

# Annual Report of the Surveillance Commissioner for 2008

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

1. This report covers the second 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 83 authorisations for directed surveillance, a reduction on the number authorised in 2007. 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.
4. 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.
5. 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. One indication of the benefits of surveillance is that the Department of Health and Social Security has identified overpayments and benefit payment savings of well over £100,000 in cases where surveillance was authorised since the ROSE Act was implemented at the end of 2006.
6. Twelve Public Authorities were eligible to authorise surveillance during the first eleven months of 2008. Five Public Authorities used their powers. The overwhelming proportion of authorisations came from the Police and the Department of Health and Social Security.

7. The Regulation of Surveillance (Prescription of Offices, Ranks and Positions) Order 2008 came into operation on 22<sup>nd</sup> December 2008. The Explanatory Note states that the effect of the substitution of this order (for an earlier order) is to tidy up the names of the public authorities and to add the Road Transport Licensing Committee.
8. During the year I introduced an 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; I undertook a similar exercise on DHSS cases in the autumn. While we made one or two minor points about record keeping, the overall standard was satisfactory.
9. I contributed to two training courses for staff involved in surveillance during 2008.
10. During the year I 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. One concern of the Chief Surveillance Commissioner was the issue of proportionality and the need for Authorising Officers to ensure that surveillance is a proportionate response to the investigation under consideration.
11. 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 all 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.
12. With the benefit of two 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.
13. 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. Tynwald may wish to consider in the light of such advice whether the 1988 Act should be repealed and its terms incorporated into a further revised ROSE Act.

14. 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.
15. I understand that the Department of Home Affairs has under consideration the contents of an Interception of Communications Bill. The Department intends to consult me about the issues raised in paragraph 12 to 14 which I first raised in my 2007 Report.
16. 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  
31<sup>st</sup> January 2009