



Department of Home Affairs

ANNUAL REPORT OF THE SURVEILLANCE COMMISSIONER FOR 2011

Annual Report of the Surveillance Commissioner for 2011

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

1. This report covers the fifth 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 51 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.

The downward trend in the number of authorisations is welcome as it partly 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 have probably contributed to the downward trend we have observed in recent years. However, another factor in reducing the number of authorisations in 2011 was the difficulty experienced by the Department of Social Care described in paragraphs 8 and 9 below. 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. In 2011, unlike the previous year, no authorising authority has reported that there had been a failure to follow procedures in respect of an authorisation. I was briefed about the outcome of one case from a previous year where there had been a failure to follow procedures. I was satisfied that appropriate steps had been taken to reduce the chances of any repetition.
5. 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 operations 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 operations 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. Thirteen public authorities were eligible to authorise surveillance during 2011. Three public authorities used their powers in 2011.

8. During the year, it came to light that amending legislation to give effect to the changes in the organisation of Government Departments - to which I referred in my report for 2010 - had been considered inadequate to cover all the eventualities arising in surveillance cases being contemplated by the Department of Social Care. I was notified of the difficulty as soon as it had been identified and I was satisfied that the Department took steps to ensure that its activities stayed within the legal framework of the ROSE legislation. I was informed that the Department of Social Care continued with enforcement duties without the use of surveillance for a period making use of other sources – for example reacting to information provided by the public and other agencies and making use of the Department’s own information.
9. On 18th October 2011, in Tynwald Court, the Minister for Home Affairs moved the “Regulation of Surveillance (Prescription of Offices, Ranks and Positions) Amendment Order 2011. A full report will be found in the relevant Hansard for the 18th October – pages 72-75. The effect of the passing of this order was to permit the Department of Social Care to exercise all the powers of surveillance previously exercised by the former Department of Health and Social Security.
10. Together with my Deputy, I plan to conduct a further audit of completed case papers during the early part of 2012.
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 Chief Surveillance Commissioner’s 2010/11 Report includes reference to collaboration agreements between police authorities and to joint ventures between local authorities. The CSC provides valuable insight into possible pitfalls in the operation of such collaborative work that would prove helpful if Authorising Authorities on the Island were to seek similar agreements. The CSC also identified issues in situations where a private company is invited to undertake delegated work by an Authorising Authority.
12. 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 some £122,000 of overpayments and benefit savings have resulted from cases in which authorised surveillance played a significant part. This is a similar figure to the savings reported in earlier years so the difficulties experienced by the Department of Social Care, set out in paragraph 8 and 9, appear to have had no adverse effect on savings outcomes.
13. Now that I have had five 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. 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 for all the public authorities currently able to authorise surveillance to possess these powers.

14. With the benefit of five 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.
15. 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.
16. 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.
17. 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 14 to 16 which I first raised in my 2007 Report.
18. 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
31st January 2012

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