



Department of Home Affairs

ANNUAL REPORT OF THE SURVEILLANCE COMMISSIONER FOR 2012

Annual Report of the Surveillance Commissioner for 2012

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

1. This report covers the sixth full year of the operation of the Regulation of Surveillance Act Etc. 2006 (“the ROSE Act”).
2. My term as Surveillance Commissioner ended in December 2012; I applied to serve a further term and was re-appointed by the Minister of Home Affairs.
3. Steven Coren, Deputy Commissioner, was re-appointed for a further term in September 2012. 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. I did not authorise any intrusive surveillance episodes during the year.
5. My Deputy and I scrutinised 53 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 number of authorisations in 2012 increased by 2 over the previous year. This increase probably reflects the fact that the Department of Social Care was able to operate throughout the year, whereas in 2011 – as set out in my last annual report – there was a period when no authorisations were undertaken. However, since the ROSE Act came into operation at the end of 2006, there has been a downward trend in the number of authorisations. This trend 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 continuing pressures on public resources have probably contributed to the downward trend we have observed in recent years.

6. In 2012, 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.
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 Police Authority, this is sometimes reported as part of the court proceedings in the Island's media.

9. Thirteen public authorities were eligible to authorise surveillance during 2012. Three public authorities used their powers in 2012.
10. Towards the end of 2011, a member of the public raised with me issues about the use and possible abuse of Closed Circuit TV (CCTV). I had some experience of the potential and problems of CCTV from my years in the prison service and more recently through Public Space Surveillance Regulation – this through being a Board Member of the Security Industry Authority, the regulator of the private security industry. My Deputy and I met in February 2012 with the Island's Data Protection Supervisor to discuss CCTV issues. We supported the proposal for a Code of Practice to be drawn up to cover CCTV.
11. During 2012, a member of the public sought information from me about a possible case of surveillance. I suggested to the inquirer that the matter be raised with the authorising authority.
12. 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 2011/12 Report includes figures that demonstrate a reduction in Directed Surveillance over the last four years so the experience in the Island is mirrored in a neighbouring jurisdiction.
13. 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 Department of Social Care have identified that some £153,000 of overpayments and benefit savings have resulted from cases in which authorised surveillance played a significant part. This is a considerably greater saving compared with the figures reported in earlier years.
14. After six 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.

15. If a public authority that has not used surveillance previously approaches me for advice, I meet with the authority and provide guidance about best practice.
16. With the benefit of six 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 14 to 16 which I first raised in my 2007 Report.
20. 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
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