

**Birmingham City
Council Report to
Cabinet
27 JULY 2021**



Subject: Publicising Fly-tipping and Environmental Crime Cases – Proposed Policy

Report of: Rob James - Managing Director City Operations

Relevant Cabinet Member: Councillor John O'Shea - Street Scene & Parks

Relevant O & S Chair(s): Councillor Penny Holbrook – Housing and Neighbourhoods Overview and Scrutiny Committee

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Are specific wards affected?	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No – All wards affected
If yes, name(s) of ward(s):		
Is this a key decision?	<input checked="" type="checkbox"/> Yes	<input type="checkbox"/> No
If relevant, add Forward Plan Reference: 009083/2021		
Is the decision eligible for call-in?	<input checked="" type="checkbox"/> Yes	<input type="checkbox"/> No
Does the report contain confidential or exempt information?	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
If relevant, provide exempt information paragraph number or reason if confidential:		

1 Executive Summary

- 1.1 This report sets out the key considerations and Council's proposed policy relating to the publication of information in support of tackling environmental crime and principally the offence of fly-tipping.
- 1.2 Offences linked to rubbish dumping are often referred to as environmental crime and this type of offending is underpinned by anti-social conduct but can also extend through to organised waste crime committed by individuals and criminal gangs where considerable financial gain may be involved.

- 1.3 Fly-tipping causes significant visual blight and the costs of clearance falls to both public and private landowners. The Council has a three pronged approach in tackling fly-tipping and this involves arrangements for: supporting 'clearance' of unwanted and dumped rubbish; 'engagement' with residents and businesses to provide education and advice to support proper disposal of waste; and 'enforcement' against offenders, where it is legally possible and considered proportionate.
- 1.4 This policy proposal sets out a framework for the publication of fly tipping incidents, including the images of those who commit fly-tipping and associated environmental crime. The framework proposes to use a council-controlled website platform for publication. The framework makes it clear how and why the Council will apply the use of CCTV observation to gather evidence and how the Council will determine when it is proportionate and necessary to use publication of imagery of suspects as a tool to assist with investigations and enforcement. The policy identifies the checks that will be undertaken to ensure that the vulnerabilities of victims of fly-tipping and the rights of alleged offenders are considered, and that the legally required steps relating to data protection and privacy are satisfied.

2 Recommendations

- 2.1 That Cabinet endorses the policy framework proposal for publicising details of fly-tipping incidents and suspected offenders relating to fly-tipping and environmental crime, and that public consultation be commenced on the policy.
- 2.2 That Cabinet agrees that if there are no material changes to the policy following the consultation, then the policy will be implemented by the Cabinet Member for Street Scene and Parks, without a further report back to Cabinet. If material changes are made, then a report will be brought to September's Cabinet meeting.

3 Background

- 3.1 Video and photographic imagery which shows offences taking place is sometimes used as part of criminal proceedings against fly-tippers. This type of evidence can often be critical in establishing the identity of an offender or where they live or work. In most situations' imagery will likely have come from council camera equipment or recording made by third party eyewitnesses.
- 3.2 If an image can be used to identify a living individual, that image is therefore likely to constitute personal data. This also covers situations where no names are used but other contextual information would enable individuals to be identified such as location and date provided in a caption under the image. The council cannot ordinarily publish the face of a suspect offender, for example on the council website or other media platform, if it intends to use it in evidence as part of prospective criminal proceedings. However, publication of imagery may

be permissible where it relates to the identification and tracing of a suspect for law enforcement purposes described in section 31 of the Data Protection Act (DPA) 2018 as: *'the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, including the safeguarding against and the prevention of threats to public security.'*

- 3.3 Any information that is being processed for law enforcement purposes must adhere to the governance requirements of Part 3 of the DPA 2018 that provides a bespoke regime, tailored to the needs of the police, prosecutors and other law enforcement agencies ('competent authorities'). In all cases the law enforcement purpose must be 'based on law' and the competent authority must either have the consent of the data subject or the processing must be necessary for the performance of that purpose by that competent authority. A range of privacy, data protection principles and human rights considerations apply to the use of imagery and to the gathering of imagery and an assessment of proportionality and necessity is required in each case where publication is considered. Imagery of offenders may be gathered as part of a planned activity, such as where CCTV is installed at a fly-tipping hotspot but may be done in response to an unfolding incident where an eyewitness uses their mobile phone to make a recording. Either scenario constitutes 'surveillance' and any decision to use any imagery must weigh-up the level of privacy intrusion caused [from use of the imagery], against the impact of the offending.
- 3.4 The policy framework set out in Appendix 1 describes the council's prospective arrangements for ensuring that any action taken to publish images and information relating to investigations and cases is done so lawfully and fairly and the process is transparent.
- 3.5 The overarching purpose of the policy is to reduce offending behaviour and to reduce the frequency of fly-tipping by using publicity in a manner which increases the likelihood of detection of offenders.

4. Legal considerations relating to the gathering and publication of imagery of offenders.

Lawfulness: -

- 4.1 Fly-tipping and associated environmental crime potentially falls within a range of criminal statutes, including the Environmental Protection Act 1990 and the Anti-Social Behaviour, Crime and Policing Act 2014. These are supported by provisions under the Crime and Disorder Act 1998 which allow law enforcement agencies to work together to tackle offending.
- 4.2 The Council has a law enforcement framework which covers environmental offences. This 'enforcement policy' framework is a legal requirement under the Legislative and Regulatory Reform Act 2006 and the Council's arrangement are published within its Enforcement Policy. In addition, the Licensing and Public Protection Committee publishes the outcomes of court hearings and trials relating to environmental offences, on a rolling basis. Any publication of video

imagery under this policy would be in support of legitimate core law enforcement purposes of the Enforcement Policy and principally the identification of suspects.

- 4.3 Processing CCTV imagery as part of follow-up enforcement enquiries, including attempts to trace a suspect is lawful as the processing would be for the purposes of prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, as these fall under the remit of the Law Enforcement Directive (LED (EU2016/680) which was brought into UK law by Part 3 of the Data Protection Act 2018. This complements the UK General Data Protection Regulation which sets out requirements for processing personal data relating to criminal convictions and offences.
- 4.4 If following consultation on the proposed policy the Council is minded to process personal data for the purposes of law enforcement as described, a new separate Law Enforcement (Data Protection) Policy will need to be developed. by the Council's Data Protection Officer.

Fairness: -

- 4.5 The Council uses imagery in court proceedings which it has gathered itself or that has been supplied from third parties. This 'evidence' is subject to legal challenge and cross-examination during the court process. This scrutiny is not available outside of a court process and therefore under this policy the Council cannot consider publicising imagery sourced from third parties and only imagery from public bodies/law enforcement partners would be considered for publication.
- 4.6 The City does not have an extensive network of public CCTV cameras located within the residential areas which are being affected by small-scale, but relatively frequent fly-tipping. This means that the Council would be reliant upon the wider-scale use of CCTV cameras in residential areas if it seeks to identify and locate suspect offenders. In order to achieve this the Council can only legally do so under the provisions of the Regulation of Investigatory Powers Act 2000 (RIPA) or alternatively the Surveillance Camera Code of Practice (SC-CoP), issued by the Secretary of State which is regulated by the Surveillance Camera Commissioner under the Protection of Freedoms Act 2012.
- 4.7 The Council's enforcement officers currently gather video evidence as part of targeted 'directed [covert] surveillance' operations against fly-tippers. Each operation must be authorised by a Magistrates' Court under RIPA. This type of covert surveillance cannot be used to routinely tackle small-scale fly-tipping which is affecting residential areas. Instead, video evidence for this spectrum of offending would have to be gathered using the non-covert observation approach set out in the SC-CoP. Unlike camera usage under RIPA, this overt route involves an internal council authorisation process and potentially a consultation stage with relevant stakeholders within the locality where surveillance is proposed. As part of this approach the Council is subject to review and scrutiny through the Surveillance Camera Commissioner.

Transparency: -

- 4.8 Establishing a policy to publicise cases and suspects of environmental crime provides the Council with enforcement options beyond core 'waste prevention' approaches. These prevention approaches include assessment and monitoring of levels of defacement from fly-tipping and litter using the Land Audit Management System (LAMS) and engagement with residents and businesses over household and commercial waste disposal.
- 4.9 Using cameras under the SC-CoP would likely detect fly-tipping and environmental crime offences and suspects. This 'detection' constitutes data processing, which includes collecting, obtaining, capturing, disclosing, or storing activities. These operations can be conducted for law enforcement purposes, but they must be a necessary and proportionate way of achieving the intended purpose. This lawful basis will not apply if the intended purpose can reasonably be achieved using some other less intrusive means. A key element supporting the policy is therefore to ensure that prospective arrangements for publicising fly-tipping and environmental crime offending has a clear, precise and foreseeable lawful justification, and that the necessity to use cameras is satisfied. This 'necessity' assessment forms part of the statutory requirements set out under the SC-CoP.
- 4.10 All three limbs of *lawfulness*, *fairness* and *transparency* must be in place. A scenario to highlight this would be where a fly-tipper is caught on council CCTV, but they cannot initially be identified or traced. Publicising the suspects details may be appropriate and may assist the investigation and lead to enforcement. However, although the suspected offender's personal data was lawfully processed, the risk factor is that the suspected offender may still seek to challenge [sue or Judicially review] the council under a claim that the processing was not fair or that the process was not transparent.

5 Options considered and drivers for the policy proposal

- 5.1 Options to enhance how environmental offences are tackled form part of the current review into 'reducing fly-tipping', being conducted through the Council's Housing and Neighbourhoods Overview & Scrutiny Committee (HNOSC). One factor identified is the difficulty of detecting and deterring offenders who contribute to low level, but persistent fly-tipping within residential streets.
- 5.2 The rationale for the potential wider use of CCTV and data protection/privacy risk factors associated with publication of imagery formed part of the HNOSC considerations, but these matters are not currently identified in any specific council policy or decision. The policy proposal seeks to address this and to assist with the overarching problem associated with dealing with suspected offenders which is the ability to secure evidence that is admissible in court and that supports the threshold of there being 'a realistic prospect of conviction' if the matter were prosecuted. [This same evidential threshold also applies where a fixed penalty notice would be appropriate, for example in respect of small-scale fly-tipping. The reason for this is that statutory guidance issued by

Government states that regulators should prosecute offences where an alleged offender fails to discharge their liability to prosecution by paying the fixed penalty amount]. Determination of a suspect's identity and being able to trace the person is crucial to effective investigation and potential enforcement. In the absence of an admission of guilt from a suspected offender the Council will invariably need verifiable video imagery or eye-witness testimony, backed up by a statement in order to commence enforcement. Unfortunately, most residential fly-tipping incidents are either unwitnessed or witnesses decline to give evidence against their neighbours and enforcement is not possible.

- 5.3 A wide range of factors influence and drive small-scale fly-tipping in residential streets. For reasons which are not fully understood, during the COVID pandemic many local authority areas have experienced increased levels of fly-tipping, but also increased reporting of offending behaviour by eyewitnesses who indicate their preparedness to make a statement and to support enforcement. This is also the experience in Birmingham; however, the widespread and often sporadic nature of fly-tipping means that this encouraging position 'and a heightened risk for offenders of being seen and reported' may not be enough to deter offenders. Similarly, many fly-tipping incidents involve household waste which invariably has no evidential traceability and therefore a proactive approach to increase the likelihood of observing and catching offenders in the act is considered the only viable option to increase enforcement. Although activities such as implementing 'street patrols' would potentially give a deterrent effect there is insufficient resource to deliver this at scale and it would have limited effectiveness in tackling some offenders, for example those who evade being seen. Therefore, the wider use of CCTV observation, underpinned by the policy proposal is consistent with the councils aims to reduce fly-tipping and to support cleaner streets.
- 5.4 Based on the most recent statistical release for England [Department for the Environment and Rural Affairs – 2019/20], fly-tipping continues to show an upward trend year-on-year for England. Analysis shows that 65% of incidents involved household waste and these increased 7% from 2018/19 and 43% of the dumps occurred on pavements and roads. For the same period in Birmingham 41% of incidents involved household waste and 72% of dumps were on the pavement or highway. Although the 2020/21 data set is not yet collated/published by DEFRA the provisional data locally indicates that the recordable incidents in Birmingham, for the first three quarters of 2020/21 exceed the incidents for 2019/20. Feedback from local authorities and private landowners who share information through the Government's National Fly-tipping Prevention Group echoes this worrying trend across the country.

6 Consultation

- 6.1 The Housing and Neighbourhoods Overview and Scrutiny Committee, through their review into 'Reducing Fly-tipping' has been consulted.
- 6.2 Relevant leads at the Birmingham Control Centre and Community Safety (Resilience, Services Partnership, Insight and Prevention) and Communications Team have been consulted.
- 6.3 The policy framework is underpinned by two linked processes which offer an ongoing ability for comments to be made and these are described at Part 4 to this report. The first is the strategic approach set out in the Enforcement Policy, which is subject to formal review and public consultation through the councils Licencing and Public Protection Committee. The second is the operational approach, controlled through the council's Data Protection Officer, which controls the application and approval in respect of the use of public space observation under the Surveillance Camera Commissioners Code of Practice.

7 Risk Management and Legal Implications

- 7.1 The Council's primary statutory duties are set out within the Data Protection Act 2018, the UK General Data Protection Regulation and the Human Rights Act 1998. Several statutory provisions provide legal frameworks for undertaking the processes set out in the policy and these include:
 - Crime and Disorder Act 1998 – Section 115 – provide statutory agencies, including the council, with the ability to disclose information in any case where the disclosure is necessary or expedient for the purposes of any provision of this Act.
 - Criminal Justice and Public Order Act 1994 Section 163 – enables a local authority to provide apparatus for recording visual images of events occurring on any land in their area to promote the prevention of crime or the welfare of the victims of crime.
 - Local Government Act 1972 – Section 111 - provides local authorities with the power to do anything which is calculated to facilitate, or is conducive or incidental to, the discharge of any of their functions.
- 7.2 As detailed in paragraph 4.4, if following consultation on the proposed policy the Council is minded to process personal data for the purposes of law enforcement as described, a new separate Law Enforcement (Data Protection) Policy will need to be developed by the Council's Data Protection Officer in conjunction with the relevant sections of the Council acting as the competent authority under Part 3 of the Data Protection Act 2018.
- 7.3 The Council's City Solicitor will continue to provide legal oversight and advice in respect of the proposed policy and prospective consultation feedback in relation to governance and compliance matters.

Linkage to Existing City Council Plans and Strategies

- 7.4 The proposals within the policy support the delivery of the Council Priority “Birmingham is a great city to live in” in terms of the Council’s commitment to work with residents and businesses to improve the cleanliness of the city, and as set out in the Birmingham City Council Plan 2018 – 2022. Additionally, the policy proposal supports the aims and objectives of the Housing and Neighbourhoods Overview and Scrutiny Committee review on ‘Reducing Fly-tipping’.
- 7.5 The policy proposal forms part of the suite of street scene improvements and initiatives that are in progress, including: working with Keep Britain Tidy on developing long term strategies to start the cultural change to reduce household waste dumping and to increase responsible behaviours; recruitment of additional fly-tipping crews and enforcement officers; and developing community engagement and civic pride through the Love Your Street programme.

8 Financial Implications

- 8.1 The costs associated with publicising details of fly-tipping incidents and suspected offenders is £0.180m and will be funded through the additional investment into cleaner greener streets of £7.2m.

9 Procurement Implications

- 9.1 None applicable.

10 Human Resource Implications

- 10.1 None applicable.

11 Public Sector Equality Duty

- 11.1 The purpose of this policy is to ensure that decisions are made transparently and to eliminate unfair or inequitable decisions. Section 42 of the DPA 2018 details the safeguards which the council, as a Competent Authority must apply when undertaking sensitive (racial or ethnic origin or health etc.,) data processing. The proposed policy contributes to the Council’s corporate priorities of *transparency* and *open data* and is supported through the general data processing principles and requirements set out within the council’s Data Protection Policy including the Law Enforcement ‘appropriate policy document’.

11.2 All wards of the city are affected by fly-tipping and environmental crime. The policy supports the Council's statutory law enforcement functions and is allied to the Enforcement Policy and these ensure consistency and fairness throughout all communities in Birmingham. By its nature the proposed policy should not have an adverse impact on anyone with protected characteristics and not differentially impact on particular communities or groups in respect of the application of the policy.

11.3 Subject to any response and comment from the public consultation proposed in this report a further equality analysis will be carried out prior to further consideration by Cabinet.

12 Appendices

Appendix 1. Publicising Fly-tipping and Environmental Crime Cases – Proposed Policy.