

Annual Report of the Surveillance Commissioner for 2009

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

1. This report covers the third full year of the operation of the Regulation of Surveillance Act Etc. 2006 (“the ROSE Act”).
2. The first Deputy Commissioner, Advocate Paul Beckett, tendered his resignation in the summer of 2009. Paul had provided valuable support and advice during the first two years of the operation of the ROSE Act.
3. Following public advertisement and the usual interview procedures, Steven Coren, a public lawyer was appointed Deputy Commissioner, taking up his duties in September 2009. 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.
4. My first term as Surveillance Commissioner ended in December 2009; I applied to serve a second term and was re-appointed by the Minister of Home Affairs.
5. I did not authorise any intrusive surveillance episodes during the year.
6. My Deputy and I scrutinised 73 authorisations for directed surveillance, a reduction on the number authorised in 2008. 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.
7. An authorising authority has reported once 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, and was given a full explanation of what had happened, and an outline of remedial steps proposed to minimise the risk of repetition.
8. As in previous years, not 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 was less than the total number

authorised. There were also occasions when conflicting priorities meant there were insufficient resources to carry out authorised surveillance.

9. 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.
10. Thirteen public authorities were eligible to authorise surveillance during 2009. Four public authorities used their powers in 2009. The overwhelming proportion of authorisations came from the Police Authority and the Department of Health and Social Security.
11. 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 early part of the year. While we made one or two minor points about record keeping, the overall standard was satisfactory.
12. In February 2009, my Deputy and I received a briefing from the Police about the handling and grading of police intelligence. This was a helpful and informative process giving us a greater appreciation about how intelligence was handled and graded. We take account of intelligence reports as part of our scrutiny of authorisations.
13. 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. In his 2008-09 Report, the Chief Surveillance Commissioner suggests that “it might be useful practice for authorities to retain a record of the value of covert activity. This might assist Authorising Officers in judging whether future applications would be likely to achieve objectives or to identify other tactics that would be more proportionate. Such an “outcome audit “would assist the public authority to counter inaccurate criticism and provide evidence for public assurance.” It is, therefore, pleasing to be able to record that such information has been made available to me and I have already published an example in my last annual report.
14. 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 Health and Social Security have identified a total saving to public funds of over £120,000 during the year 2009 resulting from action taken on evidence obtained from surveillance activity. This figure does not include ongoing action to protect public funds from cases that were not resolved by the 31st December 2009; the eventual annual savings will be greater once these cases are completed.
15. 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.

16. With the benefit of three 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 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.
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 me and my Deputy about the issues raised 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 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
31st January 2010