



Department of Home Affairs

ANNUAL REPORT OF THE SURVEILLANCE COMMISSIONER FOR 2010

Annual Report of the Surveillance Commissioner for 2010

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

1. This report covers the fourth full year of the operation of the Regulation of Surveillance Act Etc. 2006 ("the ROSE Act").
2. I did not authorise any intrusive surveillance episodes during the year.
3. My Deputy and I scrutinised 52 authorisations for directed surveillance, a reduction on the number authorised in 2009. 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.

This reduction in the number of authorisations is welcome as it 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 current pressures on public resources may have contributed to the trend we have observed this year. There has been a reduction in the number of authorisations each year since the first full year of the operation of the ROSE Act in 2007.

4. An authorising authority has reported twice to me, and once to my Deputy, that there had been a failure to follow procedures in respect of an authorisation. On each occasion, either I or my Deputy met with the authority concerned, and was given a full explanation of what had happened, and an outline of remedial steps proposed to minimise the risk of repetition.
5. Unlike previous years, all the authorisations resulted 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 episodes actually implemented can be less than the total number authorised.
6. Authorised surveillance continues to play a valuable part in enabling public authorities to properly investigate matters authorised under the ROSE Act. A significant proportion of the authorised surveillance episodes 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.
7. In April 2010 changes to Isle of Man Government Departments came into effect. Some changes in the names of public authorities eligible to authorise surveillance took place. The most significant – in terms of the number of authorisations – was the change to the former Department of Health and Social Security. The part of the former Department responsible for authorisations is now known as the Department for Social Care. Thirteen public authorities were eligible to authorise surveillance during 2010. Two public authorities used their powers in 2010.
8. During the year, I undertook another audit of a sample of completed case papers. My Deputy and I undertook an audit of police cases in the autumn of 2010. Earlier in the year we

undertook an audit of a sample of DHSS cases. The overall standard we judged to be satisfactory.

9. In February 2009, my then Deputy and I had received a briefing from the Police about the handling and grading of police intelligence. I arranged for this to be repeated in the autumn of 2010 to ensure my new Deputy had received this valuable briefing and to ensure I was updated on developments over the last 18 months. This briefing was a helpful and informative process giving us a greater appreciation about the handling of intelligence. We take account of intelligence reports as part of our scrutiny of authorisations.
10. During 2010, I arranged to meet the Chief Constable to discuss surveillance issues.
11. In April 2010, the Deputy Surveillance Commissioner attended "Surveillance and the Limits of Law Enforcement", a two day conference held at Cumberland Lodge, near London. Issues discussed included the legal and moral clash between privacy and protection; the impact of developing technology on surveillance; and best practice in the regulation of surveillance and interception of communications. The conference afforded an exceptional opportunity for surveillance regulation practice in the Isle of Man to be informed by current UK practice, and also emerging trends and issues.
12. During the year I again obtained and studied the annual Report of the Chief Surveillance Commissioner in the UK. This provided 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.
13. In this year's report I am including a further 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 £121,000 of overpayments and benefit savings have resulted from cases in which authorised surveillance played a significant part.
14. Now that I have had four 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 authorising staff are fully familiar with procedures. Authorising Officers should be especially careful to fully consider 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 to grant powers to all the public authorities currently able to authorise surveillance.
15. With the benefit of four 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.
16. The 1988 Act may now be deficient in certain respects. The opinion of HM Attorney General 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. His 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.

17. 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.
18. 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 me and my Deputy about the issues raised in paragraph 15 to 17 which I first raised in my 2007 Report.
19. I can confirm that under section 28(4) of the Regulation of Surveillance Act 2006 that 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 2011

A large print or audio tape version of this document can be supplied upon request.

Department of Home Affairs
"Homefield", 88 Woodbourne Road, Douglas, IM2 3AP
Telephone: 01624 694300 E-mail enquiries.dha@gov.im