



Department of Home Affairs

ANNUAL REPORT OF THE SURVEILLANCE COMMISSIONER FOR 2015

**Annual Report
of
the Surveillance Commissioner
for 2015**

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

1. This report covers the 9th full year of the operation of the Regulation of Surveillance Act Etc. 2006 ("the ROSE Act")
2. My term as Surveillance Commissioner ended in December 2015; I was re-appointed to serve a further term by the Minister of Home Affairs in August 2015.
3. Steven Coren, Deputy Commissioner, was also re-appointed for a further term in August 2015. 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 also contributes to the compilation of the Annual Report.
4. I did not authorise any intrusive surveillance episodes during the year.
5. My Deputy and I scrutinised 52 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.
6. The number of authorisations in 2015 was a reduction of 14 from the 66 authorised during the previous year. Since the ROSE Act came into operation at the end of 2006, there have been variations in the number of authorisations. After the first full year when there were 96 authorisations, there were four years of reductions; followed by three years of increases. One factor affecting the number of authorisations is the complexity of the investigations undertaken. Inevitably, the more complex the investigation, the more likely it is that, given their limited resources, authorising authorities will not authorise as many.
7. In 2015, like the previous year, no authorising authority has reported that there had been a failure to follow procedures in respect of an authorisation.
8. 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. However, the reduced number of authorisations since 2007 also contributed to a greater percentage of authorisations being implemented in recent years than in the early years of the ROSE Act.
9. 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 press.

10. The public authorities given the powers by Tynwald to authorise surveillance has varied since 2006 as changes were made to the configuration of Government Departments. Twelve public authorities were eligible to authorise surveillance from April 1st 2014. Three public authorities used their powers in 2015. 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.
11. 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 Annual Reports of the CSC – and other material – can be found on their website:-
<http://surveillance.commissioners.independent.gov.uk/>
12. In the early part of 2015, I had an informal meeting with the newly appointed 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 suggests that warrants under the Theft Act more properly relate to surveillance activities than to interception. Such warrants might therefore more sensibly come under the purview of the Surveillance Commissioner. I endorse this suggestion.
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 Treasury – previously the Department of Social Care - have identified that some £142,000 of overpayments and benefit savings have resulted from cases in which authorised surveillance played a significant part. This total is considerably lower than in the previous year but reflects – at least in part – a reduced number of authorisations. The effects of the 2015 authorisations may in some cases not work through fully into savings until the following year, another factor to take account of when comparing the savings from one year with another.
14. After nine 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.
15. 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 nine years 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.
16. 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.

17. With the benefit of nine 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. A further option for change is referred to in paragraph 12.
18. 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.
19. If the provisions 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.
20. 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 17 to 19 which I first raised in my 2007 Report.
21. Consideration of current issues and options for the Island also continues to be informed by the ongoing debate as to the Investigatory Powers Bill of the UK Parliament (for example, the Draft Investigatory Powers Bill Joint Committee report being expected as at February 11th 2016).
22. 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
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