



Department of Home Affairs

ANNUAL REPORT OF THE SURVEILLANCE COMMISSIONER FOR 2017

**Annual Report
of
the Surveillance Commissioner
for 2017**

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

1. This report covers the 11th full year of the operation of the Regulation of Surveillance Act Etc. 2006 ("the ROSE Act"). This report, together with my earlier reports, is available on the Department of Home Affairs website.
2. Steven Coren, 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.
3. I did not authorise any intrusive surveillance episodes during the year.
4. My Deputy and I scrutinised 54 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.
5. The number of authorisations in 2017 was 54 a decrease of 15 from the 69 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 several years of increases. Variations from year to year are quite normal.
6. In 2017, like the previous year, no authorising authority has reported that there had been a failure to follow procedures in respect of an authorisation.
7. 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 higher proportion of authorisations being implemented in recent years than in the early years of the ROSE Act.
8. 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.
9. 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 2017. 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 2017".

10. On one occasion during the year, I became aware of a report from the Information Commissioner that a local authority may have been considering using surveillance. I explained that this was not permissible under the Act and that no formal request about the issue had been received by me.
11. In the autumn of 2017, I met with senior members of the Isle of Man Constabulary to exchange views on the way the police conducted surveillance. Pressure on police resources had resulted in relatively little use being made of surveillance during 2017. I was content that surveillance applications were receiving adequate attention by authorising officers.
12. Towards the end of 2017 I again obtained and studied the annual Report of the Chief Surveillance Commissioner (CSC) in the UK. The Report was published in December 2017 – HC 299. This was the last report to be produced by the CSC as from September 2017 the Investigatory Powers Commissioner's Office assumed responsibility for this task. This is the result of the implementation of the 2016 Investigatory Powers Act 2016. The Annual Reports of the CSC – and other material – can be found on their website:-
<https://www.ipco.org.uk/>
Further comments on the changes in the UK – and their possible implications for the Isle of Man Government – will be found at para 22 below.
13. In the early part of 2017, I had a further informal meeting 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 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.
14. 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 £176,000 of overpayments and benefit savings have resulted from cases in which authorised surveillance played a significant part. This total is considerably higher than in the previous year. 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.
15. After more than a decade's 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.

16. 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. There was a small reduction in the number of public authorities authorised to use surveillance during 2017, a welcome development. (see Paragraph 9 above).
17. 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.
18. With the benefit of eleven 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 13. The issue of legislative reform has been given additional impetus with the enactment of the Investigatory Powers Act 2016 (of Parliament) (see paragraph 21-23).
19. 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. For reference to the Investigatory Powers Act 2016 (of Parliament), see paragraph 21. 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.
20. 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.
21. 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. I refer in paragraph 21 below to section 272(6) of the Investigatory Powers Act 2016 (of Parliament). Clearly, the introduction of such provision may, potentially, lead to Isle of Man legislation relating to surveillance being significantly updated to take account of evolving technologies; indeed, this may be welcome. It is also notable that such provision

was introduced, according to the sponsoring Minister (Lord Keen of Elie, on behalf of the Ministry of Justice, speaking in the House of Lords), "following a request from the Isle of Man Government". I record, for completeness, that such request was not made following any specific consultation with my Deputy or I. I understand that the Department of Home Affairs and Attorney General's Chambers were each consulted.

22. Consideration of current issues and options for the Island also continues to be informed by the extensive recent debate relating to the Investigatory Powers Act 2016 (of Parliament), which received Royal Assent on 29th November 2016. It is also notable that, pursuant to section 272(6), any of the provisions of the Investigatory Powers Act 2016 may, by Order in Council, be provided to extend, with or without modifications, to the Isle of Man. Lord Keen of Elie (on behalf of the UK Ministry of Justice) told the House of Lords on 19th October 2016 that such amendment could: "assist the Isle of Man in ensuring that its legislative framework for law enforcement can be fully up to date and future-proof, enabling greater consistency with UK law". I note the Minister for Policy and Reform's indication, in Tynwald on 17th January 2017, that: "There are currently no plans for the UK's Investigatory Powers Act 2016 to be extended to the Isle of Man"; that the above permissive extent clause was agreed: "purely for future contingency purposes"; and that: "At some point the Island's legislative framework will need to be modernised, although it is much more likely that this will be by new Act of Tynwald rather than by the extension of some or all of an Act of Parliament". My Deputy and I would certainly expect to be consulted, in due course, on any future draft legislative provision relating to surveillance. In the meantime, my Deputy and I anticipate contributing, along with other relevant stakeholders, to a process in which modernisation of the oversight framework in the Isle of Man is formally reviewed. This is not least so as to ensure that, in future, the investigatory powers oversight regime on the Isle of Man of which surveillance forms part, keeps full pace with, rather than lags behind, current and evolving law enforcement technologies; and to address the increasing risk of any loophole arising within the current regulatory framework.
23. In November 2017, Steven Coren, Deputy Commissioner, attended an induction session for serving and former members of the senior judiciary appointed as Judicial Commissioners to undertake independent oversight functions under the Investigatory Powers Act 2016. The session was chaired by the Investigatory Powers Commissioner, Lord Justice Fulford. It included seminars on the work of the Intelligence and Security Committee (of Parliament), the Information Commissioner's Office and the Surveillance Camera Commissioner. The session was a valuable opportunity to learn first-hand about key areas of investigatory powers oversight in the UK, and how these might inform best oversight practice in the Isle of Man. The Deputy Commissioner thanks IPCO for the invitation to attend, and David Anderson QC, Susie Alegre and the Department of Home Affairs for their assistance.
24. 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
28th February 2018

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