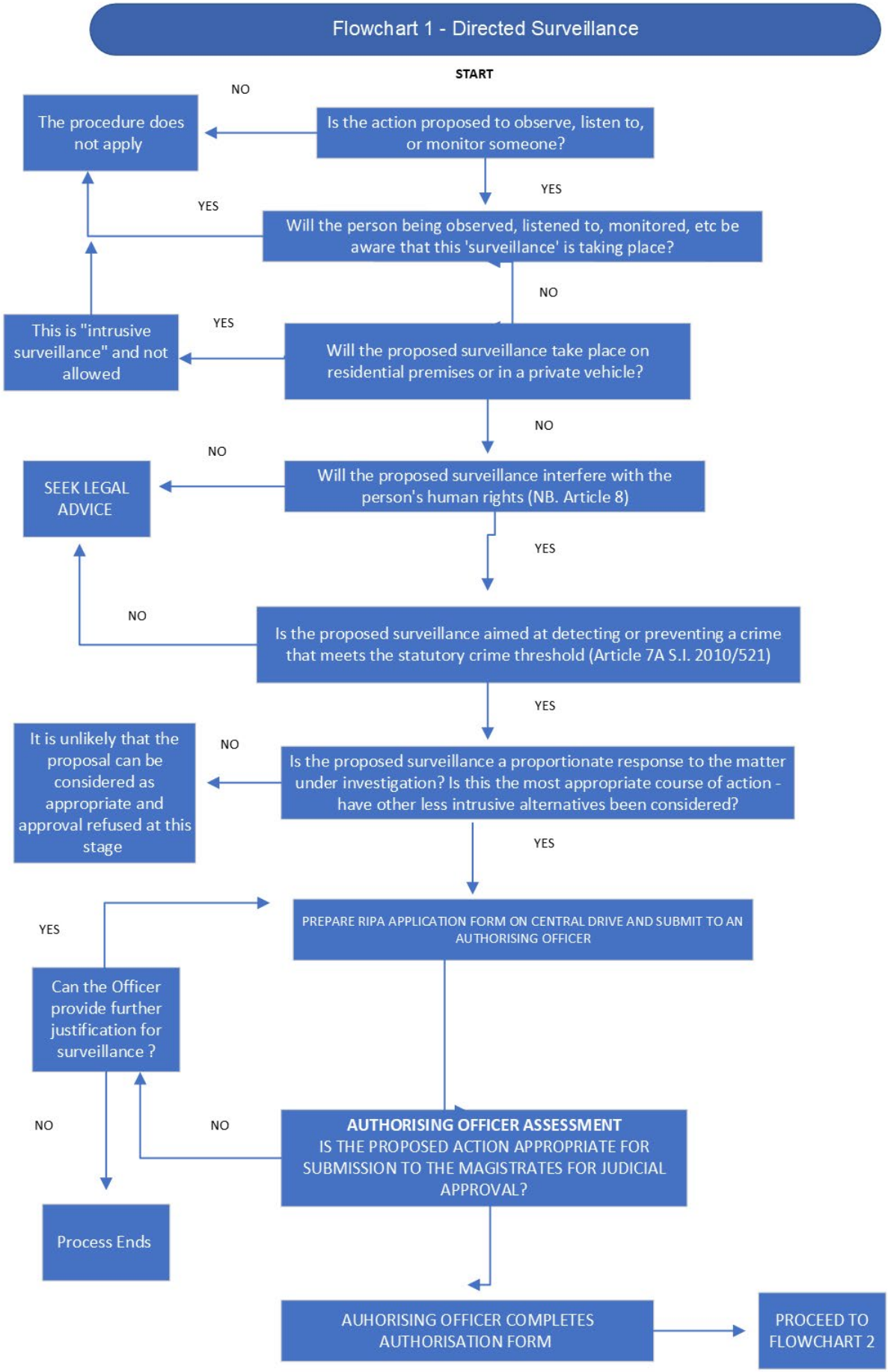
Under the Investigatory Powers Act 2016, the Investigatory Powers Commissioner has been appointed to provide independent oversight of the use of the powers contained in Part 2 of RIPA. Inspectors from the Investigatory Powers Commissioner's Office will inspect the Council from time to time to ensure that the Council is complying with RIPA.

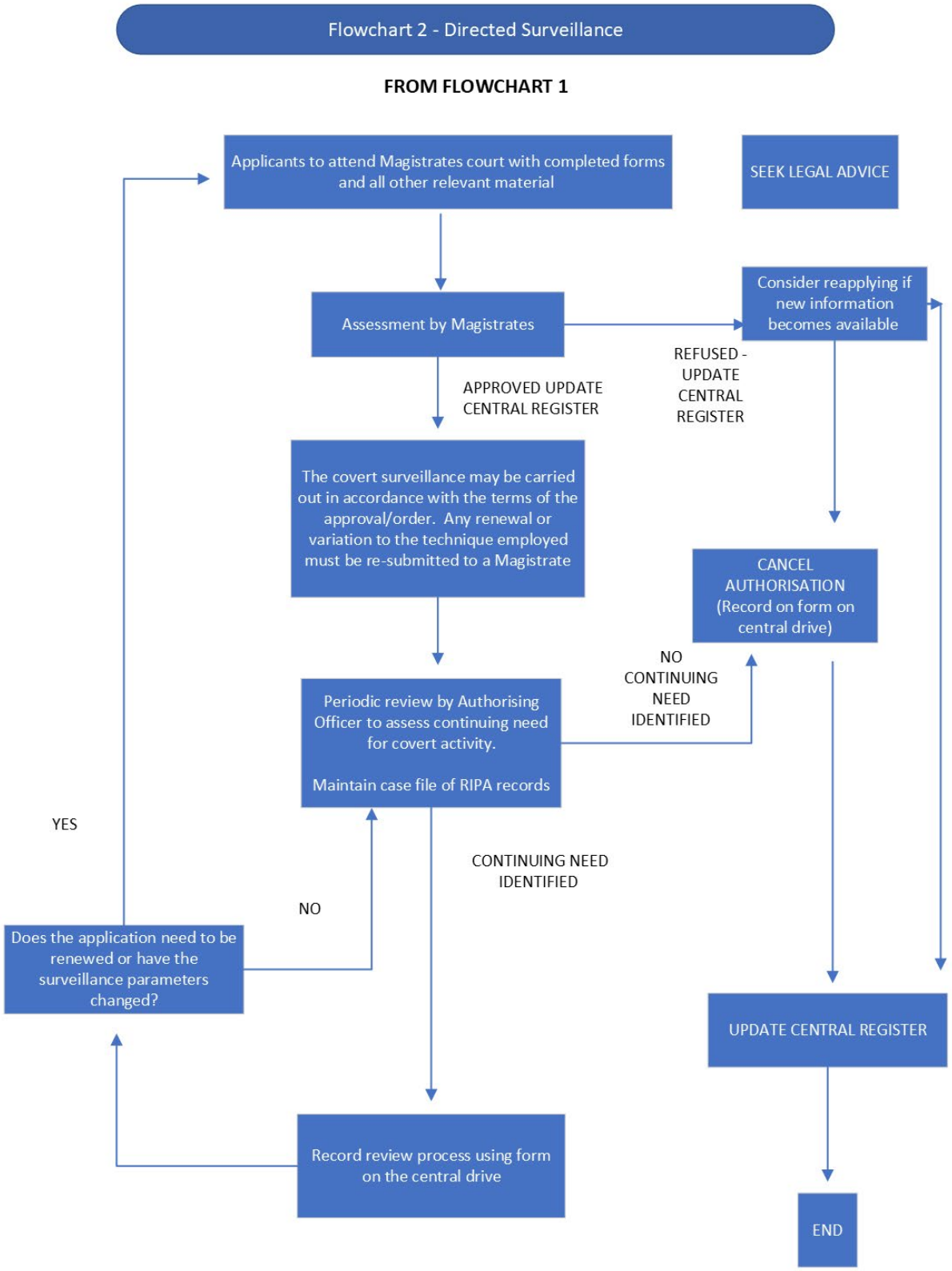
In addition, RIPA establishes an independent tribunal. This tribunal has full powers to investigate and decide any case where a person complains about the conduct of the Council in exercising its powers of carrying out surveillance. This policy also forms part of the Council's quality protocols and as such is liable to scrutiny. All officers involved in activities affected by this policy must observe the guidance contained in this document.

21. What reference documents are there?

The Council and those persons acting under Part 2 of the Act must have regard to the Codes of Practice issued under RIPA. Each Authorised Officer will have access to these codes. In addition, the Council has prepared specific forms for use by officers in relation to Directed Surveillance. These forms, and the Central Register, are available on the central U drive.

Where fraud or corruption is suspected, then regard should be had to the Council's Anti-Fraud and Corruption Strategy.


Flowchart 1 - Directed Surveillance
START
Is the action proposed to observe, listen to, or monitor someone?
NO
The procedure does not apply
YES
Will the person being observed, listened to, monitored, etc be aware that this 'surveillance' is taking place?
YES
This is "intrusive surveillance" and not allowed
NO
Will the proposed surveillance take place on residential premises or in a private vehicle?
NO
SEEK LEGAL ADVICE
NO
Will the proposed surveillance interfere with the person's human rights (NB. Article 8)
YES
NO
Is the proposed surveillance aimed at detecting or preventing a crime that meets the statutory crime threshold (Article 7A S.I. 2010/521)
YES
It is unlikely that the proposal can be considered as appropriate and approval refused at this stage
NO
Is the proposed surveillance a proportionate response to the matter under investigation? Is this the most appropriate course of action - have other less intrusive alternatives been considered?
YES
PREPARE RIPA APPLICATION FORM ON CENTRAL DRIVE AND SUBMIT TO AN AUTHORISING OFFICER
YES
Can the Officer provide further justification for surveillance ?
NO
NO
AUTHORISING OFFICER ASSESSMENT
IS THE PROPOSED ACTION APPROPRIATE FOR SUBMISSION TO THE MAGISTRATES FOR JUDICIAL APPROVAL?
Process Ends
AUHORISING OFFICER COMPLETES AUTHORISATION FORM
PROCEED TO FLOWCHART 2


Flowchart 2 - Directed Surveillance
FROM FLOWCHART 1
Applicants to attend Magistrates court with completed forms and all other relevant material
SEEK LEGAL ADVICE
Assessment by Magistrates
Consider reapplying if new information becomes available
REFUSED - UPDATE CENTRAL REGISTER
APPROVED UPDATE CENTRAL REGISTER
The covert surveillance may be carried out in accordance with the terms of the approval/order. Any renewal or variation to the technique employed must be re-submitted to a Magistrate
CANCEL AUTHORISATION (Record on form on central drive)
NO CONTINUING NEED IDENTIFIED
Periodic review by Authorising Officer to assess continuing need for covert activity.
Maintain case file of RIPA records
YES
CONTINUING NEED IDENTIFIED
NO
Does the application need to be renewed or have the surveillance parameters changed?
UPDATE CENTRAL REGISTER
Record review process using form on the central drive
END