

# Department of Home Affairs Annual Report of the Surveillance Commissioner for 2021

**Annual Report  
Of  
The Surveillance Commissioner  
For 2021**

- "to comply with Section 28(3) of the Regulation of Surveillance Etc Act 2006"

This report covers the 15th full year of the operation of the Regulation of Surveillance Etc Act 2006 ("the ROSE Act"). This report, together with my earlier reports, is available on the Department of Home Affairs website.

In my Report for 2020, I noted that the Island's Proclamation of a State of Emergency in March 2020 had a consequential impact on arrangements for surveillance. In 2021, the decisions to have two further periods of "Lockdown" in January and between March and late April continued to have an impact on arrangements for surveillance. Comparisons between 2020 and 2021 and earlier years need to take account of these disruptions.

After discussions with the Department of Home Affairs, my term as Surveillance Commissioner was extended until the end of December 2022. The term of Steven Coren, Deputy Commissioner was similarly extended.

The Deputy Commissioner provides cover for the absences of the Commissioner and also allows an alternative person for scrutiny and authorisation if a conflict of interest arises for the Commissioner in any particular case. The Deputy Commissioner and I continue to have occasional meetings to discuss issues, to ensure that common standards are applied and practice is improved. The Deputy Commissioner contributes to the compilation of the Annual Report. .

No intrusive surveillance episodes were authorised during the year.

I scrutinised 18 authorisations for directed surveillance during 2021. On a number of occasions I discussed individual directed surveillance authorisations with the authority concerned, usually to request further information. Additional information requested was always provided. There have been occasions when we have suggested that it would be sensible to reconsider an authorisation: whenever this has been raised by my Deputy or myself Authorising Officers have not commenced the proposed activity. The co-operation from the authorities authorising directed surveillance was satisfactory. I did not deploy my power to quash any authorisations during 2021.

The number of authorisations in 2021 was 18, a decrease from the 26 authorised during the previous year. Since the ROSE Act came into operation at the end of 2006, there have been considerable variations in the number of authorisations. After the first full year when there were 96 authorisations, there were four years of reductions; followed by several years of increases. Variations from year to year are quite normal.

This year's total of authorisations is the lowest since the ROSE Act came into effect at the end of 2006. It is likely that the lower level of surveillance activity reflects the impact of the Covid 19 Emergency restrictions during 2021.

In 2021, like the previous year, no authorising authority has reported that there had been a failure to follow procedures in respect of an authorisation.

Not all authorisations result in surveillance being applied. Changed circumstances – for example if the subject of the authorised surveillance was taken into custody or left the Island before surveillance commenced – means that the number of surveillance operations actually implemented can be less than the total number authorised. However, the reduced number of authorisations since 2007 also contributed to a higher proportion of authorisations being implemented in recent years than in the early years of the ROSE Act.

Authorised surveillance continues to play a valuable part in enabling public authorities properly to investigate matters authorised under the ROSE Act. A significant proportion of the authorised surveillance operations resulted in further action by the public authority concerned. In the case of surveillance undertaken by the Isle of Man Constabulary, this is sometimes reported as part of the court proceedings in the Island's media. Similarly, cases brought to court by the Treasury involving alleged benefit fraud, in which authorised surveillance had played a part, are reported from time to time in the Island's media.

The public authorities given the powers by Tynwald to authorise surveillance have varied since 2006 as changes were made to the configuration of Government Departments. Seven public authorities were eligible to authorise surveillance from October 2017. Two public authorities used their powers in 2021. Some of the larger or more complex Departments have a number of different subdivisions reflecting different responsibilities and some subdivisions have been granted the power to authorise surveillance under the ROSE Act. Thus the number of public authorities eligible to authorise surveillance does not coincide with the number of Government Departments. The latest list is approved by Tynwald and published as "Regulation of Surveillance (Prescription of Offices, Ranks and Positions) Order 2020".

During 2021 I held an exploratory meeting with the Financial Intelligence Unit in order to consider whether any of their activities were likely to require Authorisations. I also held a meeting with the new Deputy Chief Executive (DCE) at the Department of Home Affairs to brief her about my work. Since the establishment of my post, I have usually liaised with the DCE about any concerns.

In earlier years I have reported that I have obtained and studied the annual Report of the Chief Surveillance Commissioner (CSC) in the UK. However the 2017 report was the last one produced by the CSC. From September 2017 the Investigatory Powers Commissioner's Office assumed responsibility for this task. This is the result of the implementation of the Investigatory Powers Act 2016. The most recent annual report of the Investigatory Powers Commissioner (2020) was published in January 2022 and offers valuable insights into several equivalent areas of regulatory activity. My Deputy

and I also monitor case-law developments, such as the European Court of Justice decision in the Privacy International case (6th October 2020) (Case C 623/17), and judgments of the Investigatory Powers Tribunal.

In previous years, I have had informal meetings with the “Interception of Communications” Commissioner (ICC), Susie Alegre, to discuss issues where our respective responsibilities adjoin. The 2014 Report of the ICC (GD 2015/0017) includes suggestions where the law may require reform. In particular she suggested that warrants under the Theft Act 1981 more properly relate to surveillance activities than to interception. Such warrants might therefore more sensibly come under the purview of the Surveillance Commissioner. I continue to endorse this suggestion.

In this year’s report I am again including an indication of the value of surveillance to public authorities. In addition to the possible deterrent impact on potential offenders, the Treasury have identified that some £170,000 in overpayments and benefit savings have resulted from cases in which authorised surveillance played a significant part. The effects of any one year’s authorisations may in some cases not work through fully into savings until the following year, a factor to take account of when comparing the savings of one year with another. The total savings have varied considerably over the years that I have included such figures in my annual reports.

After fifteen years’ experience of the operation of the ROSE Act, it is clear that many of the authorities empowered to use surveillance have made no use of the powers; others have used the powers extremely infrequently. I have previously explained that for public authorities who make only very occasional use of the power to authorise surveillance, one challenge is to ensure that authorising staff are fully familiar with procedures. New Authorising Officers should ensure they understand their responsibilities and should be especially careful to consider fully the test of proportionality before authorising directed surveillance.

A further challenge for public authorities who use surveillance infrequently is to ensure that those authorised to carry out surveillance are trained to perform to a satisfactory standard. These challenges are factors which should be taken into account whenever consideration is given to extending the powers to authorise surveillance to other public authorities. The experience of the last decade indicates that rather than extending powers to other public authorities, there may be no present need for all the public authorities currently able to authorise surveillance to possess these powers.

If a public authority that has not used surveillance previously, or has only used surveillance on a very few occasions, approaches me for advice, I meet with the authority and provide guidance about best practice.

In my previous reports, I have commented on the need to review and update the legislation authorising surveillance on the Island, especially in view of changes made elsewhere. Those interested in the details of this important issue are referred to my previous reports. I am aware that the Department of Home Affairs intend to conduct such a review. I continue to await developments.

To underline the need to review and update the legislation authorising surveillance on the Island, I attach at the end of this year's report a copy of a joint statement from the Interception of Communications Commissioner, the Information Commissioner and myself making it clear that we jointly and urgently support the need for reviewing and updating relevant legislation.

I can confirm that under section 28(4) of the Regulation of Surveillance Act 2006 no matter has been excluded from my report at the request of the Department of Home Affairs under section 28(5).

Brendan O'Friel  
Surveillance Commissioner  
03 February 2022

## **Joint Statement on the Need for Legislative Reform on Investigatory Powers in the Isle of Man**

**By**

**Interception of Communications Commissioner, Susie Alegre**

**Surveillance Commissioner, Brendan O’Friel**

**Information Commissioner, Iain McDonald**

“This joint statement is supplemental to our respective annual reports and brings together areas of common concern about the need for a comprehensive review of the legislation governing investigatory powers on the Isle of Man to meet modern standards and operational needs.

The current legal framework has been developed piecemeal over the past thirty years. Our respective oversight roles and powers are set out in several different pieces of legislation including the Interception of Communications Act (IOCA) 1988, the Theft Act 1981, the Regulation of Surveillance Etc Act (ROSE Act) 2006 and the Data Protection Act 2018. But the legislation has not kept up with the pace of change in technology, criminality or in the standards required for effective oversight of intrusive investigatory powers.

This has resulted in significant gaps in the legislative framework. These may limit the ability of the relevant authorities to use the most effective investigatory techniques when they need them. And it means that some investigatory powers have little or no effective oversight because of the legal basis they rely on. In some cases, the legal basis for actions is unclear which risks undermining the requirement for legal certainty set out in the Human Rights Act 2001.

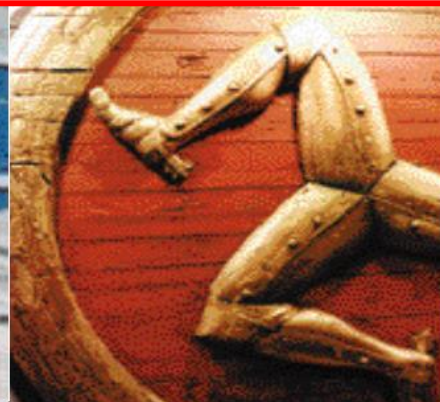
There is an urgent need for reform of the legal framework governing intrusive investigatory techniques to ensure that the Isle of Man Constabulary and other agencies have the tools they need to keep the Island safe with the appropriate checks and balances required to ensure democratic accountability and respect for human rights in this sensitive area.

We have consistently raised these concerns in our respective annual reports, and we issue this statement collectively to reinforce the importance and urgency of the issue. We engage with Government stakeholders on a regular basis and would welcome the opportunity to contribute our expertise to a comprehensive consultation on legislative reform in this area.”



**Isle of Man**  
**Government**

*Reiltys Ellan Vannin*



Department of Home Affairs  
*Rheynn Cooishyn Sthie*  
Headquarters Building  
Tromode Road  
Douglas  
IM2 5PA