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OFFICE OF SURVEILLANCE COMMISSIONERS

INSPECTION REPORT

**OFFICE FOR STANDARDS IN EDUCATION,
CHILDREN'S SERVICES & SKILLS**

28 April 2009

**Assistant Surveillance Commissioner:
His Honour Dr. Colin Kolbert**

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This report contains the observations and recommendations identified by an individual surveillance inspector, or team of surveillance inspectors, during an inspection of the specified public authority conducted on behalf of the Chief Surveillance Commissioner.

The inspection was limited by time and could only sample a small proportion of covert activity in order to make a subjective assessment of compliance. Failure to raise issues in this report should not automatically be construed as endorsement of the unreported practices.

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- 5 Her Majesty's Chief Inspector is Christine Gilbert, OFSTED, Alexandra House, 33 Kingsway, London, WC2B 6SE.

Inspection

- 6 The Inspection was conducted with the assistance of Philip Gould (Regulatory Strategy and Complaints Manager) who also took part in the last Inspection and whose experience provided continuity which was particularly helpful and Jean Humphreys (Director, Early Years Development).
- 7 A copy of OFSTED's *Guidance on Surveillance*, revised in the light of the last Inspection, was made available in advance of this Inspection. It states clearly in paragraph 5 that only CIE ADMs (and more senior staff who have received the appropriate training) can authorise Directed Surveillance and also specifies that before seeking authorisation there shall be a case review involving all officers concerned in the case. This approach exemplifies the caution and thoroughness with which OFSTED approaches any case likely to involve covert surveillance and makes it most likely that such usage will be sparing indeed.
- 8 The *Guidance on Surveillance* is succinct yet complete and is accurate and practical in its approach. In the light of the issues raised in paragraph 12 below, which were thoroughly discussed during the Inspection, it is suggested that paragraphs 9 and 10 might usefully be expanded and gain in value by giving full guidance on *proportionality* (see paragraph 12 (ii) below) and *OSC Procedures and Guidance*, paragraphs 103 and 104.

Policies and Procedures

- 9 OFSTED's excellent documentary guidance is discussed above (paragraphs 7 and 8).
- 10 Hitherto, OFSTED has been organised for possible RIPA operations as described in paragraph 3.2 of the Chief Surveillance Inspector's Report. As from September 2009 one team, managed from the Midlands Office in Nottingham, will replace the current three-team arrangement, based in Bristol (South), Nottingham (Midlands) and Manchester (North). This arrangement will implement the recommendation in paragraph 13.3 of the last Report.
- 11 The Central Record of Authorisations is kept securely by Philip Gould. It is an adequate file, given the lack of covert activity and given the continuing likelihood that an authorisation will be a rare event, even though it does not meet the full bureaucratic requirements of paragraphs 2.14, 2.15 and 4.14 of the Home Office *Code of Practice*. No doubt if a case involving *confidential information* were to arise, it would be adequately highlighted.
- 12 As noted above, there have been no authorisations since the last Inspection. However, copies of the forms which would be used were included in the bundle of documents provided in advance of the Inspection. It was noted that they were not the most recent Home Office version, a copy of which was made available and discussed in detail from the point of view of an Authorising Officer unfortunate enough to be cross-examined in Court. There are four issues to which special attention must be given and all of them are more easily dealt with by following in detail the "prompts" included in the latest forms. In particular:

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- (i) Description of the proposed operation should be full and detailed. Specify any equipment to be used; use maps or sketches to show, e.g. observation posts and target premises. Be sure that there are no ambiguities, remembering the disaster which befell the Lincolnshire Police in *R v Sutherland* as the result of a simple misunderstanding.
- (ii) *Proportionality* must be carefully explained, not merely asserted, nor is describing parts of the operation itself germane to *proportionality*. A good explanation should refer to three elements (a) balance the extent of the problem against the size and scope of the operation, demonstrating that it is not the proverbial "sledgehammer to crack a nut", (b) explain that intrusion is to be kept to a minimum and (c) show that having considered all other practical courses there is no other way in which the necessary evidence can be obtained (i.e. a covert operation is the last resort).
- (iii) The Authorising Officer's statement is not a mere rubber stamp. It should include a full account of what is being authorised (five "Ws") and *how* and *why* the Authorising Officer is satisfied that the operation is *necessary* and *proportionate*. Do not be put off if there seems to be repetition – the Authorising Officer, possibly under cross-examination two years later must be able to demonstrate his own thought processes *at the time* and will be in a weak position if he has to rely upon the applicant's account by adoption. A competent cross-examiner would be able easily to raise the point that the Authorising Officer did not apply his mind to the vital issues in the case.
- (iv) It is good practice for the Authorising Officer's statement to be completed in handwriting as a personal contemporaneous record of the thinking which justified the authorisation.

Training

- 13 Training has been taken seriously and provided regularly. It has clearly been effective in engendering a cautious approach, leading as noted above to the decision not to proceed in the one case seriously considered for Directed Surveillance in the past three years.
- 14 Copies of PowerPoint slides used in a presentation in January 2006 by Sarah Ellison, Partner in Field Fisher Waterhouse LLP, Solicitors, were made available during the Inspection and proved to be excellent. In the light of the Chief Surveillance Commissioner's recommendation (paragraph 13.8) Sarah Ellison was invited to attend a meeting of Divisional Managers to explain their responsibilities under RIPA recognising that more senior officers than the designated Authorising Officers could be called upon to consider authorisations.
- 15 CIE teams receive training from Bond Solon; and technical training including the use of OPs and walkie-talkie radios is provided for surveillance operatives, who are made aware of their RIPA responsibilities.

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- 16 The Chief Surveillance Inspector also recommended (paragraph 9) that OFSTED should consider the training needs of "trained inspectors" and "remaining staff." The matter was fully considered and on 21st July 2006 a Minute was sent to all Early Years Directorate staff drawing attention to their responsibilities under RIPA, with the intention of raising general awareness and to ensure that no covert surveillance was conducted unwittingly. A Minute of 5th January 2007 gives assurance that further work will be done on developing awareness for inspectors, in particular as to when an authorisation should be sought.
- 17 A new programme is being devised for use after the re-organisation due in September 2009.

Conclusions

- 18 OFSTED's response to the last Inspection Report has been comprehensive and all its recommendations have been fully implemented. Copies were provided of regular (usually six-monthly) meetings at which all matters raised were considered and noted.
- 19 The proper emphasis on Directed Surveillance being used only as a last resort had meant that no authorisations have been granted in the past three years. The issue was therefore raised as to whether OFSTED should retain its powers under RIPA. After several minuted discussions the view was taken (as the Chief Surveillance Commissioner had recommended in paragraph 13.5) that in view of the nature of the work of the CIE Directorate, the powers should be retained, even though they were likely to be used only as a last resort. A briefing note to that effect was prepared for Her Majesty's Chief Inspector and a paper sent to the Corporate Management Team (CMT) in March 2008, as a result of which decided that the powers should be retained and recommended such to the Home Office, with full reasons stated. The Home Secretary decided that, before laying orders before Parliament, there should be public consultation because of the sensitivity of the topic and also because of current confusion about the powers of local authorities. The consultation began in January 2009 and was due to last for three months. A decision is awaited. However, given the impressive evidence produced during this Inspection, it is greatly to be hoped that OFSTED's efforts will not go to waste because of regrettable recent actions by certain local authorities.
- 20 Everything that possibly could have been done short of actually conducting a covert operation has been done with great thoroughness and attention to detail. Excellent training has been readily provided and awareness is high. The impression is that there is a finely tuned and well lubricated Rolls Royce in the garage, just waiting to be taken out on an appropriate occasion.

Recommendations

- 21 The excellent *Guidance on Surveillance* would be more helpful if *proportionality* were dealt with more fully as outlined in paragraph 8 above.
- 22 The most up-to-date Home Office application forms for authorising Directed Surveillance should be brought into use at once and the current version discarded.
- 23 Future training should pay particular attention to the issues discussed in paragraph 12 above in order to safeguard an Authorising Officer in the event of a challenge in Court.

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- 24 In view of the sensitivity of much of OFSTED's work, careful consideration should be given to the possibility of a future covert surveillance uncovering *confidential* information. If such were to be the case, the Authorising Officer would be Her Majesty's Chief Inspector and the obligation could only be delegated to a deputy in case of unavoidable absence. This likelihood is, of course, a matter for consideration as an operational risk. If there is deemed to be no such risk, no problem arises: on the other hand, if such a risk is reasonably foreseeable, consideration should be given to providing Authorising Officer training for HMCI.



