

What's New?



Law, Best Practice & Advice

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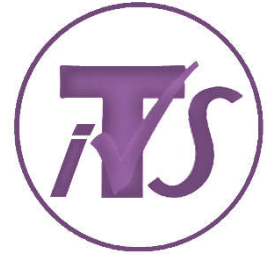
We'll Cover...



1. The changes to the system of *Intelligence Grading* ;
2. The growing importance of *Open Source* and its relationship with RIPA ;
3. The authorisation of covert techniques when RIPA is not available ;
4. Changes brought about by the Investigatory Powers Act ;
5. The new MG forms and changes to prosecution papers – the *National File Standard* ; and
6. Case law on sentencing guilty pleas.



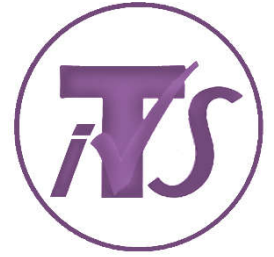
Intelligence Grading



1. 5x5x5 is dead, long live 3x5x2.
2. The categories remain the same but the indicators are different.
3. If the informant is not 'untested', they are either 'reliable' or 'unreliable'.
4. The intelligence grades are more straightforward.
5. Sharing is either '**P**ermitted' or '**C**onditional'.



Informants



- Reliable – they have submitted information in the past and this has proved to be (fairly) consistently reliable.
- Reliable – they are known to you either professionally or personally as a reliable source.
- Unreliable – previous information has not been (fairly) consistently good.
- Unreliable – previous information has often been poor or contained major errors or flaws. ('Embarrassment Test')
- Unreliable – they are known to you as a person on whom it is not safe to rely. ('Embarrassment Test' #2)



Information



- Known to the informant directly.
- Known indirectly to the informant, and corroborated.
- Known indirectly to the informant but not corroborated.
- You cannot determine how the informant knows the information.
- You have specific grounds to suspect the information is either false or malicious.



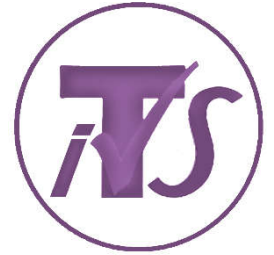
Sharing



- The intelligence may be shared in a lawful manner with another investigative agency.
- Any sharing is subject to conditions covering :
 - the use to which the intelligence may be put ; and
 - any future sharing of the intelligence.
- A government security classification must be given to all intelligence.



What is 'Open Source'?



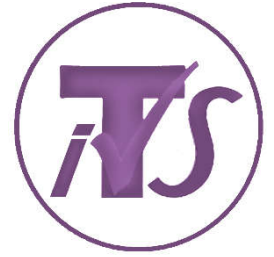
If it is available to the public (either for free or by paying a fee, it's *Open Source*.

- Information contained in **news** websites and the like.
- Things people **post about themselves** or **each other**.
- **Trails** that people leave lying around whilst on the net.
- **Data that is indexed** (by search engines such as Google) or that **is not indexed** but is publicly available.
- Everything in print – books, papers, magazines, lists...

If you don't use open sources, you are not making best use of investigative techniques!



Social Networking



Look as much as you like...

- *People post the minutiae of their lives.*
- *Profiles may be visible without log in.*
- *Privacy settings change, leaving accounts unlocked.*
- *You can go back through a person's life history.*
- *You may find photographs and / or video.*
- *Family details may be disclosed.*
- *Just because it's there, doesn't mean it's true!*

...but is it surveillance?



Covert Techniques – Directed Surveillance



Surveillance is covert if, and only if, it is carried out in a way that is **designed** to make sure that subjects of the surveillance are unaware that it is taking place. It is *directed* if it is covert but not intrusive and is undertaken :

- for the purpose of a specific investigation or a specific operation ;
- in a way that is likely to get private information about a person (whether or not one specifically identified for the purposes of the investigation or operation) ; and
- not as an immediate response to events or circumstances about which you could not reasonably be expected to get an authorisation for the carrying out of the surveillance.



Covert Techniques – CHIS



A **C**overt **H**uman **I**ntelligence **S**ource is someone who, at your request, establishes or maintains a personal or other relationship with a person for the covert purpose of facilitating the doing of either of the following :

- covertly using such a relationship to obtain information or to provide access to any information to another person ; or
- covertly disclosing information obtained by the use of such a relationship or as a consequence of the existence of such a relationship.



To RIPA or not to RIPA



If you are monitoring...	View information & No personal contact	View information & Communicate with 'S'
Public profile / page, no permission needed to view	Are you just looking, in order to see if anything is there (O.S.) <u>or</u> are you watching the space and collecting information about what they are doing (D.S.)?	Covert Human Intelligence Source...
Private profile / page, permission ('friend request' or similar) needed to view	Covert Human Intelligence Source...	Covert Human Intelligence Source...



To RIPA or not to RIPA



If you are monitoring someone...	View information No personal contact
Public profile / page, No permission needed to view	No RIPA authorisation required, however... ...if you intend to watch them online, by regularly monitoring their activities, this is really no different to watching them in person. If you intend that they are not aware that you are looking, then you should consider a directed surveillance authorisation.



To RIPA or not to RIPA



If you are a public body that is investigating someone...	...then...
...whose behaviour amounts to offences against a public body's core business, and the sentence for that could be six months imprisonment or greater (or the offence involves selling booze or fags to kids)...	<i>...you <u>may</u> use RIPA to authorise your actions.</i>
...whose behaviour amounts to offences that are not against a public body's core business, or if the sentence for that does not equal or exceed six months imprisonment (or if you are not a public body)...	<i>...you <u>may not</u> use RIPA to authorise your actions. You will have to use a 'non-RIPA' process, to authorise covert techniques, if you wish to minimise the risk of having evidence excluded.</i>



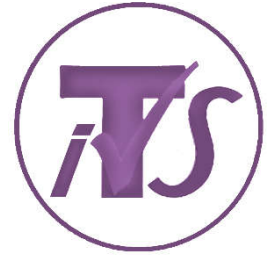
Non-RIPA Authorisations



- You don't need RIPA authorisation in order to use intrusive techniques.
- If RIPA is not available, you can still do surveillance or use a CHIS, you just need a different way to show it is **P**roportionate, **L**awful, **A**ccountable & **N**ecessary.
- Inspectors from the OSC have recognised this and are now asking to see 'Non-RIPA' records, alongside the RIPA records.



The Investigatory Powers Tribunal

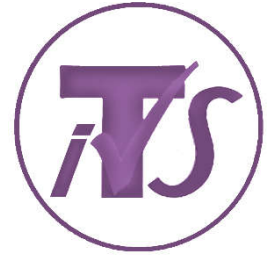


- *“Although RIPA provides a framework for obtaining internal authorisations of directed surveillance (and other forms of surveillance), there is no general prohibition in RIPA against conducting directed surveillance without RIPA authorisation. RIPA does not require prior authorisation to be obtained by a public authority in order to carry out surveillance. Lack of authorisation under RIPA does not necessarily mean that the carrying out of directed surveillance is unlawful.”*

(Case No: IPT/03/32/H – 14th November 2006)



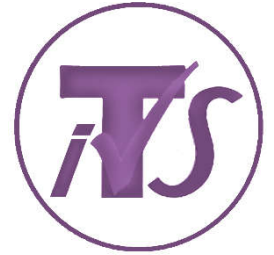
Non-RIPA Surveillance Authorisations



- Fill in a form ; it will probably look like a RIPA form ; it could even be a RIPA form endorsed 'NON-RIPA'.
- Make sure that you have justified the **necessity** and **proportionality** of your operation.
- Take it to a suitable person for authorisation – someone who understands how to assess these things ; this will probably be a RIPA AO.
- Ensure someone keeps a central record ; maybe the RIPA Monitoring Officer...



The IPA



- The *Investigatory Powers Act* has been enacted (but is not yet fully in force) ; it will replace the 'Comms Data' part of RIPA.
- If you want Information about a communication, you **MUST** use the IPA, once that part of the Act is in force.
- Extant powers (PoSHFA and LCTRS, for example), will not suffice.
- There is a new commission and a new commissioner, that will replace OSC, amongst others. They have the power to inspect **ANYTHING!**



Abbreviated Files under the NFS



- There is a (fairly) new file standard in place for all prosecution work.
- It's designed by the Crown Prosecution Service for police use, but is suitable for all (with minor modifications).
- Provided you have no reason to suspect a contested case, you should be producing a GAP file (Anticipated Guilty Plea).
- This will save investigator, support, management and lawyer time and (therefore) money.





When isn't an Early Plea Early?

- The point of a 'discount for an early plea' is that :
 - victims will not have the stress of thinking that they will have to attend court ;
 - prosecutors do not need to create schedules & court bundles ;
 - investigators can complete 'GAP files' ; and
 - the Court Service can schedule court time appropriately.
- If a defendant pleads guilty after much of the work has been done, or attempts to plead but with an unacceptably low statement of culpability, they may not get a (full) discount...



Attempts to Reduce Culpability



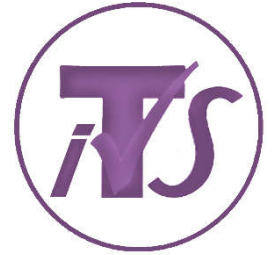
Since entering their pleas the appellants had made “a desperate attempt to try to limit their apparent responsibility and participation in the conspiracy”. As a result, further work had to be carried out, following which new bases of plea were submitted which demonstrated that the appellants’ position moved to a significant degree.

This had been a very strong attempt to move the offending down the categories in order to receive a lower sentence. Although there had not been a full hearing, much work had been done and, as a result, the full credit could not be preserved and should, instead, be in the region of 20%. (There were further reductions in sentence to reflect personal mitigation and other factors.)

Abbas [2017] EWCA Crim 251



Poor Excuse for a Late Plea



Butt's entered a late plea on the day of his trial. The explanation provided for not entering the plea earlier is that his representatives had been unable to view the CCTV footage before the first day of trial.

The judge said that this was not a sufficient explanation – Butt was fully aware of the case against him and had seen the CCTV footage himself during his interview under caution.

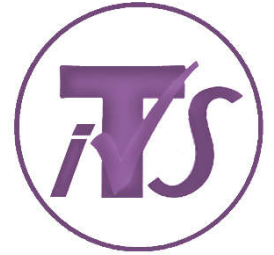
As soon as he knew that the more serious matter was to be dismissed, he could and should have pleaded guilty to this lesser charge at the earlier hearing.

The judge gave a little over 10 per cent credit for the late plea.

Butt [2017] EWCA Crim 352



Any questions?



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