



Department of Home Affairs

ANNUAL REPORT OF THE SURVEILLANCE COMMISSIONER FOR 2013

**Annual Report
Of
The Surveillance Commissioner
For 2013**

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

1. This report covers the 7th full year of the operation of the Regulation of Surveillance Act Etc. 2006 ("the ROSE Act")
2. 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 ensure that common standards are applied and practice is improved.
3. I did not authorise any intrusive surveillance episodes during the year.
4. My Deputy and I scrutinised 58 authorisations for directed surveillance. 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. The co-operation from the authorities authorising directed surveillance was satisfactory. I did not deploy my power to quash any authorisations.

The number of authorisations in 2013 increased by 5 over the previous year. This is the second year in which there has been a small rise in the number of authorisations. However, since the ROSE Act came into operation at the end of 2006, there has been a downward trend in the number of authorisations from the 96 that were authorised in 2007. The downward trend is welcome as it partly reflects – so far as I can judge – greater care being taken by authorising authorities about the possible use of surveillance. The process of obtaining an authorisation absorbs resources and the continuing pressures on public resources have probably contributed to the downward trend.

5. In 2013, like the previous year, no authorising authority has reported that there had been a failure to follow procedures in respect of an authorisation.
6. Not all the 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.
7. 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 Police Authority, this is sometimes reported as part of the court proceedings in the Island's media.
8. Thirteen public authorities were eligible to authorise surveillance during 2013. Three public authorities used their powers in 2013.
9. During the latter part of the year, the Government announced proposals for changes in the structure of Government. While these changes, which are subject to Tynwald approval, will not be implemented until 2014, current proposals will mean changes in responsibilities for authorisations. It will be important that any structure of Government changes that are agreed

are implemented fully in accordance with the ROSE Act. Any new authorising staff will also need to be adequately trained for their new responsibilities.

10. During the early part of 2013, I met with the recently appointed Chief Constable to discuss the interface between the Isle of Man Constabulary and the work of the Surveillance Commissioner.
11. During the year, my Deputy and I undertook an audit of the completed case papers of authorised surveillance for one of the authorities that regularly authorise surveillance. We were satisfied with what we examined.
12. During the year I again obtained and studied the annual Report of the Chief Surveillance Commissioner (CSC) in the UK. This Report continues to provide broader and useful background to my work in the Isle of Man although the legislation is not identical and the scale of activity is very different. The Chief Surveillance Commissioner's 2012/13 Report includes figures that demonstrate a reduction in Directed Surveillance in recent years so the experience in the Island – a considerable downward trend, albeit there have been minor increases in the last 2 years - is mirrored in a neighbouring jurisdiction.
13. 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 Department of Social Care have identified that some £245,641 of overpayments and benefit savings have resulted from cases in which authorised surveillance played a significant part. This is a much greater saving compared with the figures reported in earlier years and although it partly reflects a greater number of authorisations, it also suggests greater effectiveness in combating possible offences under the Social Security Administration Act 1992.
14. After seven 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 very 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. Authorising Officers 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 evidence so far 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.

15. 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. There were occasions when this took place during 2013.
16. With the benefit of seven years' experience of the workings in practice of the ROSE Act, the question continues to arise whether there should be a unified surveillance system under Manx law. At present surveillance is split between the ROSE Act and the Interception of Communications Act 1988 (as amended) ("the 1988 Act"). Under the 1988 Act, warrants are to be issued by the Chief Minister. One option might be to consider transferring his functions

to the Chief Constable under supervision of the Surveillance Commissioner pursuant to the ROSE Act.

17. The 1988 Act may now be deficient in certain respects. The opinion of HM Attorney General's Chambers should be sought as to whether the 1988 Act covers communications in forms which have evolved since the 1988 Act was introduced – for example emails or other internet communications. Their opinion could also be sought as to whether the 1988 Act is compatible with the Human Rights Act 2001 (of Tynwald). In this regard, the Isle of Man Appeal Court has stated that Tynwald might wish to consider whether the 1988 Act should be repealed and replaced. It noted that the equivalent English legislation, the Interception of Communications Act 1985 (of Parliament), was replaced by the Regulation of Investigatory Powers Act 2000 (of Parliament), apparently with the introduction of the equivalent English human rights legislation. Tynwald may wish to consider in the light of such advice whether the 1988 Act should be repealed and its terms consolidated into a further revised ROSE Act.
18. If the provision of the ROSE Act were to be unified with the 1988 Act, Tynwald may also wish to review whether it would be appropriate to reconstitute the Interception of Communications Tribunal as the Regulation of Surveillance Tribunal.
19. I understand that the Department of Home Affairs continues to have under consideration the contents of an Interception of Communications Bill. The Department intends to consult my Deputy and I about the issues described in paragraph 16 to 18 which I first raised in my 2007 Report.
20. 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
31st January 2014

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