Directed Surveillance and Covert Human Intelligence Sources (RIPA Powers)

Purpose
To advise Council of the GPhC’s current powers under RIPA legislation and the resultant recommendations outlined in the Office of Surveillance Commissioners Report and seek approval to obtain further powers.

Recommendations

The Council is asked to:

1. Agree that RIPA powers to authorise directed surveillance and the use of covert human intelligence sources should be sought in line with the recommendations set out in the Office of Surveillance Commissioners Report dated 11 January 2013 (attached at Appendix 1).

2. Note the Office of Surveillance Commissioners report.

1.0 Introduction

1.1 Directed surveillance is defined as that being undertaken for the purposes of a specific investigation. It involves the observation of a person or persons with the intention of gathering private information to produce a detailed picture of a person’s life, activities and associations. It does not include covert surveillance carried out by way of an immediate response to events or circumstances which, by their very nature, could not have been foreseen.

1.2 A covert human intelligence source (CHIS) is a person who establishes or
maintains a personal or other relationship for the purpose of covertly obtaining or covertly disclosing information (an informant).

1.3 The GPhC is listed as a relevant authority in the Regulation of Investigatory Powers Act 2000 (RIPA). However, due to a legislative omission, the GPhC does not have powers to use directed surveillance. The GPhC is also unable to authorise the use of covert human intelligence sources (CHIS).¹

1.4 Nevertheless, as the GPhC is listed as a relevant public authority under RIPA, it is the subject of routine inspections by the Office of Surveillance Commissioners. On 11 January 2013, Sir David Clarke, Assistant Surveillance Commissioner, visited the GPhC to review, for the first time, the management of the GPhC’s surveillance activities. No direct surveillance authorisations have been made by the GPhC. Therefore, the purpose of the meeting was to update the OSC on the GPhC’s RIPA-related activity, including test purchasing, and discuss any possible changes that needed to be made to the current situation.

2.0 Key Considerations

2.1 The addition of directed surveillance and CHIS would usefully add to the resources already available to the GPhC and would enhance the organisation’s regulatory capabilities. Recent events have shown that there are circumstances in which the ability to authorise the use of RIPA powers, particularly the use of CHIS, would enable the GPhC to take a more proactive approach to investigation, when justified.

2.2 As outlined in the report, the OSC recommends that necessary action is taken to ensure that SI 2010/521 (the relevant statutory instrument) is amended so as to invest the GPhC with RIPA powers of directed surveillance and CHIS, as soon as possible. On the assumption that the Council would wish it, Chief Executive has begun the process of seeking legal change as suggested by the OSC; Council’s explicit support for this is sought.

3.0 Equality & Diversity implications

3.1 There are no known equality and diversity implications arising from this paper.

4.0 Communications implications

4.1 There has already been some media interest in this topic since the OSC’s visit in January 2013. Chemist & Druggist reported that the GPhC were reviewing the need for authorisation to conduct covert surveillance in February 2013. We

¹ Section 29 of RIPA covers the use of covert human intelligence sources (CHIS).
will therefore need to communicate Council’s decision to seek additional powers under RIPA.

5.0 Resources implications

5.1 There are no immediate resources implications arising from this paper.

6.0 Risk implications

6.1 There is a risk that without these powers being available to the GPhC, we may not be able to investigate cases as proactively as we would like.

Recommendations

The Council is asked to:

i. Agree that RIPA powers to authorise directed surveillance and the use of covert human intelligence sources should be sought in line with the recommendations set out in the Office of Surveillance Commissioners Report dated 11 January 2013 (attached at Appendix 1).

ii. Note the Office of Surveillance Commissioners report.

Duncan Rudkin, Chief Executive & Registrar
General Pharmaceutical Council
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26 March 2013
Appendix 1

Office of Surveillance Commissioners Inspection Report
11 January 2013
(next page)
Dear Mr. Rudkin,

Covert Surveillance

On 11th January 2013, an Assistant Surveillance Commissioner, Sir David Clarke, visited your Council on my behalf to review, for the first time, your management of covert activities. I am grateful to you for the facilities afforded for the inspection.

I enclose a copy of Sir David’s report which I endorse. Your Council is in a unique and curious position. It is listed as a relevant public authority in Schedule 1 of RIPA but cannot conduct directed surveillance or authorise CHIS, although the Royal Pharmaceutical Society of Great Britain, which was your predecessor in regulating the pharmacy profession had the power to conduct directed surveillance under RIPA and the ability to use CHIS would be useful to your Council. There is no apparent reason why your Council lacks these powers, apart from legislative oversight. Fortunately, your officers have a good level of RIPA awareness to avoid the risk of unauthorised activity.

The single recommendation is that action be taken, at your behest, to amend SI/2010/521 as soon as possible to invest your council with RIPA powers to use directed surveillance and CHIS.

I shall be glad to learn that your Council accepts the recommendation and will see that it is implemented.

One of the main functions of review is to enable public authorities to improve their understanding and conduct of covert activities. I hope your Council finds this process constructive. Please let this Office know if it can help at any time.

Yours sincerely,

Christopher Rose

Mr Duncan Rudkin
Chief Executive and Registrar
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OFFICE OF SURVEILLANCE COMMISSIONERS

INSPECTION REPORT

General Pharmaceutical Council

11th January 2013

Assistant Surveillance Commissioner:
Sir David Clarke

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DISCLAIMER

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.

The advice and guidance provided by the inspector(s) during the inspection could only reflect the inspectors' subjective opinion and does not constitute an endorsed judicial interpretation of the legislation. Fundamental changes to practices or procedures should not be implemented unless and until the recommendations in this report are endorsed by the Chief Surveillance Commissioner.

The report is sent only to the recipient of the Chief Surveillance Commissioner's letter (normally the Chief Officer of the authority inspected). Copies of the report, or extracts of it, may be distributed at the recipient's discretion but the version received under the covering letter should remain intact as the master version.

The Office of Surveillance Commissioners is not a public body listed under the Freedom of Information Act 2000, however, requests for the disclosure of the report, or any part of it, or any distribution of the report beyond the recipients own authority is permissible at the discretion of the Chief Officer of the relevant public authority without the permission of the Chief Surveillance Commissioner. Any references to the report, or extracts from it, must be placed in the correct context.

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Directed surveillance and covert human intelligence sources  

Council 11 April 2013

Chief Surveillance Commissioner  
Office of Surveillance Commissioners,  
PO Box 29105,  
London,  
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12th January 2013

GENERAL PHARMACEUTICAL COUNCIL

INSPECTION REPORT

Inspection date 11th January 2013
Inspector Sir David Clarke  
Assistant Surveillance Commissioner

Introduction

1. The Council (GPhC) was created by the Pharmacy Order 2010 (SI 2010/231), made under the Health Act 1999 as amended by the Health and Social Care Act 2008. It is an independent statutory corporation created to regulate the pharmacy profession throughout England, Wales and Scotland, and is overseen by the Professional Standards Authority.

2. The Senior Corporate Management structure of GPhC is headed by the Chief Executive and Registrar, supported by five Directors. The Chief Executive and Registrar is Duncan Rudkin, whose address is General Pharmaceutical Council, 129 Lambeth Road, London SE1 7BT.

3. Though the Pharmacy Order was made on 10th February 2010, it came into force in stages. GPhC assumed its regulatory functions on 27th September 2010. Until then the profession was regulated by its own professional body, the Royal Pharmaceutical Society of Great Britain (RPSGB), which had carried out this function since 1841.

4. RPSGB was a public authority listed in Schedule 1 Part II of the Regulation of Investigatory Powers Act 2000 (RIPA) as a relevant authority for the purposes of section 28 (directed surveillance). It was not empowered to authorise the use and conduct of covert human information sources (CHIS).

5. By section 30(1) of RIPA, the persons designated to authorised directed surveillance are the individuals holding such offices, ranks or positions with relevant public authorities as are prescribed for the purposes of this subsection by an order under this section.

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6. SI 2003/3171 prescribed the officers of RPSGB with power to authorise directed surveillance as Director of Fitness to Practice and Legal Affairs or Director of Practice and Quality Improvement. Directed surveillance could be authorised under section 28(3)(b)(d) and (e):

- for the purposes of preventing or detecting crime or preventing disorder;
- in the interests of public safety; or
- for the purpose of protecting public health.

7. In 2010, SI 2003/3171 was replaced by SI 2010/521, to reflect numerous changes in the structure and hierarchy of various public authorities since 2003. The new Order was made on 25th February 2010, shortly after the Pharmacy Order, and came into force on 6th April 2010. In relation to RPSGB, it prescribed Director (Grade 7) as authorising officer for directed surveillance, again under section 28(3)(b)(d) and (e). I understand that RPSGB had three such directors.

8. To reflect the transfer of regulatory functions from RPSGB to GPhC, Schedule 1 Part II of RIPA was duly amended to remove RPSGB from Schedule 1 of RIPA, replacing it with GPhC. This amendment was effected by the coming into force of Schedule 4 paragraph 28 of the Pharmacy Order 2010.

9. However, the Pharmacy Order, made in February 2010, contained no provision amending SI 2003/3171 (nor, prospectively, SI 2010/521). The result is that whereas GPhC is scheduled as a relevant public authority for the purposes of RIPA, and is therefore subject to periodic OSC inspection, it has no officers prescribed as authorising officers for the purposes of section 30 of RIPA. Thus, it cannot authorise directed surveillance. On the other hand, RPSGB remains listed in SI 2010/521 even though it no longer has any regulatory function or powers. This appears to have been a legislative oversight.

10. RPSGB made a number of directed surveillance authorisations in the early days of RIPA, but made none after 2003. Needless to say, none has been made by GPhC.

11. This is the first OSC inspection of GPhC. The last OSC inspection of RPSGB was conducted by Andrew Mackian, Surveillance Inspector, on 15th July 2009.

**Inspection**

12. I carried out the inspection on 11th January 2013 at 129 Lambeth Road. I met the following officers of GPhC:

- Duncan Rudkin, Chief Executive and Registrar;
- Claire Bryce-Smith, Interim Director of Inspection and Fitness to Practice (and Head of Inspections);
- Lara Hayward, Legal Adviser.

13. The primary purposes of my inspection, in these unusual circumstances, were:
• to discuss the investigatory work done by GPhC, and the level of RIPA awareness on the part of its relevant staff, so as to be satisfied that no unauthorised covert surveillance takes place, and
• to consider whether to recommend that steps be taken to remove the legislative anomaly; and
• if so, and if GPhC acquires RIPA powers, to discuss the steps to be taken to establish a compliant RIPA structure.

14. I am grateful to all concerned, particularly Ms Hayward who made the arrangements, for their helpful and constructive engagement with my inspection. I regret that I had to postpone my visit from November to January for personal reasons.

The regulatory work of GPhC

15. Mrs Bryce-Smith, as Head of Inspection, heads a team of 27 inspectors, all pharmacists, located throughout Great Britain. The inspectors are organised into three regional teams, each under a regional manager. Their inspections are carried out overtly, the inspectors identifying themselves and authenticating their identities. Most inspections are announced in advance, though some are unannounced.

16. A separate team of ten investigation case workers and investigators, based at headquarters, works under the Head of Investigations and Case Management, Bernie Lunney. I was told that Ms Lunney joined GPhC from a local authority where she was a senior manager in benefit fraud investigation.

17. When a complaint is made or a concern is raised about a registered pharmacist, it is allocated as a stream 1 or stream 2 case. A stream 1 case, being of a less serious nature, is likely to be investigated by an inspector and may be resolved by a letter of advice. Stream 2 cases, covering more serious issues such as fraud, sexual assault or prescription errors causing a death, may lead to a fitness to practice hearing, and are allocated to an investigation case manager and investigated more formally. Some investigations are carried out in conjunction with the police or other regulatory body such as the Medicines and Healthcare Products Regulatory Agency (MHRA), occasionally under RIPA authorisation made by that other body.

18. Some of the investigators were previously employed by RPSGB in the same capacity; others have been recruited since. I was told that most have received investigation training which includes RIPA awareness, but there is a recognised need for updated RIPA training to ensure that nobody has slipped through the net.

19. I was provided with section six of the Inspectors’ Manual, covering Directed Covert Surveillance and Test Purchases. This helpfully draws attention to RIPA and its associated legislation, defines directed surveillance and CHIS, and makes clear that GPhC is not authorised to carry out such activity under RIPA.
Test purchases

20. From time to time GPhC inspectors need to make test purchases, obviously without identifying themselves. Although, as the Manual makes clear, this activity normally requires neither a directed surveillance nor CHIS authorisation, as has been confirmed by OSC, a formal procedure is in place to seek and obtain written approval from both the Regional manager and the Head of Inspection. The accompanying guidance states that “It is important to note that test purchases remain an activity that may potentially risk straying into the covert surveillance arena”.

21. 19 such approvals were made in the year ended 31st March 2012, though none have been made since. I examined a sample of these approval forms. In some respects they echo the forms used for RIPA authorisation, in addressing the issues of necessity and proportionality, though without the RIPA elements of duration, review and cancellation; each approval expressly covers a single test purchase event, after which the outcome is recorded on the form.

22. The inspector, completing the form to seek approval of a proposed test purchase, is required to address the questions “Supply details of why RIPA does not apply to the proposed purchase” and “Provide details of any potential risks of obtaining personal information or building personal relationships when making the purchase and explain how these will be minimised”. This keeps RIPA considerations at the forefront of the minds of the inspector, regional manager and Head of Inspection alike, and provides a valuable safeguard against overstepping into RIPA territory.

The need for RIPA powers

23. GPhC is in the process of designing and implementing a modernised approach to the inspection and regulation of registered pharmacists and technicians, moving away from a prescriptive “tick box” approach which focuses more on processes than outcomes. In so doing, it envisages a more flexible use of a wider range of investigation techniques which may, in an appropriate case, include directed surveillance if it is available. As it was put to me, regulation should be conducted not with a light touch but with the right touch, which in serious cases may need to be rigorous and imaginative. In my view directed surveillance under RIPA should be within GPhC’s armoury, albeit to be used only as a last resort when necessary and proportionate.

24. A recent BBC television programme highlighted a series of contraventions by pharmacists in a particular area of London, supplying prescription-only medicines (POMs), such as valium and morphine, without prescriptions. The supplies were made only to Arabic speakers, so the programme makers had recruited such persons to act as undercover investigators, effectively as CHISs.

1 I found some confusion in the guidance, and in one of the test purchase authorisations, as to whether such test purchase operations are overt or covert. They are covert, in the sense that they are calculated to ensure that the shopkeeper is unaware of the nature of the transaction; see, by analogy, section 26(9)(a) of RIPA. The reason why no RIPA authorisation is required is not that test purchases are conducted overtly. It is that a simple test purchase operation does not include any surveillance, over and above the transaction itself, which is likely to elicit personal information, and does not involve the formation of a relevant covert relationship.
25. Such contraventions are particularly difficult for GPhC to investigate without RIPA powers. Test purchases by their own staff, non-Arabic speakers, would be ineffective. With powers to recruit and authorise suitable persons as CHISs, effective regulation of such pharmacists would be enhanced.

26. GPhC fully understand that if invested with RIPA powers, steps must be taken to establish a compliant RIPA structure, including:

- devising and adopting a RIPA policy and guidance document, with reference to the relevant authorisation, review, renewal and authorisation forms;
- designating a Senior Responsible Officer and authorising officers;
- establishing central records of directed surveillance (and, if so empowered, CHIS) authorisations;
- training for investigators and authorising officers (and, if so empowered, CHIS controllers and handlers).

Conclusion

27. This has been an unusual inspection, in that GPhC is listed as a relevant public authority in Schedule 1 of RIPA but cannot use RIPA powers of either directed surveillance or CHIS. Its predecessor had the RIPA power of directed surveillance, and there seems no logical reason for the present regulatory body to lack it. Additionally, I consider that the power to authorise the use and conduct of CHIS would, in suitable cases, be a useful weapon in GPhC’s armoury, one which is possessed by other regulatory bodies such as MHRA.

28. In the meantime, I am satisfied that there is a good level of RIPA awareness to avoid the risk of unauthorised covert activity taking place.

29. Accordingly I make the following

Recommendation

That action be taken within Government to amend SI 2010/521 so as to invest GPhC with RIPA powers of directed surveillance and CHIS as soon as possible.

David Clarke
Assistant Surveillance Commissioner