

EMAIL from Mr David P. KITSON to all Scarborough Borough Councillors

Subject: Emails from Unreasonable Complainants

Dear Cllrs

As stated at Council last week, I am emailing to provide you with a more detailed response to the question raised by Cllrs Randerson and Jefferson.

In the first instance I must make it absolutely clear that:

- (a) the issue is being misunderstood and taken out of context;
- (b) the Council is not accessing Councillors' email accounts to implement the practice outlined below;
- (c) this has nothing to do with Covert Surveillance under Part 2 of the Regulation of Investigatory Powers Act 2000 (RIPA) (nothing 'covert' is going on);

The practice in place is in fact a very simple, overt, and reasonable practice which is in operation throughout the public sector for the protection of not only staff and Members, but also to protect limited resources. It is also a practice that I discussed with the Assistant Surveillance Commissioner during their last inspection of the Council, and in relation to which I will explain further below.

The Council has in place a policy for dealing with 'unreasonably persistent' and 'unreasonable' complaint behaviour ('the Policy'). This can be accessed on the Council's website at the following address:

<https://democracy.scarborough.gov.uk/mgConvert2PDF.aspx?ID=12595>

The Policy is derived from a model policy previously available from the Local Government Ombudsman (LGO) whose website is www.lgo.org.uk, and was approved by Council on 7 September 2009.

The Policy states that *"...the Council does not expect its staff or Members to tolerate unacceptable behaviour by complainants or any customer."* It sets out examples of complaint and communication behaviour that may be considered to be unreasonable. Where an individual or third party is acting in an unreasonable manner they are informed that this is the case, with an explanation as to why their behaviour is considered unacceptable. They are told that should they continue to act in an unreasonable manner, their access to Officers and Members will be restricted, and that this includes the redirection to a central mailbox of any emails they send to Officers or Members. This is done in an open and transparent manner.

Should the individual or third party fail to moderate their behaviour, the matter is referred to the Director's Team to consider whether the individual or third party should now be declared as unreasonable under the Policy. If this occurs, then the measures set out and explained in the warning email are put in place.

Of course there may be emails sent from such complainants that the Council needs to address as part of its range of statutory duties. This is why they are redirected to the unreasonable complainants mailbox rather than be deleted or rejected by the system. Access to this mailbox is restricted to myself, the Director Lisa Dixon, and the Officer responsible for the complaints process, so that any emails which need to be addressed as part of the Council's statutory duties are forwarded appropriately.

At no point are these emails accessed via logging into a Councillors (or indeed an Officers) email account. Again, this entire process is carried out in an overt manner, with the complainant being properly advised of the measures and why they are being invoked.

Failure to deal with unreasonable behaviour of this type would result in the Council failing to comply with legal duties to protect Officers and Members, such as the mutual duty of trust and confidence. It would also impact upon the use of Council resources and hinder the Council's ability to deliver services. There is of course an acceptance that as an Officer working for a public body you may be subject to criticism from time to time, but that does not equate to an open season and the line must be drawn, otherwise the Council would be negligent towards its staff and Members.

Part 1 of RIPA deals with 'Communications'. Part 2 of RIPA deals with 'Covert Surveillance' and is not relevant to the matter at hand.

[Please note that RIPA is pending repeal and replacement by the Investigatory Powers Act 2016, however the date for this to take force is yet to be appointed. The provisions of the Investigatory Powers Act 2016 are very much similar to those within RIPA.]

Under Part 1 of RIPA the Council's email system is categorised as a 'private telecommunication system', in that it is not a telecommunication system offered or provided to the public, but is connected to such a system.

Section 1(2) of RIPA states:

It shall be an offence for a person-

(a) *intentionally and without lawful authority, and*

(b) *otherwise than in circumstances in which his conduct is excluded by subsection (6) from criminal liability under this subsection,*

to intercept, at any place in the United Kingdom, any communication in the course of its transmission by means of a private telecommunication system.

Section 1(6) of RIPA states:

The circumstances in which a person makes an interception of a communication in the course of its transmission by means of a private telecommunication system are such that his conduct is excluded from criminal liability under subsection (2) if-

- (a) *he is a person with a right to control the operation or the use of the system; or*
- (b) *he has the express or implied consent of such a person to make the interception.*

Therefore no offences are being committed.

Section 1(5) of RIPA (so far as is relevant) states:

Conduct has lawful authority for the purposes of this section if, and only if-

- (a) *it is authorised by or under section 3 or 4;*
- (b) *it takes place in accordance with a warrant under section 5...*

...and conduct (whether or not prohibited by this section) which has lawful authority for the purposes of this section by virtue of paragraph (a) or (b) shall also be taken to be lawful for all other purposes.

Section 3 of RIPA provides authorisation in a number of defined situations. Of relevance is the following at section 3(3):

Conduct consisting in the interception of a communication is authorised by this section if-

- (a) *it is conduct by or on behalf of a person who provides a postal service or telecommunications service; and*
- (b) *it takes place for purposes connected with the provision or operation of that service...*

For clarity, a 'telecommunications service' is a service consisting in the provision of access to, and facilities for making use of, a telecommunication system. A 'telecommunications system' means any system (including the apparatus comprised in it) which exists for the purpose of facilitating the transmission of communications by any means involving the use of electrical or electro-magnetic energy.

In consequence of the above, the Council (being a provider of a private telecommunications system and a telecommunications service in order to access and make use of that system) is able to undertake the basic redirection of emails from unreasonable complainants.

Further, under section 4(2) of RIPA the Secretary of State issued the Telecommunications (Lawful Business Practice) (Interception of Communications) Regulations 2000 ('the Regulations'). The Regulations allow a business (which includes a public authority) to intercept a communication for various prescribed purposes, including for the purpose of monitoring to prevent or detect crime, to investigate or detect unauthorised use of the system, or to secure the effective operation of the system.

In addition, prior to being able to use Council ICT equipment and the Council's email system/service all Officers and Members are required to read through, agree, and comply with the Council's various ICT policies.

In doing so users expressly consent to the Council being able to manage the system/service as set out within those policies.

During the last inspection by the Assistant Surveillance Commissioner I explained this practice and asked for views upon the same. Although Part 1 of RIPA is (or was) the remit of the Interception of Communications Commissioner (ICC), the Assistant Surveillance Commissioner stated that he could see no issue with the practice, but would speak to his counterparts at the Office of the ICC. I can confirm that the Office of the ICC have not contacted us to raise any issues with this practice.

Kind regards

David Kitson

Solicitor

Deputy Monitoring Officer

Regulatory and Governance Manager