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ADVICE NOTES

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## **ADVICE NOTES – HIDDEN SURVEILLANCE**

**This advice note considers the issues for organisations such as care homes who may be considering using hidden surveillance. It also looks at the subject from the point of view of families and friends of people who are cared for by such organisations, and who may themselves be considering using hidden surveillance.**

### **What do we mean by hidden surveillance?**

By hidden surveillance, we mean the use of hidden cameras or audio equipment to monitor the actions of staff or others in their interactions with someone under their care.

### **Why is the Commission interested in hidden surveillance?**

The Commission's aim is to protect and promote the human rights of people with mental health problems, learning disabilities, dementia and related conditions.

We are aware that small discreet video recording devices are sometimes being used to monitor the actions of care staff in care homes, other care settings and when people are receiving care at home.

Hidden surveillance has exposed the serious abuse of some very vulnerable people, and much of this abuse had been longstanding; such as the abuse exposed in the BBC Panorama programme in Winterbourne View hospital in 2011. However, it raises complex legal and ethical issues, and it is important that these are considered carefully before hidden surveillance is used in relation to a person with mental illness, learning disability, dementia, or related conditions.

### **What is the Commission's view?**

There are serious human rights considerations in relation to the use of hidden surveillance, but we do not argue that it should never happen.

A balance needs to be struck between protecting people and respecting their right to privacy. We set out below some of the things that need to be considered in striking that balance.

## **GENERAL CONSIDERATIONS**

### *The importance of capacity*

Our main interest is in people who are not able by reason of their condition to give or refuse consent to hidden surveillance in a care setting.

Those who have the capacity to consent to being filmed receiving care have the right to refuse. They should not be placed under surveillance without their agreement.

If there is concern that a person with capacity is subject to undue influence and is being exploited or abused, we would normally advise that the matter be referred to the local authority for consideration of adult protection measures.

Care needs to be taken in deciding whether someone lacks capacity to consent to such a step. Capacity is 'decision specific', so the fact that a person has been judged unable to make another decision (for example, to manage their finances), need not mean they lack capacity to decide on being subject to surveillance.

It is also important to ensure that, if a person could make a decision with the right support, that support is provided.

### *Legal and human rights issues*

There is no doubt that the use of hidden surveillance is an intrusion into an individual's privacy, which will generally require legal justification.

Article 8 of the European Convention for Human Rights states that:

“Everyone has the right to respect for his private and family life, his home and his correspondence”

This right protects people against unnecessary intrusion by the state into their personal life. The issue when considering hidden cameras is whether there is adequate evidence to justify any interference with this right, and if that interference is a proportionate response to any identified risk.

There are also a range of UK and Scottish laws which need to be considered: particularly the Data Protection Act 1998 and, for public authorities, the Regulation of Investigatory Powers (Scotland) Act 2000. Various Codes of Practice under these Acts provide helpful guidance. Even where the Acts may not apply directly, the Codes give useful checklists of issues that should be considered.

Although the Commission's primary interest is in protecting the rights of a person receiving care, it is important to remember that using surveillance may also affect the legal and human rights of all of those being filmed – whether or not they are suspected of wrongdoing, and whether or not they are an employee of the person or body responsible for the surveillance.

### *Practical considerations*

It is not for the Commission to recommend if hidden surveillance should be used or not; it is a decision for private individuals and employers once they have explored and exhausted all reasonable alternatives and should be an option of last resort.

For everyone considering using hidden surveillance, it is important to consider not just whether surveillance is justified, but how it is carried out.

This includes:

- Where the camera is positioned – as it may record intimate procedures and other residents or patients. In general, you should only record what you really need to record;
- Who would be able to view the images and who the images would be shared with. Again, this should be as restricted as possible;
- Whether recordings should be visual only or also record sound;
- Whether the date and time are accurately recorded on the video – this may be important for evidential purposes;
- How the images are stored, and whether storage is secure;
- How long the recordings should be stored for – this should be no longer than necessary.

## **CARE HOMES AND OTHER CARE PROVIDERS**

In some circumstances, employers may consider using hidden surveillance of their staff: usually in relation to criminal activity e.g. theft, serious health and safety breaches.

It would be rare for employers to consider using such equipment if they had concerns about the potential abuse of vulnerable people in their care. If there were such serious levels of concern then immediate action to protect the vulnerable adult should normally be taken.

We would advise that employers seek legal advice if they are considering using hidden surveillance in relation to the actions of staff. Registered care providers should also contact the Care Inspectorate for advice in relation to using CCTV or hidden surveillance in their service.

All public authorities in Scotland, including hospitals, local authorities and care regulators such as the Care Inspectorate, must act in a way which is compatible with the European Convention of Human Rights. If a care provider is asked by someone (e.g. a relative) if they can install a device, then the care provider would need to consider the request and be able to justify any decision they make.

If providers find that a visitor or someone else has installed a hidden camera or other recording device in their premises they should investigate further. They can remove the device but should not dispose of it. They should consider contacting the police if they are concerned that the device may have been used for an unlawful or criminal purpose. If that does not appear to be the intention, they should seek to establish who placed the device, and discuss with them why they felt it necessary to install it.

## **FAMILIES OR FRIENDS WHO MAY BE CONSIDERING INSTALLING HIDDEN SURVEILLANCE**

We would always hope that anyone who had any concerns about the care, treatment or support of a vulnerable person would raise this with the staff involved in the first instance.

If it was felt that they could not do this, then the next step could be to raise the issue with the local manager, an advocacy worker or a professional e.g. a social worker. If this has been tried without any reassurance, then a formal complaint may be made to the local service. Where a service is registered with the Care Inspectorate, it is possible to complain directly to them [online](#) or by telephoning 0345 600 9527.

The person with concerns may, though, feel that this might take too long or not be treated seriously.

If anyone has serious concerns about possible abuse then there are local adult support and protection procedures. The local authority is the first port of call for these. More information is available at <http://www.actagainstharm.org>

Our view is that there would need to be clear reasons why hidden surveillance was thought to be necessary instead of using these procedures, particularly if the person being cared for cannot give consent.

A care home could refuse to allow hidden cameras in their service, but may not be able to prevent any evidence obtained by a hidden camera from being used, even if it was done without their permission.

Where someone wants to install a camera in their relative's home to monitor a care worker, it is not clear that the local authority or employer has any right to prevent this, unless this is specified in any prior contractual arrangement.

Section 36 of the Data Protection Act states that:

“Personal data processed by an individual only for the purposes of that individual's personal, family or household affairs (including recreational purposes) are exempt from the data protection principles and the provisions of Parts II and III.”

According to the code of practice on surveillance cameras issued by the Information Commissioner's Office, this means that 'The use of surveillance systems for limited household purposes can be exempt from the Data Protection Act.'

Private individuals are not bound by the Human Rights Act. There appears to be no legal requirement for them to let anybody know they are filming in their own home. There could be legal risks if material which is recorded is used inappropriately – for example shared over the internet.

## **WELFARE GUARDIANS AND ATTORNEYS**

Some private individuals may be the welfare power of attorney or welfare guardian for the person they are concerned about. It is unlikely that they would have been granted specific proxy decision making powers to initiate or consent to hidden surveillance, but they may have some general powers to take or be consulted about

decisions which are relevant. A welfare guardian could also make an application to a sheriff to have a specific power granted.

Where a care provider or family member is considering hidden surveillance and knows that there is a welfare guardian or attorney, they should check the powers of the guardian or attorney. Where they have relevant powers, authorisation must be sought from that guardian or attorney.

All welfare guardians and power of attorneys are required to consider the principles of the Adults with Incapacity (Scotland) Act 2000 when making any decisions on behalf of a person, and should apply these principles in relation to arriving at any decision about the use of hidden surveillance. These include that the action would benefit the person concerned, and is the least restrictive alternative to achieve that benefit.

## **CRIMINAL INVESTIGATIONS**

There may be some cases in relation to criminal investigation where it is thought necessary to use hidden surveillance in relation to a patient or resident of a care home to record their movements or interactions with a third party. This would be very unusual and would need to involve the police or other statutory authorities.

The Regulation of Investigatory Powers (Scotland) Act 2000 and the Regulation of Investigatory Powers Act 2000 set out the legal framework for the use by public authorities of covert surveillance. This applies to local authorities, the police, and NHS bodies.

## **PROFESSIONAL CODES**

Doctors, nurses, social workers and other professionals need to consider whether their professional codes apply. For example, the General Medical Council has issued guidance to doctors on making video recordings of patients<sup>1</sup>, which discusses patients who lack capacity, and includes the following paragraph on covert recording:

“54. Covert recordings should be undertaken only where there is no other way of obtaining information which is necessary to investigate or prosecute a serious crime or to protect someone from serious harm. This might arise in cases where there are grounds to suspect that a child is being harmed by a parent or carer. Before any covert recording can be carried out, authorisation must be sought from a relevant body in accordance with the law. If you consider making covert recordings you must discuss this with colleagues, your employing or contracting body, and relevant agencies, except where this would undermine the purpose of the recording, in which case you should seek independent advice. You must follow national or local guidance. In most circumstances, covert recordings should be carried out by the police.”

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<sup>1</sup> ([http://www.gmc-uk.org/static/documents/content/Making\\_and\\_using\\_visual\\_and\\_audio\\_recordings\\_of\\_patients.pdf](http://www.gmc-uk.org/static/documents/content/Making_and_using_visual_and_audio_recordings_of_patients.pdf))

## The role of the Commission

The law in relation to privacy is complex and fast moving. In general, the best advice is always to be clear about the necessity and proportionality of any form of surveillance. If you can protect the vulnerable person without it, hidden surveillance should not be used.

The Mental Welfare Commission cannot give detailed legal advice. We can give advice on what we believe is appropriate and ethical in relation to decisions about people with mental health problems, learning disability or dementia. You can contact our advice line on **0131 313 8777** or freephone **0800 389 6809** (for people with mental ill health, learning disability, dementia or related conditions, or for their families or friends).

## Further information

[Risks, rights and limits to freedom](#)

[Decisions about technology](#)

[Care Inspectorate contact details](#)

The [1998 Data Protection Act](#) (DPA) protects people's personal information in relation to the use of surveillance.

The Information Commissioner's Office (ICO) publishes a [Data protection code of practice for surveillance cameras and personal information](#). Appendix 3 has a helpful checklist of 12 guiding principles to consider

[The Regulation of Investigatory Powers Act 2000](#) and the [Regulation of Investigatory Powers \(Scotland\) Act 2000](#)

[Covert Surveillance and Property Interference – revised Code of Practice: Scottish Government 2014.](#)



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