



**POLICY AND RESOURCES SCRUTINY COMMITTEE
16TH APRIL 2013**

SUBJECT: SURVEILLANCE OF EMPLOYEES

REPORT BY: ACTING DIRECTOR OF CORPORATE SERVICES AND SECTION 151

1. PURPOSE OF REPORT

- 1.1 The purpose of this report is to respond to a request from Councillor Hefin David for details of surveillance undertaken on Caerphilly CBC employees and the engagement of Conquest Surveillance to undertake such activity.

2. SUMMARY

- 2.1 The report provides details of employee surveillance undertaken by the Authority and covers the legal framework for such activity, the process for agreeing employee surveillance, the background to the appointment of Conquest Surveillance and the associated costs and benefits.

3. LINKS TO STRATEGY

- 3.1 The Authority is entitled to expect the highest standards of conduct from all its employees and its conditions of service and the Code of Conduct provide that employees must not behave in such a way as to bring the Authority into disrepute.

4. THE REPORT

- 4.1 Surveillance has been considered by the Authority since 2004 and was initially used solely in relation to suspected fraudulent insurance liability claims. Subsequently, surveillance has also been used on employees who are suspected of defrauding the Authority by, for example, undertaking private work in paid Council time, abusing the sickness policy or misappropriating Council property. In some cases the referral has been made by members of the public who have contacted the Authority with details of the allegations.

4.2 Legal Framework

- 4.2.1 The Authority takes very seriously its obligations under the Data Protection Act 1998, the Human Rights Act 1998 and the Information Commissioner's Office (ICO) Employment Practice Code, as well as the general duty of care to its employees. However, it also acknowledges that in some exceptional circumstances covert surveillance may be authorised by a Head of Service and the Head of Workforce & Organisational Development where fraud, criminal activity or malpractice by an employee against the Council is suspected.
- 4.2.2 Before covert surveillance is authorised an Impact Assessment is carried out in line with the Employment Practice Code. This impact assessment is the means by which Caerphilly CBC can judge whether a monitoring arrangement is a proportionate response to the problem it

seeks to address. Sometimes, once the impact assessment is completed the covert surveillance is not carried out, as it may not be considered proportionate or an alternative approach may have been found, such as obtaining witness statements or reporting the matter to the Police. The adverse impact upon the employee is considered and surveillance is kept to the minimum required avoiding breaching any privacy.

- 4.2.3 In line with the Employment Practice Code, the Authority also specifically includes a contractual term in every agreement with a contractor to provide covert surveillance that surveillance must not be taken unlawfully and should be undertaken in a manner that reduces the impact upon the employee and should not include anyone other than the employee. The Authority also ensures that covert surveillance is strictly targeted at obtaining evidence within a set timeframe. Any other information is disregarded, and where feasible, deleted, unless information is revealed that no reasonable employer could reasonably be expected to ignore (e.g. other criminal activity or malpractice). Any information is used and stored in line with the Data Protection Act 1998.
- 4.2.4 The leading case in the area of employee surveillance is *McGowan v Scottish Water* [2005] IRLR 167 EAT. Following suspicions that McGowan had submitted falsified timesheets, Scottish Water determined that covert surveillance should be carried out on him. Evidence was gathered and McGowan was subsequently dismissed on the grounds of dishonesty in accordance with Scottish Water's disciplinary procedure. He argued that the covert surveillance had breached his right to respect for private and family life under Article 8 of the European Convention on Human Rights (ECHR). However, the Employment Appeal Tribunal held that Scottish Water was investigating what was effectively criminal activity, which is an exception to the ECHR. The surveillance went to the heart of the investigation that Scottish Water was bound to carry out to protect itself. The surveillance was not undertaken for minor or whimsical reasons and was not, therefore, disproportionate. By contrast, surveillance carried out on the "off-chance" of discovering misconduct is less likely to be considered proportionate.
- 4.2.5 In following this case and the Employment Practice Code, Caerphilly CBC does not undertake covert surveillance for minor reasons on the "off chance". Covert surveillance is only undertaken in exceptional circumstances where there is evidence of suspicion of fraud, criminal activity or malpractice by an employee against the Council and where the employee is already suspected of breaching trust and their contract of employment.

4.3 **Process for Agreeing Staff Surveillance**

- 4.3.1 Where there are concerns raised regarding the conduct of an employee and surveillance is being considered an "Application for Authorisation – Directed Surveillance on Employees" form must be completed (copy attached as Appendix 1). This form meets the impact assessment requirements of the Employment Practice Code and must be authorised by a Head of Service, who must ensure that the form is accurate and that the request is proportionate.
- 4.3.2 Completed applications are subsequently reviewed by the Head of Workforce & Organisational Development who will also make an assessment of the accuracy and proportionality of the request before final approval is granted. If the Head of Workforce & Organisational Development agrees the request it is referred to the Insurance and Risk Management Section for a contractor to be engaged. The contractor will receive a copy of the approved application and will undertake the requested surveillance and provide a report. A copy of the report is provided to the Head of Workforce & Organisational Development for a decision to be made on the case.

4.4 Appointment of Conquest Surveillance

- 4.4.1 The Authority has previously approached and utilised the services of a number of companies to undertake surveillance work but there have been issues with the quality of the surveillance captured, the timescales for instruction and the late receipt of reports from some of the companies used. Conquest Surveillance, a local company based in Blackwood, has provided a consistent and timely service for the Authority and is, therefore, the preferred contractor for surveillance work. However, when Conquest Surveillance is unable to undertake a particular assignment an alternative contractor will be engaged.
- 4.4.2 In preparing this report for the Scrutiny Committee the Authority's Internal Audit Section was asked to review the arrangements for employee surveillance. One of the findings of this review is that the engagement of Conquest Surveillance is not compliant with Standing Orders from a procurement perspective. As a consequence of this arrangements will now be made for a formal procurement process to be undertaken. No new employee surveillance cases will be agreed until this procurement exercise has been completed.

4.5 Costs and Benefits of Surveillance Activity

- 4.5.1 The expenditure on employee surveillance for the last three financial years is summarised below. With the exception of £6,000 all costs relate to services provided by Conquest Surveillance:-

Financial Year	Amount (£)
2010/11	54,205
2011/12	62,487
2012/13	39,895
Total: -	156,587

- 4.5.2 As part of the review work undertaken by Internal Audit an analysis has been carried out of recent employee surveillance activity leading to the total spend of £39,985 in the 2012/13 financial year. The findings are summarised below:-

Number of employees subject to surveillance <i>(0.12% of Caerphilly CBC's total workforce)</i>	11
Ongoing Cases	5
Cases where employee dismissed	1
Cases where employee resigned	2
Cases where employee returned to work	3

- 4.5.3 The financial benefits of surveillance activity are difficult to determine with accuracy but resources are saved by ceasing inappropriate sickness payments and avoiding the misuse of the Council's property. Furthermore, in some cases direct costs can be incurred where cover arrangements have to be put in place for absent staff. Consideration also needs to be given to the impact on other staff in terms of workload to cover absent colleagues and the effect that this has on staff morale.

4.6 Regulation of Investigatory Powers Act 2000

- 4.6.1 The Authority also undertakes covert surveillance under the provisions of The Regulation of Investigatory Powers Act 2000 (RIPA). The Act sets out strict controls for public authorities wishing to carry out covert surveillance of individual members of the public as part of their exercise of their statutory functions. In addition to the Act, advice and guidance is found within the Codes of Practice issued by the Home Office.
- 4.6.2 The Authority has a corporate policy which provides guidance on how surveillance should be used by the relevant officers and these activities are subject to inspection by an Assistant Surveillance Commissioner or by a Surveillance Inspector (or in some cases both).
- 4.6.3 For the period commencing 1st April 2012 and ending on 31st March 2013, the Council has undertaken 20 RIPA operations. These cover a range of activities such as investigations into the possible illegal slaughter and supply of meat to food businesses and the supply of alcohol and tobacco to minors. Full details will be reported to the Audit Committee shortly.
- 4.6.4 All of the RIPA operations have been duly authorised under the statutory provisions, which now includes judicial approval before the operation is commenced. All covert surveillance operations authorised under RIPA have been undertaken by Caerphilly CBC staff.
- 4.6.5 As mentioned in paragraph 4.1 surveillance has also been used in relation to suspected fraudulent insurance liability claims against the Council. Where such surveillance has been required it would have been requested by our insurers, arranged and paid for through our claims handlers or solicitors and carried out under the RIPA process. During the last three years there have been no cases of surveillance on members of the public in relation to personal injury claims.
- 4.6.6 RIPA does not apply in relation to employee surveillance and judicial approval is not required. However, the process for agreeing staff surveillance as set out in Section 4.3 of this report is in line with the spirit of the Act.

5. EQUALITIES IMPLICATIONS

- 5.1 A full Equalities Impact Assessment has not been undertaken on this report, which is for information purposes only. There are, however, clear Equalities and Human Rights issues involved in operating any form of surveillance on employees who are entitled to the right of privacy, liberty etc. under the Human Rights Act.
- 5.2 This of course has to be balanced against the Council's duties and responsibilities as noted under Section 4 and so the use of directed surveillance is strictly governed and only used where no alternatives are available.
- 5.3 There may be equality related issues linked to a long-term sickness case, for example where relevant information gathered by surveillance could prove/disprove any allegations of fraudulent behaviour by an employee. However, question 8 of the application form (as shown in Appendix A) is intended to ensure that any information that can be gathered by other means should be a first port of call.
- 5.4 The application form also takes into account the impact that surveillance has on other people, not only the employee under direct surveillance. Question 7 asks about collateral intrusion to ensure that people not involved in the particular case do not have their rights violated by Council actions.
- 5.5 The Council's procurement process since 2011 includes a comprehensive Equalities and Welsh language statement as well as a Pre-Tender Questionnaire that will be used during any future procurement process for a contractor to undertake employee surveillance.

6. FINANCIAL IMPLICATIONS

- 6.1 The total cost of employee surveillance for the last 3 financial years is £156,587.
- 6.2 The Authority's proactive approach to risk management has generated substantial savings in insurance costs since 1996 and a report will be presented to Cabinet on the 30th April 2013 outlining further savings arising from a recent tendering exercise for insurance cover. These savings will be available to support the Authority's Medium-Term Financial Plan (MTFP).

7. PERSONNEL IMPLICATIONS

- 7.1 Employee surveillance is undertaken in line with the requirements of the ICO's Employment Practice Code.

8. CONSULTATIONS

- 8.1 There are no consultation responses that have not been reflected in this report.

9. RECOMMENDATION

- 9.1 Members are asked to note the contents of this report and subject to the views of the Policy and Resources Scrutiny Committee and Cabinet that a formal procurement process will be undertaken for a contractor to undertake employee surveillance.

10. REASONS FOR THE RECOMMENDATIONS

- 10.1 To ensure that Members are informed of the process for employee surveillance in Caerphilly CBC and that Standing Orders are followed for the procurement of such activity.

11. STATUTORY POWER

- 11.1 Local Government Act 1972.

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Appendices: Appendix 1 – Application for Authorisation, Directed Surveillance on Employees